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Court of Appeal

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Hon Justice James Burchett
Hon Justice Peter Salmon
Hon Justice Michael Moore

Supreme Court

Hon Justice Anthony Ford, Chief Justice
Hon Justice Warwick Andrew
Hon Justice Robert Shuster (from 7 May 2008)
Hon Justice Peter Salmon (14 September – 17 October 2009)
Hon Justice John Laurenson (19 October – 5 December 2009)

Land Court

Hon Justice Anthony Ford, Chief Justice
Hon Justice Warwick Andrew
Hon Justice Robert Shuster (from 7 May 2008)
Hon Justice Peter Salmon (14 September – 17 October 2009)
Hon Justice John Laurenson (19 October – 5 December 2009)

Magistrates' Court

Chief Magistrate:
Mr Samiu Palu

Principal Magistrates:
Mr Peauafi Pifeleti
Mr Folau Lokotui
Mr Salesi Mafi

Senior Magistrates:
Mr Paula Tatafu
Mr Latu Mohenoa

Magistrate:
Mr Vaha'i Foliaki

Attorney General

Mrs 'Alisi Numia Taumoepeau(until May 2009)
Mr John Joseph Cauchi (from May 2009)

Solicitor General

Mr ‘Asipeli ‘Aminiasi Kefu

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Lemoto v Gardiner anor

Supreme Court, Nuku'alofa
Andrew J
CV 299/2007

8 February 2008

Employment law – wrongful dismissal – whether leave without pay approved – evidence did not show that leave approved – case dismissed

The plaintiff requested six months leave without pay from his position as cargo manager or acting cargo manager of Air New Zealand. The plaintiff claimed that his request was signed and approved by his manager. The defendant claimed that the request was not approved. The plaintiff left and when he returned there was no job available. The plaintiff claimed damages for wrongful and unfair dismissal against the defendants following the loss of his job as cargo manager of Air New Zealand. He sought general damages in the sum of $50,000 and special damages in the sum of $536.46 per fortnight from 13th November 2006 until date of judgment against both defendants jointly and severally. The plaintiff filed an amended statement of claim to the effect that the defendants were also under a duty of care to advise him, if long term leave was not approved or that he was at risk of losing his employment if he were to go on leave regardless.

Held:

1. The Court found that there was no leave form duly signed and approved by the plaintiff's manager. The Court also found the plaintiff to be an unconvincing witness with too many contradictions in his evidence. His evidence was not accepted.
2. The plaintiff did not show on the balance of probabilities that the leave had ever been approved or granted. It was implausible that it would ever be granted in the first place; it was against company policy; no such leave form existed; the Court accepted the evidence of the first defendant that no such leave was granted and did not accept the evidence of the plaintiff and his witnesses that it was.
3. The Court found that the plaintiff resigned his job and therefore there was no breach of any duty of care, as alleged, owed to the plaintiff. He was told that his job could not be held open for him for such length of time and he was generously told that he would be welcomed back if there was a position available at the time.
4. The plaintiff's case was dismissed.

Counsel for the plaintiff : Mr Tupou
Counsel for the defendants : Ms Stephenson

Judgment

The Plaintiff's claim is for damages for wrongful and unfair dismissal against the defendants following the loss of his job as cargo manager of Air New Zealand. He seeks general damages in the sum of $50,000 and special damages in the sum of $536.46 per fortnight from 13th November 2006 until date of judgment against both defendants jointly and severally.

This case is concerned with the relatively straight forward question of whether or not the plaintiff had been granted 6 months approved leave without pay from his position as cargo manager or acting cargo manager of Air New Zealand. Additionally the plaintiff filed an amended statement of claim to the effect that the defendants were also under a duty of care to advise him, if long term leave was not approved, that he was at risk of losing his employment if he were to go on leave regardless.

Was the plaintiff granted six months approved leave without pay?

The 1st defendant, Sue Gardiner is the manager of and agent of the 2nd defendant, Pacific Forum Line Limited trading as Forum Travel. She is the manager of Forum Travel. They operate Air New Zealand in Tonga and Ms Gardiner is responsible for the day to day running of Air New Zealand and Forum Travel.

The plaintiff was employed by Forum Travel as a cargo clerk of Air New Zealand from July 2004 until December 2005. From then until May 2006 he was employed as Cargo Manager although the defendants say that he was never confirmed in that position and that he was in fact the acting cargo manager in that period.

It is common ground that due to financial pressures the plaintiff wished to take a long period of leave as he believed that he could work in Hawaii and earn more money there, thus alleviating his financial problems.

The plaintiff says that in early 2006 he requested 6 months leave without pay but that it was not allowed by the CEO John Maclennan. He says that he then saw Ms Gardiner in April 2006 and again requested 6 months leave without pay but that if he completed his business there he would return in 3 months. He said he had discovered that other employees had been given long leave without pay with the approval of Sue Gardiner. He says he saw her at the cargo shed in April 2006 and she agreed to his request informing him to fill in a leave form which he did and which Ms Gardiner signed. He says he then took the approved leave form to the front office and showed it to his wife (she also worked for Air New Zealand) informing her that his request for leave had been approved, before taking it to the Chief Accountant Makafalani Schaumkel which is the normal procedure. He says the form was left in the in-tray of Mr Schaumkel and he returned to work. Then about a week later he says that he took his request for a discounted air fare to Melenaite Veikune the Travel Centre Manager who then processed it. He had requested that the ticket be on credit saying in evidence that this was authorised by Ms Gardiner. That is acknowledged as correct. The ticket was Nuku'alofa – Auckland – Honolulu – Auckland – Nuku'alofa. The ticket was applied for whilst he was still employed and it was invoiced to his wife at Air New Zealand.

The plaintiff says that he then proceeded on his leave without pay for 6 months, on the 13th May 2006.

The plaintiff says that the next thing that happened is that whilst on his leave in Hawaii he emailed Ms Gardiner on the 17th October 2006 enquiring about his job and about his return. That email says:

> "Sue, I've appreciate everything that you've done so far especially allowing myself to take long leaves. I'm coming towards my time here and would like to know if I'll still have my job like we both understood or you have other plans or I might have lost it already, I'd really like to know so I can plan ahead...."

Ms Gardiner emailed back to the plaintiff on the same day and said in part:

> "I explained to you that we would certainly take you back when you returned as you are a good team member but that depends on us having a job available at the time. I can not take on additional staff when the business does not warrant it ..... But again I have to have a position available before I can employ staff ..... Hope you understand ... something could come up ..."

The plaintiff says that he next advised his wife that he had lost his job and it is said that his wife went to see Ms Gardiner saying to her that it had been agreed that the plaintiff would return to his job. His wife ('Elisapesi Lemoto) said in evidence that she left the office without hearing a response.

The plaintiff next says that he went to Auckland on the 12th November 2006 in an attempt to meet with the CEO John Mac Lennan to get an answer as to why he lost his job when he had approved leave without pay. He says nothing was resolved and in a letter to Mr Mac Lennan dated 27th February 2007 he said:

> "I went on a six months leave without pay which was signed and approved by Sue Gardiner ... without knowing why I got kicked out I wanted to approach PFL ... I was angry for being displaced without a reason ... up until now I have not been given a good enough answer why I got released ... she took my job and gave it away ... she has been unfair."

Thereafter the plaintiff issued these proceedings.

The defendant's version of events is very different to the above.

It is the defendant's position that neither Ms Gardiner nor anyone else ever signed a leave of absence form for the plaintiff approving a six month leave of absence from 13th May to 13th November 2006.

I make the following findings of fact:

It seems to me as a matter of common sense that it would be unlikely that a person recently promoted to the position of acting cargo manager of a busy

international airline would be permitted to take off for 6 months to pursue other employment with a guarantee that his job would be available upon his return.

The simple fact is that there is no record or copy of any such leave form. The plaintiff has not produced one. He appears to have said that he took it to the Chief Accountant Mr Maka Schaumkel and gave it to him. In other evidence he says he left it in Mr Schaumkel's in-tray. Mr Schaumkel has testified that he never saw any such form. His evidence, which I accept, is that the originals of all approved leave of absence forms were and are forwarded to the defendant's head office in Auckland. There is no record of it having been sent to Auckland and there is evidence, which I again accept, that a search of all pertinent records in Auckland shows that there is no such leave form in existence. Mr Schaumkel says he never saw it and obviously never sent it. The defendant's offices were burnt down in the riots of November 16th 2006. A copy would have been left there. The plaintiff may have assumed that it therefore could not be shown that there was never a signed leave form in existence unaware that copies were forwarded to Auckland if they existed.

The policy of the defendants was not to grant such leave. The plaintiff says that he became aware that others had in fact been granted such leave. But the evidence is that the only leave granted of any length was a case of maternity leave and this was for period of 3 months. The second defendant's CEO, Mr John Maclennan had instructed the first defendant not to grant the leave so that it would be very unlikely that Ms Gardiner would grant leave in defiance of that instruction.

In this case I accept the evidence of Ms Gardiner. She was an impressive witness and clearly a person of integrity and honesty. I think it can be discerned from the evidence that she is a very experienced and capable general manager as would be expected of a person in her position, that is the general manager and operator of a major international airline. Her evidence that she did not approve of or sign any such long leave without pay is supported by other evidence and clearly corroborated.

Ms Gardiner said that she had never granted 6 months leave of absence and she would not do so. She said that the plaintiff approached her in April 2006. This was at the cargo shed at the office of Air New Zealand. She says the plaintiff explained that he had desperate financial problems and he really needed to go to America where he could work and earn more money which he needed, to re-pay loans. She says she told him that it was not possible to give him this leave. She says she spoke to Mr Mac Lennan who confirmed that it would not be acceptable to the company. She relayed this to the plaintiff. She had told him that it was just not possible but she advised him that if, on his return, they had a suitable vacancy that she would be happy to employ him again. She said that the plaintiff came back 2 weeks later and pleaded for 3 months leave to go to Hawaii. She says she again explained to him that it was not possible. The plaintiff, she says, was upset and he said that he didn't have a choice but that he would have to go. She says that she again said that his job could not be held open but that when he came back to come and see her and that if a position was available then he could be re-employed. She says that the plaintiff clearly understood this. The next day the plaintiff told her he would be leaving in Mid-May about the 13th (2006). She says that she then spoke to other staff about a suitable replacement and Fahina Fonua was appointed as permanent cargo manager in Mid-May. The staff were all advised of this. She said that the plaintiff's wife was aware. She said the next time she heard anything was when she received the email in October from the plaintiff. That is the email already cited.

Fahina Fonua confirmed that she was appointed as permanent cargo manager and commenced in the second week of May 2006. She said in evidence that she understood she was taking over the plaintiff's job – and it was not her understanding that the plaintiff was to come back to the job. Ms Fonua then gave some other evidence which I find confusing and conflicting. For example she said that Sue had said that "the plaintiff was on leave for 6 months but no staff were allowed to be on leave for 6 months". She also said that Sue had said to her that the plaintiff would lose his job as he not a good worker. She said she was introduced to the plaintiff as his replacement and she asked him to teach her the work. The plaintiff never said he would see her when he got back.

Evidence was called from Kapeli Lanumata who had previously worked with the plaintiff in Air New Zealand's cargo section. He said that the plaintiff had told him that Ms Gardiner had approved his leave. I don't think that carries much weight and in any event this witness agreed he was in conflict with Air New Zealand and was also bringing a claim for wrongful dismissal. He appeared as particularly biased and I place little store on his evidence.

The evidence of Ms Gardiner is corroborated by that of Lisa Veimau, the airport duty manager with Air New Zealand. She was advised that the plaintiff's request for 6 months leave of absence had been refused. He had requested this to go overseas and pay off his loan. She was asked to consider a replacement for the plaintiff and was involved in the decision to employ Fahina Fonua.

Ms Gardiner's evidence was further corroborated by Melenaite Veikune. She was the Travel Centre Manager at Air New Zealand. She said she was advised by Ms Gardiner that the plaintiff would be leaving soon as he had applied for 6 months leave without pay and that "we do not give it" and that they needed to appoint someone else to replace him. She said she was surprised at this as the plaintiff had recently been appointed as acting cargo manager. She said Fahina Fonua was appointed permanently to the position and she, Melenaite introduced Fahina to the cargo staff. Her evidence is that she introduced Fahina to the plaintiff and advised him that Fahina was replacing him as cargo manager and Fahina said to the plaintiff that he had better show her the ropes She said Fahina started work and the plaintiff left the job. This was in May 2006.

I found Melenaite to be a most impressive witness who was patently honest and reliable. Her evidence was barely challenged in cross-examination.

Melenaite was then responsible for processing the staff discount airline ticket which the plaintiff applied for. This was the ticket to travel to Hawaii via New Zealand and return to Nuku'alofa. It might be thought that this is evidence supporting the fact that the plaintiff had been granted leave. But this does not follow because there is clear evidence that the plaintiff was entitled to such a discount ticket as long as he applied for it when still employed with Air New Zealand. The fact that he was leaving thereafter did not change the fact that he was entitled to the ticket in any event and it was duly issued to him.

Melenaite confirmed that the plaintiff was never given a 6 months leave of absence without pay. She denied that there was ever any plot to get rid of the plaintiff.

There was evidence that this ticket issued to the plaintiff could only be altered within 3 months of issue. The plaintiff had managed to alter the ticket invalidly outside the 3 month period.

It is said on the plaintiffs behalf that the email of the 17th October 2006, from the plaintiff to Ms Gardiner, is consistent with and supportive of the plaintiff's claim that leave had been approved. That is, it is said that the plaintiff expresses thanks to Sue Gardiner

"especially allowing myself to take long leaves". But the email is somewhat equivocal as the plaintiff then enquires if he still has a job. There is nothing equivocal about the defendant's reply, that is, "I explained to you that we would certainly take you back when you returned as you are a good team member but that depends on us having a job available at the time."

The plaintiff's wife 'Elisapesi Lemoto said that on the day the plaintiff got his leave approved he came to her office in a happy mood saying that his leave had been approved by Sue Gardiner and that he showed her the form with Ms Gardiner's signature on it which is a signature well known to her. I think firstly that it is unremarkable that a wife would seek to give evidence in support of a husband as best she can. But did she really see this signature? No one else has and the document simply does not exist. The plaintiff was determined to go to Hawaii and perhaps he needed to convince his wife that leave had been granted. Perhaps he did show her a leave form but I think it would be a bit unusual to then feel the need to indicate the defendant's signature. She said he then took the form to Maka (the accountant). That is not quite consistent with Maka who says he told the plaintiff that the form had to be signed. I find her evidence to be questionable.

In my view the evidence is overwhelming that there was no such signed leave form and where there is no such form in existence Mrs Lemoto's evidence does not satisfy me on balance, that she did see the form duly signed and approved by Ms Gardiner.

I found the plaintiff to be an unconvincing witness with too many contradictions in his evidence. I think his story is implausible and I do not accept his evidence.

Conclusion

On the facts as I find them to be I think the evidence is overwhelming that the plaintiff was never approved to take 6 months leave of absence without pay.

Certainly the plaintiff has not shown on the balance of probabilities that this leave had ever been approved or granted. It is implausible that it would ever be granted in the first place; it was against company policy; no such leave form exists; I accept the evidence of the first defendant that no such leave was granted and I do not accept the evidence of the plaintiff and his witnesses that it was.

I find that the plaintiff, driven as he was by financial pressures, was going to go to Hawaii to work and earn more money to satisfy his debts, come what may. He was advised by Sue Gardiner in unequivocal terms that such leave could not possibly be granted but that if he wished to rejoin the company he would be welcomed back provided that there was a position available at that time. He decided to go and left the job on or about the 12th May 2006 departing for Hawaii without approved leave, of his own volition and with full knowledge that the consequences of this would be that his job could not and would not be held open for him. He was not dismissed by the defendants. He, in effect, resigned or abandoned his job.

It would have been entirely unreasonable for the plaintiff to assume that he could leave his job without his employer's approval and expect his employer to hold his job open for up to 6 months at his leisure.

In the circumstances where the plaintiff resigned his job there was no breach of any duty of care, as alleged, owed to the plaintiff. He was told quite reasonably that his job could not be held open for him for this length of time and he was generously told that he would be welcomed back if there was a position available at the time.

For all of these reasons the plaintiff's case is dismissed.

I give judgment for both defendants.

270 Costs are awarded to the defendants as agreed or taxed.

Kafovalu v Banks; The Way Christian Fellowship v Vivi anor

Supreme Court, Nuku'alofa
Ford CJ
CV 1030/2007 and CV 714/2005

26 February 2008

Civil dispute – ownership of building – credibility crucial – plaintiff successful

The dispute involved the ownership of a building erected in 2004 upon the plaintiff's town allotment at Sunia'akaveka Road, Hala'ovave, Kolomotu'a. The plaintiff sought a declaration that the building belonged to him and his family Church, the "Way of Salvation". The defendant contended that the building in question belonged to the "Way Christian Fellowship", a small religious worshipping group based in California which allegedly operated a branch in Tonga.

Held:

1. The issue of credibility was central. The Court found the defendant's version of the relevant events vague and inherently implausible. By a complex web of deception the defendant systematically embarked on a process deliberately designed to enable him to take control for himself of the plaintiff's allotment in Tonga and the building that had been erected thereon for the plaintiff's family.
2. The Court found that the evidence given by and on behalf of the plaintiffs was credible and reliable and the Court accepted that version of events.
3. The plaintiffs in the principal proceeding succeeded in making out their case and judgment was entered accordingly. They were entitled to the remedies sought along with costs to be agreed or taxed.

Statute considered:

Charitable Trust Act 1993

Mr Edwards for the plaintiffs in CV1030/07 and for the defendants in CV714/05
Mr Tu'utafaiva for the defendants in CV1030/07 and for the plaintiff in CV714/05

Judgment

The proceedings

[1] By consent both these actions were heard together. Although the parties and issues involved in each proceeding are different, the outcome in the one will inevitably have a significant bearing on the outcome in the other. Most of the evidence was confined to what I sometimes refer to as the principal action, namely CV 1030/2007, and that will be reflected in this judgment. Unless I indicate to the contrary, therefore, this judgment will be dealing with the evidence presented in relation to the principal action.

[2] Essentially the case centres around two individuals; on the one hand Tevita Kafovalu, who along with Sione Nonu are the plaintiffs in the principal action and, on the other hand Anthony Banks, who with his wife and daughter are the defendants in the principal action. Mr Banks and his family are American citizens from California. Mr Kafovalu and his wife are Tongans but they have been living in the United States since 1983. They have six children aged between 23 years and 11 years. In 2003 Mr Kafovalu obtained American citizenship. Unless the context indicates otherwise, references to "the plaintiff" in this judgment will be a reference to Mr Kafovalu and references to "the defendant" will be a reference to Mr Banks.

[3] The dispute involves the ownership of a building erected in 2004 upon the plaintiff's town allotment at Sunia'akaveka Road, Hala'ovave, Kolomotu'a. The plaintiff seeks a declaration that the building belongs to him and his family Church, the "Way of Salvation". The defendant, on the other hand, contends that the building in question belongs to the "Way Christian Fellowship", a small religious worshipping group based in California which allegedly operates a branch in Tonga. I should preface this judgment by observing that in Tonga buildings are regarded not as fixtures attached to the land but as personal property or chattels.

The case for the plaintiff

[3] In his opening submissions, Mr Edwards helpfully referred to several distinct time periods in the relationship between the plaintiff and the defendant and he used different headings to identify each respective period. Although, in the interests of brevity, I will not follow the exact breakdown suggested by Mr Edwards, I accept that the relationship can conveniently be categorised into different historical time periods.

Period of formation of the relationship and then separation

[4] The two men first met in May 1997 when Mr Kafovalu's family who live in Riverside, California, joined up with a small worshipping group known as the Way Christian Fellowship of which Mr Banks was the President and Pastor and his wife, Mary, was the Vice President and Treasurer. The two families became extremely close. They worshipped together during the week as well as on Sundays.

[5] Mr Banks is a builder by occupation. He operates a building construction company known as "Resurrection Construction". Mr Kafovalu has worked for some 13 years as a cabinetmaker with a company called Premier Laminating Services Inc.

[6] In the year 1998 the defendant encountered financial difficulties in his business and had to sell his home. His family shifted and lived in the suite at the Business Centre in Riverside where church meetings were held. The congregation at that time consisted of approximately 4 families. The suite was divided into two areas. The front part was used for worshipping and services and the rear part was occupied by the defendant and his family.

[7] During this period Mr Kafovalu and his family supported Mr Banks assisting him financially and in other ways. It was subsequently discovered, however, that the use of part of a business suite for accommodation purposes violated the bylaws of the city of Riverside and the tenancy of the Way Christian Fellowship Church was accordingly terminated.

[8] In September 1998 Mr Banks and his family decided to leave Riverside and move to Idaho. Mr and Mrs Banks resigned from the positions they held in the Way Christian Fellowship Church. The resignations were duly accepted by the Board of Directors and at the same time Mr Kafovalu was appointed Pastor and President of the Way Christian Fellowship Church. His wife, Kalolaine, was appointed Vice President and Treasurer. Mr Kafovalu was ordained as Pastor in November 1998.

[9] In accordance with official requirements, the Secretary of State of California Domestic Non-Profit Corporations and the City of Riverside Planning Department were duly notified of Mr Kafovalu's appointment as Pastor and President of the Way Christian Fellowship Church.

[10] Mr Banks returned to Riverside from Idaho in February 2000 and he requested Mr Kafovalu to reordain him as a Pastor of the Way Christian Fellowship Church but the latter indicated that it was not the time and he will have to wait.

The period of planning and betrayal

[11] In this section I have adopted the description of the period used by Mr Edwards. In his written submissions, Mr Tu'utafaiva was critical of the heading and submitted that "the allegation of planning and betrayal appears to run like a golden thread in the plaintiff's claim." As indicated above, however, I did find it convenient to break up the complicated historical background to the litigation in this way.

[12] The period in question covers the months between February 2000 and September 2000. The plaintiff alleges that during that time, unbeknown to him and his wife and other members of the congregation of the Way Christian Fellowship Church, the defendant clandestinely went behind his back and, after surreptitiously obtaining access to the books of the church from Mrs Kafovalu, forged certain documentation and appointed himself as Chief Executive Officer, President and Pastor of the Way Christian Fellowship Church. He duly proceeded to notify the City of Riverside Planning Department and the Secretary for Domestic Non-Profit Corporations of the alleged change in the church hierarchy.

[13] When they learned of "the deception" as the plaintiff called it, other members of the congregation wanted to take Mr Banks to court over his actions but, although he was considerably upset over what had happened, Mr Kafovalu disagreed with pursuing court action. He and his wife simply withdrew quietly from the Way Christian Fellowship and the small membership started to disperse.

The period of isolation

[14] This period covered the months between September 2000 and June 2001. The plaintiff and the defendant had nothing to do with each other during these months. In September 2000 Mr Kafovalu had started holding family prayer meetings and worshipping services at his home in Riverside. He had the large garage of his home renovated so that prayer meetings could be held there and he formed a worshipping group which he called the "Way of Salvation".

[15] One of the plaintiff's witnesses described the worshipping group as something similar to the Pentecostal Church in that, "we sing and we jump and we shout out to the Lord." The plaintiff's family has obvious musical talents. Photographs and a DVD were produced showing the family playing musical instruments and singing in their converted garage. The DVD did not show any "jumping" or "shouting" but the music and singing appeared to be professional and the worshipping was presented with complete decorum. Evidence was also given as to how at one point the daughters in the family had made a CD of religious songs and then sold copies raising US $2000 in funds for a trip to Tonga.

Period of goodwill

[16] This period was identified by Mr Edwards as running from June 2001 to December 2003. Mr Kafovalu told the court that by June 2001 the congregation of the Way Christian Fellowship Church had dispersed. The fellowship ceased to have an office or place of worship and it no longer held services. Mr Kafovalu said that it was about this time that Mr Banks and his family started to attend church services and group worshipping at the Kafovalu home. The defendant's construction business was doing well and Mr Banks was generous showing much goodwilll to the Kafovalu family. In October 2001 upon the occasion of the graduation of one of Mr Kafovalu's daughters Mr Banks paid the return airfare for Mr Kafovalu and the daughter to travel to Tonga.

[17] At one point after one of the Sunday services, Mr Banks explained to Mr Kafovalu that he was operating his construction company, Resurrection Construction, jointly with the Way Christian Fellowship Church in a very profitable property development scheme which involved purchasing old houses cheaply then reconstructing or renovating them and selling them off at a high price. Because the church was registered as a charitable organisation, government grants were obtained to finance the scheme. In the year 2003, however, problems in relation to taxation on those property transactions began to surface.

[18] On another occasion during discussions after a Sunday service and meal, Mr Banks raised another issue with Mr Kafovalu which, in the context of the present case, later took on a particular significance. As Mr Kafovalu explained it:

> "We continued our regular Sunday services and Sunday meals and discussions when he told me and my family that God had called him to bless me and my family. He said that he was making money and he had appreciated our association and I had not caused any trouble with him and I had saved the Way Christian Fellowship Church and he wanted to give us US $40,000 to help extend the back of a home for a living area and business area. The business he suggested was a rest home. I and my wife did not agree as we would not be able to live in our home or hold our Sunday services there. A rest home would require it to be a licensed premises and my family cannot live there or hold any services. I told Anthony Banks to keep his present and generosity for later and wait for the right time."

[19] In the second half of 2003 the plaintiff decided that he would come to Tonga and build a house on his allotment from which he would run a ministry and the building would be used as his home and as a place of worship for his relatives and friends. He described this concept as a vision he had earlier received from God. He began conducting fundraising projects for his project in Tonga (which included production of the CD by his daughters). In November 2003 he asked Mr Banks if he would give him the help he had previously offered to enable him to go to Tonga and realise his vision and he also asked whether he (Mr Banks) as a carpenter would come to Tonga and supervise the construction of the building. Mr Banks agreed to make donations and to design and supervise the construction of the building for the Kafovalus (that is admitted in the pleadings).

[20] Building materials and supplies for the project along with certain miscellaneous items were acquired during November and December 2003 and they were then packed into two containers stored at their home by Mr Kafovalu and his family. It was a major exercise. The DVD referred to earlier gives some indication of the work involved in systematically stowing all the building materials into the containers. The task appeared to be supervised entirely by Mr Kafovalu. It also appeared from the DVD that no one outside his family assisted (in his evidence, however, Mr Banks told the court that he had also assisted in loading the containers and the labourers employed were Guatemalans and Mexicans). The two containers arrived in Tonga in January 2004.

Second period of planning and betrayal

[21] Again, for this heading I have adopted Mr Edward's description. Mr Edwards likened this period to the earlier period of "planning and betrayal" he had referred to. It effectively runs from January 2004 to August 2005. Mr Banks and Mr Kafovalu arrived in Tonga in January 2004 and construction of the new building began during the first week in February. Mr Banks, as an experienced builder, had the task of

making application for the building permit and other necessary consents. It was designed as a two-storey building. The ground floor would be used principally as a place of worship and the upper floor as living quarters. Construction commenced as soon as the building permit had been issued. The entire exterior of the building was finished by the end of February leaving only the electrical wiring and interior lining to be carried out before construction was complete.

[22] The building was constructed entirely of plywood which Mr Kafovalu had obtained from the company he worked for, Premier Laminating Services Inc. There is a dispute as to the monetary equivalent of the respective donations made by the plaintiff and the defendant to the construction of the building. In his pleading the plaintiff alleges that the total construction costs amounted to approximately US $75,702.94 and he estimated that of that amount $8,000 was contributed in labour and time by Mr Banks and $14,074.06 was donated by the Way Christian Fellowship Inc. The balance, the plaintiff claims, was effectively his own contribution.

[23] The plaintiff provided the construction workers who were mainly family members and friends. He said that some were paid by him for their work but most were volunteer workers. Some rough handwritten records were produced which, if accurate, showed that the total amount paid out on account of wages over the period of construction was $4,490. Payments appear to have been made on seven days and, with one exception, appear to have been for that particular day's work only. The days were 6, 7, 13, 14, 20, 21 and 24 February 2004 (one page was dated "2003"). The average number of workers on those days were 14 and the amounts paid out varied between $10 per day and $120 per day, with one exceptional payment of $250 per day.

[24] Mr Kafovalu told the court about an incident that occurred during this first visit which, in his words, made him "angry". After explaining that Mr Banks had handled all the paperwork required by the Tongan authorities relating to the building construction, he went on to tell how at one stage Mr Banks had asked him to go and find out if the building permit had yet been granted. Mr Kafovalu said that he went to the office of the Lands & Survey and he was informed by the staff that the permit could not be granted because it was not lawful for the permit to be issued to a church that never held a lease.

[25] At the same time, the Lands & Survey officer showed Mr Kafovalu the building permit application form which had been completed and filed by Mr Banks. Mr Kafovalu was concerned to note that it stated that the application was by the Way Christian Fellowship and the "Proposed Use" was shown as a "Church". He said that he was angry because it should have been in his own name and the "use" should have been shown as "residence". He inquired of the staff as to what would be necessary to make the changes and he was told that he could simply make the alterations and initial them. Mr Kafovalu said that he then telephoned Mr Banks from the Lands & Survey office and told him that the permit application form was wrong. He said that Mr Banks was apologetic and told him that he (Mr Banks) had made a mistake and he instructed Mr Kafovalu to make the necessary alterations to the permit application form. Mr Kafovalu did so, changing the name of the Applicant to "Tevita Kafovalu" and the "Proposed Use" to "Residence".

[26] At the end of February 2004 Mr Kafovalu and Mr Banks returned to the United States.

[27] In November 2004 both men again travelled to Tonga to complete the building at Hala'ovave. It was during this period that Mr Banks approached Mr Kafovalu and others while they were working on the building site and had them sign an application form to register the Way Christian Fellowship as a trust in Tonga. Mr Kafovalu told the court that there was no meeting about it and Mr Banks did not explain what his intentions were but he agreed to sign the document not thinking for one moment that the application had anything to do with the ownership of the new building. Mr Kafovalu also explained that he did not really know what he was signing because Tongan was his first language and the form was in English. He said that Mr Banks had also instructed him to sign certain other application forms during the period of construction which he was not familiar with because they were in English but, as he stressed more than once in the course of his evidence, he trusted Mr Banks.

[28] The two men returned to the States in late November 2004 and their relationship appeared to be back to normal. They continued with their services, prayer meetings and Sunday meals. According to the plaintiff the plan was that the building would be officially dedicated on 9 August 2005. The building was left in the care and custody of Mr Kafovalu's brother-in-law, Siaosi Vivi who lived in the house next door which had also been built on Mr Kafovalu's allotment.

[29] Mr Kafovalu told the Court that in approximately April 2005 he noticed a change in Mr Banks's attitude and in that same month Mr Banks left their family church at Riverside and ceased turning up for services and Sunday meals. Mr Kafovalu said that in June 2005 Mr Banks "secretly" left Riverside and came to Tonga. He said that that was after Mr Banks had received confirmation that the Way Christian Fellowship Church had been registered in Tonga as a trust. Mr Kafovalu found out from relatives in Tonga that Mr Banks was planning to open and dedicate the new building on his (Mr Kafovalu's) allotment to the Way Christian Fellowship Church and the date of the dedication had been fixed for July 10, 2005, one month ahead of the scheduled dedication date.

[30] On 22 June 2005 Mr Kafovalu telephoned Mr Banks in Tonga to find out what was going on and in the course of that telephone conversation Mr Banks told him that he (Mr Kafovalu) was no longer the owner of the land and building but he (Mr Banks) was now the owner and all the belongings in the buildings were his and he had leased the land.

[31] The Kafovalus then received a letter from Mr Banks dated 23 June 2005 posted locally in Riverside, California. It is rather lengthy but, as it assumed much significance during the trial, I set out its contents in full:

> "Dear Tevita and Kalolaine,
>
> You both have freely admitted to conspiring to defraud The Way Christian Fellowship of its property in Tonga, Tevita by admitting that he planned to get a secretary and set up a new

council in the name of The Way of Salvation and Kalolaine when she said she had instructed George to change the name on the church paperwork.

I have come to you on three separate occasions, alone, with the witness, and in front of the church leadership trying to get you to repent of this course of action, that you have treated me and my ministry with contempt and disdain. Tevita even told me not to talk to the people at the church in Tonga, a church that I found it, funded, and built.

God has clearly set me to you as a gift to encourage you, to teach you, to guide you, to protect you, and to strengthen you. I have done this to the best of my ability. Both my wife, Mary, and I gave you our love, a labour, our wisdom, and our money. We held back nothing. We treated you with respect and lifted you up. How you received God's gift is not my responsibility, just like when I put an offering into the basket at church, how it is spent is not my responsibility. I do, however, still have a responsibility to the people in the church in Tonga.

I have two choices, I can let you steal the church and you are trying to steal it because it was not given, or I can prevent you from stealing it. I have chosen the latter course of action. I have chosen this course of action because Jesus said, "The thief comes not to kill, to steal, and to destroy", John 10:10. Therefore, I know the outcome before it happens, if I allow you, you will *kill* my vision for Tonga, you will *steal* the building and you will *destroy* the church. That is **not** going to happen.

In the name of the Father, Son, and the Holy Spirit, I am taking the following action:

> Tevita Kafovalu, you are hereby excommunicated from The Way Christian Fellowship.
>
> Tevita Kafovalu, your license to minister the gospel is hereby revoked.
>
> Tevita Kafovalu, your certificate of ordination is hereby revoked.
>
> Tevita Kafovalu, your position as assistant pastor at The Way Christian Fellowship in Tonga is hereby terminated.
>
> Tevita Kafovalu, all of your rights and privileges as a member of The Way Christian Fellowship are hereby terminated. You may

no longer minister in, speak at, and enter into, inhabit, stay at, attend or in any way utilise any facilities under the control of or owned by The Way Christian Fellowship. Your personal belongings will be removed from the church by church staff and stored under lock and key for safekeeping.

Kalolaine Kafovalu, you are hereby excommunicated from the The Way Christian Fellowship.

Kalolaine Kafovalu, your license to minister the gospel is hereby revoked.

Kalolaine Kafovalu, your certificate of ordination is hereby revoked.

Kalolaine Kafovalu, or your rights and privileges as a member of the The Way Christian Fellowship are hereby terminated. You may no longer minister in, speak yet, and enter into, inhabit, stay at, attend or in any way utilise any facilities under the control of or owned by the The Way Christian Fellowship. Your authority is terminated.

This course of action will be explained to the congregation in both Riverside and in Tonga and copies of this letter will be placed in both churches.

Sincerely,

Anthony Banks
Founder, Pastor and President
The Way Christian Fellowship

P.S. To Kalavini and Vika,
Don't think what you've done has gone unnoticed by God."

[32] Mr Kafovalu said that when he received that letter from Mr Banks he realised that the latter had "cheated" on him.

[33] The next development in the narrative occurred on 6 July 2005 when the plaintiffs in the principal action (Mr Kafovalu and Mr Nonu) issued proceedings against the defendants (Mr Banks and his family) in the Land Court and at the same time applied for an injunction restraining the defendants from trespassing on the plaintiff's allotment or using any part of the new building on the land. Their legal counsel at that stage was Mr 'Etika. The pleadings alleged that, unbeknown to Mr Kafovalu, Mr Banks had made an early move to come to Tonga and announce himself to be the new leader and he had advised the six families who had newly

converted to the faith in Tonga that Mr Kafovalu had been excommunicated and the official opening of the Church in Tonga had been bought forward to 10 July 2005.

[34] Mr Banks filed an affidavit in opposition to that injunction application in which he claimed that he had reached an agreement with Mr Kafovalu in January 2004 to construct the building in Tonga for The Way Christian Fellowship and in March 2005 Mr and Mrs Kafovalu had reneged on that agreement and wanted to change the name of the church to The Way of Salvation. The injunction application came before Chief Justice Webster who on 8 July 2005 declined the plaintiff's application for interim relief. Mr Banks was, therefore, free to proceed with his official opening of the new building. The "Dedication & Blessing" duly took place on 10 July 2005.

[35] Notwithstanding that development, the Kafovalu family still proceeded with their plans to travel to Tonga in early August 2005. Mrs Kafovalu told the court that the visit was going to be the first real opportunity for her six children to catch up with their Tongan relatives. She told the Court that she was quite shocked when the family pulled up outside their allotment on the afternoon of 11 August 2005 and saw a security guard on duty and a large sign which had been erected in front of the new building, which was supposed to be their own residence, which was headed "THE WAY CHRISTIAN FELLOWSHIP". The sign stated "Founder/Pastor/President - Anthony Banks". It also had the words, "Pastor -- Jimmy (Simi) Florian". There was another heading "Deacon" but the name of the Deacon had been deleted.

[36] Mr Kafovalu said that he had a discussion with Mr Banks on that occasion but there was no reconciliation. He described Mr Banks as been remorseful and apologetic. He said that Mr Banks cried and apologised to him saying: "I'm sorry for what I have done wrong -- the devil tried to separate us -- friendship." Mr Kafovalu was challenged about this evidence in cross examination but he confirmed that it was true. Counsel asked him what he understood when Mr Banks said that he had "done wrong". Mr Kafovalu replied: "First, our intention was to construct my building for religious worship. Secondly, he came ahead without us having any understanding. He chased me out of my house and land and it was guarded by security."

[37] Mr Kafovalu added that on the following day Mr Banks told him to remove his (Mr Banks's) name from the sign in front of the building and put in his own name but Mr Kafovalu did not consent to it because he had no intention to have a church on the property. As he emphasised on numerous occasions throughout his cross-examination, it was his intention to build a dwelling house for family religious gatherings -- not a church.

[38] Mrs Kafovalu's version of their arrival that day was slightly different. She said that as the family approached the building on that occasion they were told by the security man to go back out onto the road. Mr Banks was present but he refused to let the Kafovalus enter the building. He waved papers at them and told them that they had no right to come onto the property and they should go and see Justice Webster. Mrs Kafovalu told the court that she would never forget that night because they were prevented from entering their own property and they had nowhere else to go. She said that the family lay down by the roadside with the children using their suitcases as pillows. Later in the night it began to rain and Mrs Kafovalu said that at that point, in desperation, she went and obtained accommodation elsewhere.

[39] The following day they consulted another law practitioner, Mr Laki Niu, who confronted the security man and Mr Banks and attempted to persuade them to allow the Kafovalu family to enter the building but he apparently was unsuccessful. The family ended up staying with a relative at Fasi. They returned to the States approximately 2 weeks later. That, in essence, was the thrust of the evidence given by the plaintiff and his wife.

[40] One of the witnesses called for the plaintiff was 40-year-old Siaosi Vivi. He is married to Mrs Kafovalu's younger sister,Seini, and as noted earlier, they live in the house on Mr Kafovalu's allotment right next door to the building in question. He told the Court that he first met Mr Banks when he and Tevita Kafovalu arrived in Tonga from the United States on 29 January 2004. He said that he clearly recalled his conversation with Mr Banks that day when the latter said that God had told him to give US $20,000 to Tevita (Mr Kafovalu) and he didn't do it. He said that after one week God spoke to him again and asked him to double that amount and make it US $40,000. He told Mr Vivi that he was in Tonga to build a house for Tevita.

[41] The witness told how he and his family worked on the new building on a voluntary basis without payment because it was to be a house for Tevita and his family Church. He also allowed his taxi and van to be used without charge every day during construction. He said that if he had known it was a building for Mr Banks's Church then his family would not have worked for free or provided the vehicles. In cross examination he was shown the pay records referred to earlier which showed that one of his sons had received $20 per day on some occasions. The witness said that he was unaware of that but, in any event, he condemned the amount as derisory.

[42] Although it was not included in his written brief of evidence, Mr Vivi told about a discussion he had with Mr Banks prior to the opening of the new building. Mr Vivi confirmed that the official dedication had been planned for August 2005. Later he learned that Mr Banks had arrived early from the United States and he was proposing to bring the dedication forward from August to July. Mr Banks asked Mr Vivi if he would be the Deacon and he told him that Tevita would not be involved any more because he had been excommunicated. Mr Banks said that he wanted Mr Vivi and his wife to speak at the opening ceremony and he gave him some items so that he and his family would agree to what he was proposing. One of the items he gave him was a silver ingot bar (which was produced as an exhibit) and he also told Mr Vivi that he would build him a house at Popua so that he could have his own home and if Tevita was going to be upset because of the early dedication ceremony then he (Mr Banks) would pay to put him up in other accommodation in Tonga (the implication presumably was that, in anger, Tevita might attempt to evict Mr Vivi from his home which stood on Tevita's allotment).

[43] Mr Vivi said that during the same conversation Mr Banks spoke to him about the type of business that could successfully be set up in Tonga. In this regard he mentioned lawn mowing, importing floors and operating a catering business. Mr Vivi turned down the various propositions put to him that day by Mr Banks. He told the Court that what Mr Banks was doing was completely different from what had been proposed when they first started working on the new building. He formed the view that Mr Banks was "a very dangerous person to get involved with." Mr Banks then

removed Mr Vivi's name which had been painted on the sign at the front of the new building under the heading "Deacon". He also took back the key to the building which Mr Vivi had and took away the responsibility he had earlier given him of looking after the building. Mr Vivi did not attend the July opening of the building.

The case for the defence

[44] It is not easy to summarise the evidence given by the defendant, Mr Banks. His evidence in chief was presented in the form of a booklet affidavit which, along with the exhibits, amounted to 126 pages. His cross-examination took place over a period of four days. He denied what the plaintiff had said about what Mr Edwards termed "the first period of planning and betrayal". He said that upon his return to Riverside from Idaho, Tevita Kafovalu asked him to take over the English-speaking congregation of the The Way Christian Fellowship while he would take the Tongan congregation. He did admit that from September 2000 Mr Kafovalu held regular family prayer and worshipping meetings at his home in Riverside and as from the first half of 2001 his family (the Banks family) attended the prayer meetings and worshipping services at the Kafovalu family home. He also agreed that the Kafovalu family group was called The Way of Salvation Church and that it still operates in Riverside, California.

[45] Mr Banks accepted that the Kafovalu family had helped him out and been very generous during his difficulties and, in return, he had offered to build a rest home as an addition to the Kafovalu family home. He also admitted paragraph 44 of the plaintiff's statement of claim which described the origins of the Tonga building project in these terms:

> "Two years later, on or about the month of November 2003 the first plaintiff (Mr Kafovalu) asked the first defendant (Mr Banks) whether he could come to Tonga to construct the building and for the first defendant to help the first plaintiff in fulfilling his vision and calling from God. The first defendant agreed to help, donate and construct the building for the plaintiffs."

[46] Mr Banks strongly maintained that the intention all along was that the building would be a church and that it was never intended to be a residence for the Kafovalu family. He contended that initially the building was going to be a church for The Way of Salvation. On 29 December 2003 he had Mr Kafovalu sign a letter which he (Mr Banks) had prepared on The Way of Salvation letterhead addressed to The Way Christian Fellowship Inc thanking Pastor Banks for his donation in the amount of $14,074.06 "for the church we are building in Nuku'alofa, Tonga, South Pacific next year." Attached was a list of the items donated. Mr Banks said that under American law any donations to the building of a church building on foreign soil are a legitimate tax deduction and he confirmed that he claimed the deduction in this case.

[47] In cross examination Mr Banks accepted that The Way of Salvation was the name of the worshipping group for Tevita Kafovalu and his family. He was closely cross examined, therefore, as to when he alleged the building became the property of

his worshipping group, The Way Christian Fellowship. His answers were somewhat equivocal. At one point he seemed to suggest three possible dates but in the end he appeared to pinpoint January 2004 as the month when The Way Christian Fellowship took over the building. The morning after that exchange in cross examination, Mr Banks asked the Court if he could make a statement. He then said this:

> "Mr Edwards asked me when did I first decide to name the church The Way Christian Fellowship and I replied between 2 February 2004 when we lodged the permit application and 22 February 2004 when the constitution and bylaws arrived from the USA. When I got home I thought about it. The correct answer is between 29 January 2004 when we arrived and 2 February 2004 when we applied for the permit." Later still in his cross-examination, Mr Banks claimed that Tevita Kafovalu had never had possession of the building because it belonged to The Way Christian Fellowship and it had been intended to be that way from the very beginning.

[48] Mr Banks accepted that there was nothing in writing recording a transfer from the Kafovalus or The Way of Salvation to The Way Christian Fellowship and so he was further cross examined as to the basis upon which he claimed that such a transfer had taken place. Again, his evidence was somewhat equivocal. He claimed that when it came time to present the paperwork for a building permit Mr Kafovalu did not have the necessary paperwork for The Way of Salvation to be registered as a trust in Tonga and so he and Mr Kafovalu agreed that the permit would be applied for and the building built in the name of The Way Christian Fellowship. The evidence he relied upon to confirm the transfer was then identified as principally three documents produced as exhibits by Mr Banks which were associated with the construction of the building. They assumed some significance in the evidence and so I will identify each of them in turn.

[49] The first was the Ministry of Works Building Permit Application Endorsement form dated 30 January 2004. It showed handwritten entries recording the Owner as "The Way Christian Fellowship" and the Project as "Residence". The original document was not produced but the word "Residence" appears to have been written over a deleted word.

[50] The second document is a Ministry of Health "Check List/Construction Application." It shows the "Name of Applicant" as "Tevita Kafovalu"; the "Proposed Use" as "Residence " and the "Name of Owner" is shown as "Anthony Banks". In the body of the form there is a heading, "Type of Project" and again the word "Residence" appears. This is an important document. It is the document which Tevita Kafovalu had said in evidence "made him angry" because originally it had shown the name of applicant as Anthony Banks and the proposed use as "church". A description other than "residence" had also obviously appeared under the heading in the body of the form "Type of Project" but it is impossible to make out the deleted words. After the alterations were made, Tevita inserted his initials and the date " 2.2.04".

[51] The next document dated February 3, 2004 is a letter from the Tonga Fire Service setting out the fire safety requirements for construction. In that letter the "Applicant" is described as "The Way Christian Fellowship", the "Owner" as Anthony Banks and the "Proposed Use" as "Church Fellowship Building".

[52] When these documents had been put to Mr Kafovalu in evidence, he said that they had all been completed by Mr Banks and he had not been aware of the first and third documents. Mr Kafovalu said that in the one document he had seen, which is the second document referred to above, he had taken exception when he had seen "The Way Christian Fellowship" listed as the applicant and the proposed use as "church" and so he had changed the wording as described. During his cross examination Mr Banks was asked why he had shown himself as the owner on the second and third documents. He answered, "Because I was the one building the building."

[53] Mr Banks produced and also made numerous references to another document identified as an application form for registering a Board as a trust under "the Charitable Trust Act 1993". That was an application form completed by Mr Banks to have The Way Christian Fellowship registered as a Trust in Tonga. It was signed by six people described as the Trustees, including Tevita Kafovalu. It is undated but it would appear from other accompanying documentation that it probably came into existence on or about 29 November 2004. It is the document also referred to in paragraph [27] of this judgment where it is noted that Mr Kafovalu explained that he did not know what he was signing because Tongan was his first language and the form was in English.

[54] I did not find Mr Kafovalu's explanation in this regard convincing. I believe that he was aware at the time that the document he was signing was an application to register The Way Christian Fellowship under the Charitable Trust Act in Tonga. Why he disputed that proposition is something of a puzzle. It marred, what was otherwise, his convincing and credible testimony. Putting that indiscretion to one side, I do not find that the document in question helps advance Mr Banks's case. It relates only to the incorporation of The Way Christian Fellowship. As Mr Banks had to accept in cross examination, there was nothing in that particular document which showed that the trust had been formed to take over the building in question.

[55] Mr Banks also admitted that there was nothing in writing whatsoever to indicate that Tevita Kafovalu had ever agreed to lease his allotment to The Way Christian Fellowship or any other church group. Mr Banks had earlier claimed that in one of their discussions Tevita had agreed to lease the land to the Church for $1. That proposition was strongly denied by Tevita.

[56] Mr Banks admitted having offered to build a rest home at the rear of the Kafovalu's home in Riverside at a cost of US$40,000 but, contrary to Mr Kafovalu's claim, he denied having agreed to donate that same sum towards the construction of the building in Tonga. At one point in the course of his cross-examination, Mr Banks said that he estimated the value of the building when completed "including the land" at $150,000 and he estimated the contribution he had made individually or through The Way Christian Fellowship at $60,000. I did not find this evidence convincing, however, nor was it supported by any reliable documentary evidence. During the

hearing, the Court took a view of the building in question. It does not appear to have been properly maintained. It is now in a rundown and dilapidated state.

The second set of proceedings (CV 714/2005)

[57] In this proceeding which was issued on 1 November 2005 the plaintiff is The Way Christian Fellowship and the two defendants are Siaosi Vivi and Sione Veikoso Nonu. Vivi and Nonu are related to Tevita Kafovalu through marriage. Mrs Vivi and Mrs Kafovalu are Sione Nonu's sisters. Sione Nonu also has another sister, Vika, who lives in the United States. Vika is married to Kalavini Tonga, a school bus driver in Riverside, California. Kalavini travelled to Tonga to give evidence in this proceeding.

[58] In itself this claim should not be occupying the time and attention of this Court. It follows on from the July 2005 land case referred to earlier when Tevita Kafovalu and Sione Nonu were unsuccessful in their application to have Mr Banks and his family evicted from Mr Kafovalu's town allotment upon which the building in question is situated.

[59] In this proceeding it is alleged by Mr Banks, on behalf of The Way Christian Fellowship, that between August and October 2005 Siaosi Vivi and Sione Nonu broke into "the church building of the plaintiff" (The Way Christian Fellowship) and removed property belonging to the plaintiff. The property is identified under six headings, namely:

(a) Musical Instruments (10 items);
(b) Appliances (two fans and a refrigerator);
(c) Tools (one Orange Chicago half inch drill);
(d) Church Office (Account Book, Bank passbook, All receipts, stationery and transaction records);
(e) Furniture (2 folding tables, 4 folding chairs, 1 pulpit, 15 various religious pictures);
(f) Sunday school supplies (papers, pencils, crayons, markers).

[60] At the same time as the writ was filed in this proceeding back in November 2005, The Way Christian Fellowship filed an ex parte application for interim orders. The application was supported by affidavits filed by Anthony Banks and a Jim Florian, a Fijian national married to a Tongan who Mr Banks in July 2005 had appointed as a Pastor of The Way Christian Fellowship. The orders sought were granted by Chief Justice Webster on 1 November 2005. They required the defendants to forthwith return to the plaintiff all the property described above.

[61] That order gave rise to much bitterness and infighting between Mr Banks and the Florian family on the one hand and the Vivi and Nonu families, who were related to Tevita Kafovalu's family, on the other. The Florian family lived in a rented house immediately behind the building in question. The Vivi family lived in a small house immediately alongside the building in question. There was evidence about the locks on the building in question being changed by the respective factions on approximately 9 occasions and at one stage the whole front door of the building had been removed. There was evidence also about abusive exchanges and physical fights between Mrs

Vivi and Mrs Florian. On one occasion Mrs Florian's teenage daughter ripped Mrs Vivi's washing from the line, tore it up and trampled it into the mud. The matter went back to Court and Justice Webster found Siaosi Vivi and Sione Nonu in contempt of Court and gave them a suspended prison sentence.

[62] In his written judgment in relation to the committal hearing, the former Chief Justice remarked: "I am sorry to say I was shocked to find that there was little evidence of the Christian virtues of loving your neighbour or forgiveness by any of the parties -- we pray in the Lord's Prayer "forgive us our trespasses, as we forgive them that trespass against us", but that does not seem to have been happening on either side." It is evident from the present 17 day hearing that His Honour's words fell on deaf ears.

[63] In essence, the cause of all this bitterness was that the Vivi and Nonu families were adamant that the musical instruments did not belong to The Way Christian Fellowship as claimed by Mr Banks but that they had been purchased by Kalavini Tonga in the States and sent out to Siaosi Vivi in Tonga for his two sons who were living with the Vivi family.

[64] With the making of the interim orders back in November 2005, the reality is that this particular proceeding is no longer extant. Evidence as to the whereabouts of the various items in question was vague and unconvincing. In cross examination, Mr Florian expressed considerable uncertainty when asked about the items listed under (b) to (f) above.

[65] The position regarding the musical instruments is more significant, however, because of the basis upon which The Way Christian Fellowship claims ownership of the same. In his affidavit, sworn on 1 November 2005, filed in support of his application for an injunction, Mr Banks deposed that the musical instruments and other property belonged to The Way Christian Fellowship and he annexed to his affidavit two documents which he claimed proved that proposition. The first was a copy of a bill of lading, number LAX 01650 with the shipment manifest annexed and the second was a copy of the quarantine entry, number 133113. The significance of the bill of lading was that it showed that the consignment that apparently contained the musical instruments and other goods, was consigned by Kalavini Tonga from Riverside, California, on the 14th of February 3, 2005 to: "SIAOSI VIVI (REV) THE WAY CHRISTIAN FELLOWSHIP TONGA". The quarantine entry form showed in the box at the top of the document headed " Importer and address", the words "The Way Church C/O Siaosi Vivi Nuku'alofa".

[66] The evidence was that the entry in the quarantine form described above had been completed in Tonga by or on instructions from Mr Banks and so I place little reliance on that. The delivery address on the bill of lading, however, was more significant. The bill of lading was completed by " S.F. ENTERPRISES" a General Freight firm based in Long Beach, California. On the face of it, therefore, the reference to The Way Christian Fellowship in the delivery address added credence to Mr Banks's claim that the musical instruments and other goods in the consignment were owned by The Way Christian Fellowship.

[67] The defence in this proceeding, however, called evidence from Kalavini Tonga which challenged this assumption. Mr Tonga presently works as a school bus driver in Riverside but prior to October 2006 he was employed for 25 years as a supervisor in the loading and unloading of aircraft at Los Angeles International Airport. Mr Tonga gave evidence that he and his wife Vika regularly send clothing, food, gifts and miscellaneous items to Siaosi Vivi in Tonga because two of their sons are being raised by Siaosi Vivi and his wife, Seini (Vika and Mrs Vivi are sisters). Mr Tonga told the Court that he had purchased the musical instruments, packed them and sent them with other goods to Siaosi Vivi for his children. As he put it:

> "I have spent money to come here to give evidence because I am most disturbed with Mr Banks's claim that he has a right to musical instruments which I purchased and sent to Siaosi Vivi for my children. Mr Banks or his church has nothing to do with what I regularly send to Siaosi and his family. Mr Banks is trying to explain the bill of lading which the shipping company issued but he knows very well he has NO right to the musical instruments I send my family."

[68] Mr Tonga was referred to the bill of lading Mr Banks had been relying upon. He noted that Siaosi Vivi was not a minister or pastor and he contended that the word "Rev" in brackets which appeared after Siaosi Vivi's name had been added subsequently to the bill of lading as had the words "The Way Christian Fellowship Tonga".

[69] Mr Tonga told the court that when Siaosi Vivi contacted him in October 2005 and informed him that the church was claiming the musical instruments he went along to S. F. Enterprises in Long Beach, California and enquired as to how Mr Banks had received a copy of the bill of lading for his shipment to Siaosi. He said that the lady he dealt with at S.F. Enterprises, Soana Moimoi, explained that she had subsequently changed the wording of the bill of lading in accordance with instructions she had received from Mr Banks that the property was for the church. Mr Tonga told the court that he was angry when he found this out and he threatened to sue S. F. Enterprises. The company apologised to him and co-operated in making copies of other documentation available to him.

[70] A letter was produced from Soana Moimoi on S.F. Enterprises letterhead dated 1 November 2005 addressed to, "To Whom It May Concern". The relevant extract from the letter reads as follows:

> "I Soana L Moimoi working at S. F. Enterprises as Office Manager and I want to provide you with this information of Antony Banks (sic) who gave you a wrong information about the crts that Mr Kalavini Tonga and his wife came to the office and paid to me in cash to ship this crates to their cousin Siaosi Vivi and all the stuffs in the crates they both buy this stuffs and it was none of the stuff belongs to the Church or Antony Banks.

> And another things Anthony does he call me to fax the received of Kalavini to him and I did not know he was trying to come to Tonga to claim this things but it was not his stuffs or anythings belong to the church. He have no right at all to this crates everythings belong to Kalavini Tonga and his wife.
>
> I would like to let you know I will be in Tonga in December 15, 2005 if you want me to come to the court I will come and told Antony Banks he have no right at all to this crates or the churches and he is a big lie and I don't know how will be somebody will come and try to claimed somebody stuffs.
>
> Please let me know maybe you will postpone until I come to Tonga that way I will tell Anthony Banks he don't have anything in this crates."

[71] For his part, Mr Banks strongly denied giving instructions to Soana Moimoi or anyone else to alter the delivery wording on the bill of lading and his counsel submitted that nowhere in her letter did Ms Moimoi state that Anthony Banks had told her to insert the words "Rev" and "The Way Christian Fellowship Tonga" on the bill of lading.

Conclusions

[72] I say at once that I find it unfortunate that this case should have occupied 17 valuable sitting days of this court. With a little goodwill on both sides I am sure that a sensible compromise could have been agreed to but the parties could not even reach agreement on having the matter referred to mediation. In his reserved decision dated 6 April 2006 in relation to the contempt of court proceedings, where the parties effectively were Mr Banks and Mr Florian on the one hand and Siaosi Vivi and Sione Nonu on the other, Chief Justice Webster referred to the litigants as being "equally intolerant and inflammatory". His Honour also made the point which I fully endorse in relation to the present case that, "the hearing could have been completed in a much shorter time."

[73] The more significant observation made by the former Chief Justice was in relation to the issue of credibility. His Honour said:

> "I regret that I was unable to accept any of the witnesses who gave oral evidence as entirely credible and reliable. Pastor Banks did not give straight answers to questions in cross examination; Pastor Florian was theatrical and appeared to be carried away in a trance rather than giving reliable evidence; and some of Mr Vivi's answers were inherently improbable ...

As I indicated earlier, I did not consider either of the plaintiff's witnesses (Banks or Florian) completely credible and reliable . . ."

[74] To my mind the issue of credibility is central to this case. I regret that I formed a similar opinion of the oral evidence given by Mr Banks and Mr Florian to that expressed above by Chief Justice Webster. In fact, I would go further and delete reference to the adverbs "entirely" and "completely". In short, I found Mr Banks's version of the relevant events vague and inherently implausible. I find that by a complex web of deception he systematically embarked on a process deliberately designed to enable him to take control for himself of Tevita Kafovalu's allotment in Tonga and the building that had been erected thereon for Tevita Kafovalu's family.

[75] On the other hand, with the one exception I refer to in paragraph [54], and one or two other inconsequential inconsistencies, I found the evidence given by Mr and Mrs Kafovalu and Mr Kalavini Tonga credible and reliable and I accept their version of events.

[76] Exactly what Mr Banks's motives were remains unclear. I am satisfied that the list of donations which he drew up in the States on The Way of Salvation letterhead and had Tevita sign, which he now claims is evidence of Mr Kafovalu's intention to transfer ownership of the building in Tonga to The Way Christian Fellowship, was primarily designed for taxation purposes. Whether his other surreptitious actions were also motivated by taxation advantages he could foresee for his building construction company was not established on the evidence. In all events, even without establishing a motive, the plaintiffs in the principal proceeding (1030/07) have succeeded in making out their case and judgment is entered accordingly.

[77] The plaintiffs are entitled to the remedies sought along with costs to be agreed or taxed. Mr Edwards is to file an appropriate draft judgment.

[78] For the reasons just expressed, the plaintiff, The Way Christian Fellowship, in the other proceeding (CV 714/05) fails in its claim against Siaosi Vivi and Sione Nonu. The defendants in that action are also awarded costs to be agreed or taxed.

R v Nisifolo

Supreme Court, Nuku'alofa
Shuster J
CR 155/2006

10, 13, 14 November 2008; 9 January 2009

Criminal law – robbery – issue as to identity – defendant guilty

On 3 February 2006 the complainant was employed as an accountant at a Hot Bread Shop and she went to her main office to deposit the daily shop takings of $467. The Crown contended that whilst the complainant was standing outside the office, the accused approached the complainant and started a conversation with her. At a point in time he raised his fist, as if to strike at the complainant. The Crown alleged that the complainant moved backwards and into a defensive position, in order to defend herself and at that point the accused reached out and pulled the bag of money from the complainant which contained the takings and ran away. The defendant was charged with the offence of robbery. He pleaded not guilty and alleged mistaken identity.

Held:

1. Circumstantial evidence could be powerful evidence, but it was important that it was examined with care to consider whether the evidence which the prosecution relied upon in proof of its case was reliable and whether it did in fact prove guilt. Furthermore, before convicting on circumstantial evidence the Court should consider whether it revealed any other circumstances which were or may be of sufficient reliability and strength to weaken or to destroy the prosecution's case.
2. The case against the defendant depended to a large extent on the correctness of one [or more] identification[s] made of him and which he alleged to be mistaken. To avoid the risk of any injustice the Court needed to consider the special need for caution before convicting the defendant in reliance on the evidence of identification by a single witness.
3. The Court found the complainant to be very credible. Accordingly, the defendant was found guilty.

Cases considered:

Fagan v the Metropolitan Police Commissioner [1968] 1 QB 439
R v Aziz and others [1995] 2 Cr App R 478
R v Vye, Wise and Stephenson 97 Cr App R 134

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown : Mr Fakahua
The defendant represented himself

Judgment

The Defendant

The Defendants is: - charged on an indictment filed in the Supreme Court on the 1st September 2008. The Defendant was charged with the offence of Robbery. He was arraigned on the 1st September 2008 and he pleaded Not Guilty to the single count indictment- as is his legal right.

The substantive hearing of this matter took place on the 10th 13th and 14 of November 2008.

The Charge Against the Defendant

> Count One. ROBBERY-contrary to section 154(1) of the Criminal Offences Act Particulars of which are: - PISIMA'AKE NISIFOLO on or about the 3 February 2006 at MAILETAHA, you did rob UINISENI KIVALU of $467.00 by using violence thereby overcoming her opposition to the taking.

The Brief Facts

On the 3rd February 2006 the complainant UINISENI KIVALU was employed as an accountant at a Hot Bread Shop, she went by car over to her main office in order to deposit the daily shop takings of $467.00. The Crown says whilst the complainant was standing outside her Head Office, the accused approached the complainant and started a conversation with her. At a point in time he raised his fist, as if to strike at the complainant. The Crown alleges, the complainant in apprehension of being punched, moved backwards and into a defensive position, in order to defend herself. At this point the Crown say the accused reached out and pulled a bag of money from the complainant, which contained takings of $467.00, after stealing the money, the accused ran away, so the Crown say the offence of robbery is complete.

Elements of Robbery

Section 154 (Cap 18)

> (1) Robbery is the taking of anything capable of being stolen by using violence or threats of injury to the owner or

person in lawful possession of the thing taken or to any property of his- so as to put him in fear and thereby overcome his opposition to the taking.

(2) Every person who commits robbery shall be liable to imprisonment for any period not exceeding 10 years.

The term assault-is frequently used to include both an assault and a battery. Strictly speaking an assault is an independent offence, and should always be treated as such see: - *Fagan v the Metropolitan Police Commissioner* [1968] 1 QB 439.

An assault is any act and not a mere omission to act by which the person intentionally- or recklessly causes another person to apprehend immediate unlawful violence. So an assault involves a hostile intent.

Leading Cases and Policy

In considering this my judgment - I considered and applied cases widely known throughout the Commonwealth. These cases are routinely applied in common law jurisdictions for offences; or allegations involving cases such as this. They can equally be applied in Tonga.

> Modern Law says I must consider and apply to every case "a defendant's good character directive" that is to say good character cannot of itself provide a defence to a criminal charge, but it is evidence which I should take into account when I come to consider my verdict. *R v Vye, Wise and Stephenson* 97 Cr App R 134 & *R v Aziz and others* [1995] 2 Cr App R 478.

The Burden and Standard of Proof

As this is a criminal trial before a Judge sitting alone: - I certify I have directed myself in accordance with the Law on the Burden and Standard of Proof in a criminal case. Where appropriate I have given the defendant the benefit of doubt. The prosecution brings this case; they must prove the case beyond any reasonable doubt so that I am sure the defendant committed the offence. The defendant does not have to prove anything; because he is innocent until he is proven guilty.

Circumstantial Evidence

If there is reliable evidence from a witness who actually saw a defendant commit a crime; or if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the defendant himself having admitted it, these would all be good examples of direct evidence against him / her.

Circumstantial evidence can also bolster direct evidence.

> 1 On the other hand it is often the case that direct evidence of a crime is not available, and the prosecution relies in whole or in part upon circumstantial evidence to help prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say, when taken

together will lead to the sure conclusion that it was the defendant who committed the crime.

2 It is not necessary for the evidence to provide an answer to all-the questions raised in a case. One might think it would be an unusual case indeed in which a judge or jury can say 'I or we now know everything there-is to know about this case'. But the evidence must lead to the sure conclusion that the charge which the defendant faces is proved against him.

3 Circumstantial evidence can be powerful evidence, but it is- important that it is examined with care, and to consider whether the evidence which the prosecution relies upon in proof of its case is reliable and whether it does in fact prove guilt. Furthermore, before convicting on circumstantial evidence I should consider whether it reveals any other circumstances which are or may be- of sufficient reliability and strength, to weaken or to destroy the prosecution's case.

4 Finally, I must be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, neither the prosecution the defence nor I, should do that.

Voluntary Caution Statement

I am required under the law to consider a defendants voluntary caution statement[s] and also his / her charge statement- as to whether they are voluntary; or not, in the true sense of the word. In this case the Crown told me they did not seek to rely upon the VCS or charge statement of the defendant.

The Defence Case

- The accused as is his right under the law denies the offence as alleged in the Indictment - and
- He puts the prosecution to strict proof- alleging mistaken identity he also put forward:-
- A defence as one of alibi.
- He gave evidence on oath and he called witnesses.

Alibi

- The defendant says that he was not at the scene of the crime when this crime was committed.
- The prosecution has to prove his guilt so that I am sure of it
- The defendant does not have to prove he was elsewhere at the time.

- On the contrary the prosecution must disprove his alibi.
- Even if I were to conclude that the alibi was false, that does not by itself entitle me to convict the defendant.
- It is a matter which I might take into account,
- I should also bear in mind that an alibi is sometimes invented to bolster a genuine defence.

Visual Identification

The case against the defendant depends to a large extent on the correctness of one [or more] identification[s] made of him- and which in this case he alleges to be mistaken. To avoid the risk of any injustice in this case, such as has happened in cases in the past, I need to warn myself of the special need for caution before convicting the defendant in reliance on the evidence of identification by a single witness.

1. A witness, who is convinced in his or her own mind, may as a result be a convincing witness; but may nevertheless be mistaken. The same may apply to any number of witnesses in a case
2. Mistakes can also be made in the recognition of someone known to a witness, even of a close friend or of a relative. The law is quite clear- I must therefore examine carefully the circumstances in which the identification by the witness was made. Analysing in particular for how long did she have the person she says was the defendant- under direct observation? AND-

- At what distance and in what light
- Did anything interfere with that observation?
- Had the witness ever seen the person, she observed before?
- If so how often, and how many times
- Had she any special reason for remembering him?
- How long was it between the witness's original observation, and any identification she may have made to the police?
- Is there any marked difference between the description given by the witness to the police when he was first seen, and, the appearance of the defendant today?

The Evidence

The Crown called five (5) witnesses to prove their case. Their first witness PW1 was the complainant UINISENI KIVALU. PWI gave an eye witness account of her movements on the night in question the 3rd February 2006. She testified that it was the defendant who she saw face to face standing- right in front of her-; and she saw him in a good light. She said the defendant approached her and in her opinion- he was going to strike her, so that is why she pulled back. She described the defendant as wearing a black t-shirt, with black pants; and he had a red grip scarf- on his head. She told the court the robbery took place at around 1000pm on 3rd February 2006. The complainant said that the area they were standing in- near to her car - was well lit,

She was delivering the day's takings to her Head Office; the takings amounted to some $467, when the day's takings were snatched from her hands. She described her assailant as having long hair, and being of medium build. She positively identified the accused as the assailant in court. She said that he had since cut his long hair, and as a result- he now had much shorter hair. PW1 used the words - "she was sure it was him"

PW1 testified she also saw the accused on the day following the robbery (4th February 2006) he was standing near to a Chinese shop. The witness said he then moved across the road to end up standing near to a tree. The witness testified she saw the accused on the 4th when she went out searching for him as the suspect in the robbery. She said she was en route to an address she had been given for him, along with her witness and friend LU'ISA MALAMALA. The complainant confirmed; when she saw the accused standing by the tree on the 4th; he was still wearing the same clothes he had on when she was robbed of her shops takings the night before. If that is true, then that is quite persuasive identification and also reliable recognition evidence. The complainant gave her evidence calmly- she was quite persuasive and she was not swayed in her very positive identification of the accused, as being the culprit who carried out the robbery in February 2006. I found as a fact PW1--- was a credible witness.

Tevita Malama

The witness Tevita Malama PW2 testified he worked with the accused. He described him as a taxi driver and said they both worked from a taxi base near to the hospital. The witness told the court the accused was wearing a black T-shirt, with black pants and a red grip on the night of the alleged robbery, so in essence he confirmed what the accused was wearing, on the night of the alleged robbery and he also proved the accused was in fact mobile. This witness corroborates the accused's clothing in particular he refers to his black pants. I found he was also a credible witness.

Lu'isa Malamala

The witness Lu'isa Malamala told the court the complainant contacted her on the day following - the alleged robbery. The complainant had already told the court in her evidence in chief- that the robber approached her and had asked if she was MALAMALA'S wife. That conversation had taken place on the night of the alleged robbery- immediately prior to the robbery. When the complainant described the features of the man who she said robbed her the night before, and, had said he asked her if she was MALAMALA'S wife, Lu'isa said it sounded like the description of the accused- NISIFOLO PISIMA'AKE. Both PW3; and the complainant PW1 said they drove, over heading towards the accused's home address, and, on the way to the, accused's house, they saw the accused standing near to a Chinese shop. The complainant told me she identified the accused, both Crown witnesses testified the accused was wearing black pants. a black-T shirt and a red grip/scarf on his head but, they both described his hair as being much shorter than it was in 2006. All in all, the Crown says this is compelling evidence, and sufficient to convict the accused of robbery.

The defence case

The defendant

The defendant gave evidence that on the night in question he was wearing a black t-shirt with the image of Bob Marley on both the front and on the back of his t-shirt, he wore white pants and had a red grip scarf on his head. The defendant denied being at or near the scene, in essence, the accused claimed mistaken identity on the part of the complainant. He gave evidence that on the day following the robbery which was the 4th February 2006 he changed his clothing and had put on black pants, a black t-shirt and a red grip scarf.

DW2 Sulia Hoeift

She is the de facto partner of the accused in this case; she testified on the night of this offence the accused wore, white pants, a black-t-shirt with a Bob Marley image on both the front and on the back of the t-shirt, together with a red grip scarf on his head. She said on the night in question she was at home all night and she had no knowledge of what the accused may or may not have done. On re-examination she confirmed that when he went out the following day, the accused wore the same clothes he had worn; on the night in question the 3rd February 06.

DW3 Sione Teu

He gave evidence that the robber wore a grayish hood and black pants and he stated that the robber was tall and skinny, and it was not the defendant. He said he saw the robber standing face to face with the victim. He accepted he only saw the robber for a few seconds, and that he was standing 10-15 meters away when he saw the robbery. He said he only became aware of the robbery when the victim screamed and he did not see his face.

DW4 Otara Folau

She told the court she was only aware of the robbery when the victim screamed she did not actually witness the robbery, she told the court the robber wore a grayish hood and black pants and she saw him running away. She confirmed she did not see his facial features.

Inferences and Speculation

A court is not entitled to speculate, but it may draw inferences. There may be strong circumstantial evidence in which a court may say, when taken together will lead to the sure conclusion it was the defendant who committed the crimes. As I have indicated--Circumstantial evidence can be powerful evidence, but it is equally important to examine it with care and to consider whether the evidence upon which the prosecution relies in proof of its case is reliable and if it does prove guilt; or, are there any other circumstances which are, or may be of sufficient reliability and strength to weaken or destroy the prosecution's case. Finally a court should be careful to distinguish between arriving at conclusions based upon reliable circumstantial evidence and mere speculation. Speculation in a case amounts to no more than

guessing; or making up theories without good evidence to support them, neither the prosecution, the defence nor should I do that.

Analysts and Conclusion

In this case the defendant submits the prosecution has failed to prove its case beyond reasonable doubt, and he asks me for an acquittal. I do not intend to rehearse the evidence or the written closing, speeches because in a case such as this, it is a question of whom do I believe, on the evidence placed before me. Further- this was a short trial with just a few issues. It is the evidence given in open court-and on oath which goes to prove whether or not I find the guilt or innocence of the accused. Assessing the evidence as a whole:-

As said before --UINISENI KIVALU- gave me an eye witness account of her movements on the night of the 3rd February 2006. She testified it was the defendant who she saw face to face standing right in front of her- and she said she saw him in a good light. She told me the defendant approached her and in her opinion- he was going to strike her so that was why she pulled back. She described the defendant in detail, as wearing a black t-shirt, with black pants; and he had a red grip scarf on his head. She told the court the robbery took place at around 10.00pm on the 3rd February 2006. The complainant told me that the area they were standing in- near to her car - was well lit. She was delivering the day's takings to her head office which amounted to some $467 when the takings were snatched from her hands. She described her assailant as having long hair, and being of medium build. She also positively identified the accused as the assailant in court and said that he had since cut his long hair, and as a result- he now had much shorter hair. The witness PW1 used the words - "she was sure it was him". She then told me that she also saw the accused on the day following the robbery (4th February 2006) he was standing near to a Chinese shop. She said he then he moved across the road to end up standing near to a tree she was with her witness and her friend LU'ISA MALAMALA. The complainant witness confirmed to the court; when the saw the accused standing by the tree on the 4th; he was still wearing the same clothes he had on when she was robbed of the day's takings the night before. This is quite persuasive evidence it is evidence of both identification and is also recognition evidence. The complainant gave her evidence calmly- she was persuasive and she was not swayed in her positive identification of the accused, as being the culprit and who carried out the robbery in February 2006. In my view she would have no reason to lie or make up evidence. She even carried out her own investigation and as such I found as a fact she was a very credible witness. Accordingly I find the prosecution has proved its case beyond reasonable doubt so that I am sure it was the defendant who robbed the complainant and I find him guilty as charged.

R v Maile

Supreme Court, Nuku'alofa
Shuster J
CR 175/2008

15 and 16 December 2008; 9 January 2009

Criminal law – abetment of theft – all elements proved beyond reasonable doubt – guilty

On 20th February 2008 there was a theft of $4,200 worth of property from the home of the complainant. The Crown alleged the defendant, with another person, abetted the theft. The defendant was charged with abetment of theft. The defendant pleaded not guilty. He denied knowing that the goods were stolen.

Held:

1. The Court applied the well-known test for dishonesty in *R v Ghosh* which states "it is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest; even if he himself asserts, or genuinely believes he is morally justified in acting as he did."
2. The prosecution proved its case beyond any reasonable doubt. The defendant was found guilty.

Cases considered:

Machent v Quinn [1970] 2 All ER 255
R v Aziz and others [1995] 2 Cr App R 478
R v Barrrick (1986) 7 Cr App R
R v Ghosh [1982] 2 All ER 689
R v Gomez [1993] 1 All ER 1
R v Parker 53 Cr App R 289 CA
R v Vye, Wise and Stephenson 97 Cr App R 134

Statute considered:

Criminal Offences Act (Cap 18)

Judgment

The Defendant

The defendant is charged on an Indictment filed on the l5th July 2008, he is charged with a single offence alleging- abetment of theft. The defendant was arraigned on the 12th August 2008 before me; he pleaded Not Guilty to the charge, as is his legal right. The hearing of this matter took place on the l5th and 16th December 2008, and on conclusion the matter was adjourned to today for a written judgment.

The Charge

- Count One - Abetment of Theft Contrary to section 8 & 143 & 145 (b) of the Criminal Offences Act (Cap 18)
- Particulars of which are: - on or about the 20th February 2008 at Tofoa, you did abet SATI'O MATAKAIONGA in committing theft by directly assisting him to take the following goods:-
- 2 Fala 15 (15 feet mat) valued at $800
- Falu Uongokumi (20 foot mat) valued at $600
- 14 Kie waist mats valued at $500
- Fihu 20 (20 foot white mat) valued at $800
- Paongo mat valued at $400
- Undecorated mat valued at $400
- DVD player valued at $400
- Perfume valued at $300

The total value of these good is $4200.00, knowing these goods were stolen;

The Prosecution's Case

As the indictment clearly states the prosecution allege the defendant (with another person) abetted the theft of $4,200.00 worth of Tongan property, from the home of the complainant, on the night of 20th February 2008. A complaint of theft was reported to the police, and an investigation commenced, which culminated in the defendant's arrest, interview and his subsequent committal by a Magistrate for trial in the Supreme Court.

The Defence Case

The defendant as is his right under the law denies the offences as alleged in the Indictment and put the prosecution to strict proof. He gave his explanation of the events in a VCS to the police, and to this court. The VCS was not challenged by the defendant and is in evidence before me. The defendant also gave evidence in court; his evidence is accorded the same respect and consideration as any other parties. His defence is he did not know the goods were stolen. He also called a witness in his defence his co-accused.

Essential Elements of the Offence of Abetment

Section 8 Abetment of crime and the punishment of an abettor

> Every person who directly or indirectly commands, incites, encourages or procures the commission of an offence by any other person, and, every person who knowingly does any act for the purpose of facilitating the commission of an offence by any other person is an abettor and shall (unless otherwise expressly specified by any enactment) —
>
> (a) Where the offence is actually committed in pursuance or during the continuance of such abetment, be liable to the same punishment as if he himself had actually committed that offence; and

Essential Elements of the Offence of Theft

To find the Accused Guilty of an offence of theft, under section 143 and 145 (b) of the Criminal Offences Act (Cap 18) the prosecution must prove each of the essential elements of the offence. In layman's terms and in a nutshell the essential elements of theft are:-

- THE DISHONEST
- APPROPRIATION OF PROPERY
- WITH THE INTENTION OF
- PERMANENTLY DEPRIVING THE OWNER OF IT

Leading Cases and Policy

In considering this my judgment I have considered and applied the following leading cases widely known throughout the Commonwealth. These cases are routinely applied in common law jurisdictions for offences; or allegations involving theft, or cases involving dishonesty. They can be applied here in Tonga.

- *R v BARRRICK* (1986) 7 Cr AR [s]. For allegations which concern Breach of Trust. It is trite law that a servant or agent owes a high duty of care to his employer to carry out his duties properly; and more important honestly. The higher up the scale one goes in a company, or organization, the higher the degree of responsibility is imputed in him by law; because without that trust; the business world and all organs of a government would be in chaos.
- *R v GHOSH* [1982] 2 All ER 689. Is the well known test for Dishonesty, which states; "it is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest; even if he himself asserts, or genuinely believes he is morally justified in acting as he did."

- *R v GOMEZ* [1993] 1 All ER 1. Authority for the well established test of; appropriation and or, misappropriation of property. This is a Leading House of Lords case which all legal practitioners should read, understand and apply in cases such as this.
- *MACHENT v QUINN* [1970] 2 All ER 255 DC. It is not necessary to prove all the articles or values mentioned in the indictment to have been stolen, if it is proved that the defendant stole any one of them. *R v Parker* 53 Cr App R 289 CA per Donaldson at page 229 it is submitted that the jury must be agreed on which particular item, or value was stolen.
- DEFENDANTS GOOD CHARACTER DIRECTIVE. Modern Law says I must consider and apply to every case "a defendant's good character directive" that is to say good character cannot of itself provide a defence to a criminal charge, but it is evidence which I should take into account when I come to consider my verdict. See: *R v Vye, Wise and Stephenson* 97 Cr App R 134: *R v Aziz and others* [1995 2 Cr App R 478.

The Burden and Standard of Proof

Certification: As this is a trial before a Judge sifting alone; I certify I have directed myself in accordance with the Law on the Burden and Standard of Proof in a criminal case. Where appropriate I have given the Accused the benefit of any doubt. The prosecution brings this case; they must prove the case beyond any reasonable doubt so that I am sure he committed the offence. The defendant does not have to prove anything; because he is innocent until he is proven guilty.

Voluntary Caution Statement

I am also required under the law to consider a defendants voluntary caution statement and also his charge statement and confession as to whether they are voluntary; or not, in the true sense of the word.

- I find as a fact upon hearing the evidence that the VCS Exhibit 1, is voluntary in the true sense of the word;
- As is the charge statement Exhibit 2 and the confession statement Exhibit 3.
- These documents were never challenged by the defendant

Prosecution Case

I heard a total of 3 prosecution witnesses who testified they knew the accused and had dealings with him concerning this particular case.

- The first prosecution witness PW1 testified she is the owner of a house in Tofoa which contained property which she says was stolen on the night in question, she identified property recovered by the police as her property.

She told the court the house stored property and it was unlit at night.

- The second prosecution witness PW2 was a taxi driver, he gave evidence and confirmed on oath he picked up the accused and took him to another house together with his co- accused, from where the defendant was arrested by the police with a quantity of property including a number of mats. The taxi driver's evidence is that he called at a house with no lights on- where his taxi was loaded with property including mats- quite late at night. He told the court he was asked to take the back roads and asked to drive near to a cemetery where he dropped the two men who then carried off the goods to a house from where they were later arrested.
- The third witness was the Officer in charge of the case who arrested the defendants identified the property and who interviewed the defendant.
- Most of what the witnesses said was never challenged or shaken by the defendant in his cross examination. At the conclusion of the case, I was formally asked by the Crown Prosecutor to find the accused guilty as charged.

Defendant's Case

The defendant elected to give evidence after his rights were explained to him by the court. The defendant's evidence basically followed his account contained- in his VCS and in his charge and confession statement. These documents have been translated and are in evidence by consent. The defendant denied knowing the property subject to the charge was stolen. In my view the defendants VCS is very relevant in determining either his guilt or innocence. He also called a witness in his defence a serving prisoner and his co-accused in this matter.

Inferences and Speculation

A court is not entitled to speculate, but it may draw inferences. There may be strong circumstantial evidence in which a court may say, when taken together will lead to the sure conclusion it was the defendant who committed the crimes.

Circumstantial evidence can be powerful evidence, but it is equally important to examine it with care and to consider whether the evidence upon which the prosecution relies in proof of its case is reliable and if it does prove guilt; or, are there any other circumstances which are, or may be of sufficient reliability and strength to weaken or destroy the prosecution's case. Finally a court should be careful to distinguish between arriving at conclusions based upon reliable circumstantial evidence and mere speculation. Speculation in a case amounts to no more than guessing; or making up theories without good evidence to support them, neither the prosecution, the defence nor should I do that.

Analysis

In this case the defendant submits the prosecution has failed to prove its case beyond reasonable doubt, and he asks me to acquit him. I do not intend to rehearse the prosecution evidence in detail because in a case such as this, it is a question of who I believe on the evidence placed before me. Further this was a short trial with few issues. It is the evidence given in open court and on oath which goes to prove whether or not I find the guilt or innocence of this particular accused. In this case it is the evidence of PW2 which might succeed and help the prosecution to convict this defendant, but only if I care to believe his evidence, and if I assess him as a credible and truthful witness.

Accordingly

Assessing the evidence as a whole

- I accept the evidence of the complainant that her home was broken into and the property subject of the charge was stolen on the night of the 20th February 2008
- I believe PW2 the taxi driver when he told me he took the defendant and the co-accused in his taxi together with a quantity of property from the vicinity of the victim's home on the night of the 20th February 2009.
- PW2 was unshaken in his cross-examination. Accordingly I believe PW2 and I accept his evidence.
- I accept the evidence of the police officer that the accused was arrested together with a co-accused in possession of stolen property.
- The facts reveal the defendant fully assisted in the transportation of the stolen property from an unlit house late at night, and in my view the fact the taxi driver was asked to travel using back roads and the fact the property was dumped near the cemetery and then transported to the co-accused's home on foot, speaks volumes, and it clearly goes to prove guilty knowledge on behalf of this particular defendant.
- I reject the evidence of both the defendant and his co-accused they were both clearly involved in this crime and they were not credible witnesses.

In my view the prosecution has proved it case beyond any reasonable doubt so that I am sure the defendant committed this offence. I believe the witness PW1, PW2 and PW3; I take into account the defendants VCS, his reply to the charge, and his actions, before, during and after the commission of this crime, applying the well known test for dishonesty contained in *R v GHOSH* [1982] 2 All ER 689.

ACCORDINGLY I FIND THE ACCUSED GUILTY

Pohiva anor v Police

Supreme Court, Nuku'alofa
Shuster J
AM 22 and 23/2008

23 January 2009; 13 February 2009

Appeal from Magistrates court – against fine imposed – must be means enquiry before fine imposed – fine substituted with lesser one – conviction confirmed

This was an appeal from the Magistrates Court, Fasi and concerned a decision in two criminal defamation cases. The two cases were tried together in the lower court and on the 9th September 2008 the presiding Magistrate convicted the Appellants and sentenced each Appellant to pay a fine of $1,000 within two months or to serve six months imprisonment in default of payment. Both Appellants appealed on the grounds that the Magistrate's sentence was at the top end of the scale and that the Magistrate had already made up his mind and was biased when he heard the case.

Held:

1. The Court found that there was no hostility or pre-determination of the case against the two appellants by the Magistrate.
2. There must a means enquiry conducted before a Magistrate imposed a fine. Fines must be based upon the ability to pay. It was wrong in principle for the Magistrate to impose the maximum sentence upon conviction.
3. The Court set aside the sentence of $l,000 against each of the defendants and substituted a sentence of a fine of $500 to be paid within three months or in default of payment four months imprisonment.
4. To that extent the appeal against sentence succeeded. The Magistrate's conviction however was confirmed.

Statute considered:

Magistrates' Courts Act (Cap 11)

Counsel for the appellants	:	Mr Tu'utafaiva
Counsel for the respondent	:	Mr Little

Judgment

This is an appeal from the Magistrates Court, Fasi and concerns a decision in two criminal cases: - 816 & 851- 2007. These two cases were tried together in the lower court and on the 9th September 2008 the presiding Magistrate convicted the Appellants and sentenced each Appellant to pay a fine of $1,000 within two months- or to serve six months imprisonment in default of payment. The offence tried was a case of Defamation. The Defamation charge had been remitted from the Nuku'alofa Supreme Court; back to the Magistrates court for trial in the Magistrates Court, by Ford CJ in 2008. After trial, subsequent conviction and sentence, the Appellant's Notices of Appeal, were filed in the Supreme Court on the 17th September 2008.

The initial hearing of the Appeal; had been set by the Supreme Court for hearing on 21st November 2008 but, on that date the case was adjourned to obtain a "full transcript" of the lower court records; at the request of the respondent's counsel. The substantive hearing of the Appeal took place on Friday 23 January 2009. On that date Mr. Tu'utafaiva appeared and indicated he represented both Appellants at the Appeal. Mr Tupou had been represented during the trial in the lower court, by Mr Clive Edwards Mr Pohiva had been unrepresented.

There are Ten Grounds of Appeal

The Grounds of Appeal are as Follows

The First and Second appellants; appeal to the Supreme Court for the Order made in the Fasi Magistrates Court on 9th September 2008, to be set aside-on the following grounds.

1. The Appellants believe that the decision of the Magistrates Court fell short in that it did not allow them (the appellants) sufficient time to call witnesses to testify during the course of this case.
2. The Appellants had thought this trial was a preliminary inquiry only, and only took the opportunity to examine the case of the plaintiff and consequently were unprepared to arrange for witnesses for the trial.
3. The Appellants believed that if their intended proposition for a No Case To Answer would be rejected, at least they may have had the chance to study the case of the Plaintiff and will alternatively allow ample time to arrange witnesses to the stand when the accused will chose how their trail will be heard.
4. During the course of the trial the Appellants felt that there was already a sense of bigotry in the Magistrate.
5. This was indicative in the phrase of words of the Magistrate just, after the plaintiff had finished calling his witnesses (and the Appellants had not yet responded to the charges) which were the following words or words to the effect ... What then will you do next. You can speak

from where you are, or make statements under oath from the stand or call witnesses.

6. Whilst under pressure with the above propositions from the Magistrate; the magistrate went on further and said the following words or words to the effect...This case trial is a petty and simple case, and the court is already prepared with the verdict.
7. The Appellants were astonished as they had thought this trial was only a Preliminary Inquiry, and was unprepared to call witnesses as they needed good time to identify the whereabouts of their key witness to ask him to come to provide evidence on oath.
8. Consequently, the Appellants especially the first Appellant unprepared took the bitter opinion of making their (his) closing submission.
9. During the course of the trial, the Appellants felt that the Magistrate repeated unfavourable remarks and high tone of his words, to the Appellants, were too much and over, reflecting prejudice.
10. Although the Prosecutor had said in court that the Accused had no prior criminal records the Magistrate charged (my emphasis- imposed) the full amount of the .penalty

The Appellants Request

1. That the ruling of the Magistrate be set aside.
2. Should the Court see fit that the case be reopened in the Higher. Court to allow sufficient time for the Appellants to call their key witness to provide evidence.
3. That the identity of the Appellants key witness be kept anonymous-until he appears in court.
4. Any other orders the court deems necessary.

Conviction and Sentence

Both Appellants were convicted by the Magistrate after trial on 9th September 2008, both Appellants were ordered to pay a fine of $1,000 (the maximum fine) within two months- or serve six months imprisonment; in default of payment. Both Appellants- subsequently argue that the Magistrate's sentence - a fine of $1,000 PA is (and was) at the top end of the scale. They argue that level of fine is unfair. The argument (point) on the imposition of the maximum fine for this offence is contained in ground 10 of the Appellant's Notice of Appeal.

Supreme Court Hearing

At the hearing of the Appeal on the 23rd January 2009, counsel for the Appellants Mr Tu'utafaiva conceded the Appellants were abandoning grounds 2 and 3, and this point was duly noted by the court.

Analysis of Documentation

The Supreme Court has access to a certified court record of the Magistrates' Court at Fasi, for the dates in question, covering criminal case numbers 816-07 and; 851-08; together with an Affidavit from the presiding Magistrate Latu MOHENOA which was dated 19th January 2009, and two other affidavits which I will address in due course.

In his Affidavit the Magistrate deposed he was the presiding Magistrate who determined a single charge of defamation against the Appellants, Falisi Toupou and Siosiua Po'oi Pohiva in the lower court in May concluding the trial in September 2008.

The Magistrate deposed - oral evidence was given by Assistant Police Commissioner Unga Fa'aoa on the 12th May 2008 and following that hearing in May, the Magistrate deposed the defamation case was then adjourned to 2nd September 2008 for the continuance of the joint trial.

The Issue of a Substantial Delay

As an Appellant Judge, I am obliged to consider the issue of delay. In effect I have to question why there was such a long adjournment of this case from the 12th May to the 2nd September 2008. Why would the Magistrate adjourn a part heard trial for 113 days, especially if he had said and if he had accepted this was a simple case?

Unfortunately there is no reason recorded, either in the lower courts record, or any reason provided by the Magistrate in his affidavit dated 19th January 2009 explaining a 113 day adjournment, or, the reason for the delay, in the resumption of this trial, was it due to court commitments, lack of witness, illness or what.

Surely the right to a fair trial includes and encompasses the right to a speedy trial; and to a trial and a verdict within a reasonable period.

I have been left asking myself the question, why on earth did this trial take 120 days? I note this delay has not been listed as a ground of appeal, but in my view the issue of such a long delay in the lower court- in a part heard case, certainly needs addressing- and of necessity- it needs some comment.

The Appellants' Submission

In his address to the court Mr Tu'utafaiva indicated the case should be remitted back for trial before a different Magistrate for the reasons enunciated in the grounds of Appeal- except for grounds 2/3 which were abandoned on the 23rd January 2009. Counsel for the Appellants stated that the Respondents would not suffer any real prejudice with a retrial in the lower court.

Counsel also indicated the Appellants felt strongly that the fine imposed by the Magistrate in September 2008 was at the top end of the scale and that the Magistrate had already made up his mind, and that he was biased when he heard the case.

The Evidence in the Lower Court

The Magistrate's Affidavit and the lower court record, both indicate the defamation trial resumed on 2nd September and the prosecution closed its case, that same day.

The Magistrates court record, there appears to be some general confusion at page 9 over the submissions made at the close of the prosecution's case.

At page 9 the court record states "Clive will you take an oath for your evidence, or without the oath, or just make a speech. Does that comment mean the Appellant or Clive Edwards himself?"

> Clive replies, if the Prosecutor's party is closing, I will continue.

To my mind it is quite clear that the prosecution had closed its case. The record is unclear as to the submission indicated and made by Clive Edwards on page 9 of the court record- on a point.

For example- was, in the Appellants (or in counsels) view – THERE NO CASE TO ANSWER, based upon the totality of the evidence heard, or in witnesses credibility being largely undermined- as in the case of R v GALBRAITH, or was this just a case of the Magistrate explaining in inadequate words to the Appellants, their options at the close of the prosecution case- coupled with some inadequate court recording at the material time?

To my mind it appears quite clear- that Mr Edwards was making some form of submission, albeit that might have been somewhat difficult for him, because he had not been present in court on the 2nd September 2008, however the court record indicates counsel Mr Edwards had been present at the hearing of the evidence on the day of the 12th May 2008.

Because the court record is unclear on certain points, I will have to go on to rely upon further evidence, that is to say to look at the Affidavits provided for the substantive appeal, from the Magistrate, Mr LITTLE and Mrs KULI.

Closing of the Prosecutions Case 02-09-2008

Under the law-

At the close of the prosecution's case: - each of these two Appellants would have clear; defined and legally decided options- as a matter of course, The options are set out as follows:-

- First- they can either singly or; each Appellant could submit that there was NO CASE TO ANSWER. Following the leading case of (Galbraith)
- If the Magistrate finds there is no case to answer the accused is (or they are) discharged- and that would generally be an end of the matter, but the Magistrates decision may be subject to a review by the Attorney General more particularly so if the case was a PI.
- If the Magistrate finds there is a case to answer then the Magistrate says so and in open court, but the Magistrate does not have to give ANY reasons for finding that there is a case to answer.
- The second option- if the Magistrate finds and says there is a case to answer; then each of the Appellant has the right to go into the witness box, and give evidence- usually in the order shown in the indictment or charge.

- If he does he can be cross examined and also can be asked questions from the bench. His evidence must be given on oath or by affirmation- and from the witness box.
- The third option is they can each remain silent because the prosecution bring the case and they must prove their case beyond reasonable doubt.
- The fourth option is he / or they can make a statement from the well of the court and if they do so, they cannot be cross examined or asked questions by the court on what they say from the well of the court- but the statement will be recorded and considered by the court.
- The fifth option is they can each call witnesses in their defence, but, it is important to note that the court does not have to adjourn for them to bring their witness, however- generally speaking a court will adjourn, in the interest of fairness; if necessary the court will issue witness subpoenas if there is a sufficient reason to do so.

These are fundamental principles; which have been enshrined in the law, in order to ensure each and every person, receives a fair trial. Though it might be argued that a Magistrate in Tonga has no duty to advise anyone of his options, under the Tonga Magistrates Courts Act, the right of any accused person to a fair trial- provides a moral duty for any Judge or a Magistrate to assist each accused in his election, at the close of the prosecution's case-by explaining these options in a clear and simple manner. In my view it is particularly important to do this, if the defendant is unrepresented, or, perhaps he /she is a youth or a young person, in order to ensure a fair trial.

(This is a fundamental right under International Human Rights Legislation which Judges Magistrates are obliged to note and act upon- even in the absence of domestic enacting Human Rights Legislation.)

The Magistrate's Affidavit

The Magistrate in his Affidavit dated 19th January 2009 deposes that...after the prosecution closed its case on 2 September 2008, he says- "He said quite definitely--I did say to both defendants in Tongan words to the effect.

- "What do you wish to do; you can make a statement from where you are, give evidence under oath, or call witnesses."
- The Magistrate deposes that in response to what he said on the 2nd September 2008 to the appellants, he adjourned the case to allow time for the Appellants to prepare and present their case and the Magistrate adjourned the case for one week to the 9th September 2008.

In my view this one week adjournment which was granted was fair and the time frame of one week was sufficient time for anyone, to decide on his / her strategy- that is to say to give evidence on oath, or to make a statement from the well of the court, or to remain silent or to call witnesses and either bring them to court voluntarily, or to

apply to the court for a witness subpoena-in the case of any reluctant witness. I accept this was done by the Magistrate.

Further Analysis

In this Appeal I have had sight of two further Affidavits from Mr. Peter LITTLE and the Court Recorder, Ms KULI who deposes she was a very experienced Court Recorder and I accept she was having worked for many Supreme Court Judges. Mr. Little also deposes that the Magistrate told the defendant Mr. POHVIA his options at the close of the prosecution's case and in effect Mr Little's evidence confirms the Magistrate's Affidavit.

Mr. Little also deposes the Appellant Mr. Pohiva requested an adjournment to consider his options, and that the Appellant Tupou also requested an adjournment so that his lawyer Mr Edwards would be available on the next date. That adjournment was granted; and by anyone's standard that one week adjournment is and was sufficient time for any person to have fully considered all of his options more particularly educated persons like these appellants who work in the news industry.

I fully accept the truthfulness of the Magistrate's Affidavit, comparing the evidence contained in the affidavit of as I have said, a very experienced Court interpreter Ms Loupua KULI.

I am further convinced by my believing and accepting the truthfulness of these affidavits, that there was no hostility or pre determination of the case against either of these two Appellants by the Magistrate.

In my opinion the court record and the various Affidavits indicate quite clearly both of these Appellants were informed of their rights under the law by the Magistrate. That is to say they were both informed of their right to give evidence on oath, to remain silent or make a statement from the well of the court.

The court record however, is silent on the calling of witnesses- but I can and then must go on- in order to consider the Appellants own Notice of Appeal, which at paragraph 5 at line 7 indicates- the Magistrate used Tongan words to the effect of "**You can speak from where you are, or make statements under oath from the stand, or call witnesses**."

So with the Tongan statement, or translation of words in the Notice of Appeal. in mind, I am fully satisfied that both of the Appellants knew their rights at the conclusion of the trial, and that their rights included the calling any witness(s) in their defence and I have to conclude they chose not to.

I also take the view from studying the court record and the three Affidavits provided to each of the parties, they indicate Clive Edwards was not making a submission of; "NO CASE TO ANSWER".

Ruling and Order

For all the above reasons I have come to the conclusion that the appeals ought to be dismissed. I also conclude I have to reject the Appellants assertion that no prejudice would come from my ordering a retrial, because I accept that the main witness is now living and is working studying overseas and the cost of transporting him back to give evidence again would be far too high and would be a waste of taxpayers' money.

Looking at all the evidence reading the Affidavits and hearing the oral submissions on the 23rd January 2009, I am satisfied the trial in the lower court was fair, I conclude the Magistrate considered all the evidence- and he reached a sound conclusion.

However, I would wish to comment this was an apparently unnecessarily protracted trial, but the issue of the unexplained delay was not contained in any specific ground of appeal by either of the two appellants.

The Sentence

However insofar as the sentence is concerned; that is to say the imposition of a $1,000 PA fine against both Appellants, it is evident to me that there was no enquiry into the means of either of the Appellants in this case.

I say yet again, there must a means enquiry conducted before a Magistrate imposes a fine. Fines must be based upon the ability to pay. In my view it was wrong in principle for the Magistrate to impose the maximum sentence, upon conviction in this case.

Considering all the circumstances of this particular case, I set aside the sentence of $l,000 PA against each of the defendants and I substitute a sentence of a fine of $500.00 PA to be paid within three months of today, or in default of payment 4 months imprisonment.

To that extent their appeal against sentence succeeds. The Magistrates conviction on the 9th September 2008 however- is confirmed.

Australia and New Zealand Banking Group Ltd v Tatola

Land Court, Nuku'alofa
Andrew J
LA 11/2006

16 February 2009

Land law – application for summary judgment – triable issues – dismissed
Practice and procedure – summary judgment application in Land Court – unnecessary to decide whether Land Court had power

The plaintiff applied for summary judgment against the defendant. There was an issue as to whether the Land Court had jurisdiction to grant summary judgment. The defendant denied that there was a valid mortgage.

Held:

1. The Land Court Rules were silent as to the power to grant summary judgment and the power to enter judgment in default of defence. However, the Land Court Rules provided that, "except in these rules, the procedures set out in the Supreme Court Rules shall apply".
2. Ultimately, however as to the issue of whether summary judgment was available in the Land Court, the Court did not need to decide because even if it were to apply, the Court found that there were triable issues raised by the defendant. The Court was not satisfied that it was shown that there was or could be no defence to the plaintiff's claim.
3. The application for summary judgment was dismissed.

Case considered:
Salvation Army (Tonga) Trust v Nau [2001] Tonga LR 66

Rules considered:
Land Court Rules 2007
Supreme Court Rules 2007

Counsel for the applicant/plaintiff : Mrs Tupou
Counsel for the respondent/defendant : Mr Niu

Judgment

This is an application for summary judgment by the Plaintiff against the defendant.

This is a matter before the Land Court and the issue has arisen as to whether the Land Court has jurisdiction to grant summary judgment. The Land Court Rules are silent as to the power to grant summary judgment as in ORDER 15 of the Supreme Court Rules, nor in the power for that matter, to enter judgment in default of defence as per ORDER 14 of the Supreme Court Rules. ORDER 2 Rule 2 of the Land Court Rules does provide that except in these rules, the procedures set out in the Supreme Court Rules shall apply.

Ultimately, however as to the issue of whether summary judgment is available in the present case, I find that I do not need to decide because even if it were to apply, I am satisfied that there are triable issues raised by the defendant and I am not satisfied that it has been shown that there is or can be no defence to the plaintiff's claim.

I do not set out all of the facts of the case but the defendant denies that there is a valid mortgage in this case. I think there are issues raised as to the validity of the mortgage. That may ultimately be shown to be incorrect but nevertheless in my opinion the defendant does raise issues in relation to the mortgage and he should be entitled to raise that defence. There are issues of fact raised as to the date that the defendant entered and took possession of the land of the lease involved and issues raised as to the validity of the lease. I do not think it can be said that the defendant does not have a "hope of winning". See *SALVATION ARMY (TONGA) TRUST v NAU* [2001] Tonga LR 66 at 74.

For these reasons I do not think that this is a case where summary judgment should be entered and to put it in colloquial terms, the defendant is entitled "to have his day in court'.

THE APPLICATION IS DISMISSED.

I order that costs of this application be costs in the cause.

Saulala anor v Taumoepeau anors

Supreme Court, Nuku'alofa
Andrew J
CV 6/2009

17 February 2009

Practice and procedure – ex parte interim orders made – application to set aside – inappropriate to determine matters on ex parte basis – orders set aside

The plaintiffs claimed that no-one had been appointed as a member of the Board of Directors of the Tonga Rugby Football Union since the expiration of the four year terms of office of the previously appointed directors at the end of 2007. Therefore, the Board of Directors was not properly appointed under the Constitution of the Tonga Rugby Football Union incorporated. An ex parte application was made by the plaintiffs and interim orders granted on 29 January 2009 provided that the orders might be varied or revoked by the Court upon application within 48 hours on notice of the plaintiffs or the defendants. The defendants applied to set aside the interim Court Orders.

Held:

1. The matters to be resolved include the resolution of facts in dispute and the interpretation of the Constitution of the Rugby Union. The Court found that those matters could only be properly resolved upon trial and it was inappropriate and unfair to determine those matters on an ex parte basis.
2. The ex parte orders made on 29 January 2009 were set aside.

Judgment

The defendants apply to set aside interim Court Orders which were granted on the 29th January 2009 at the behest of the Plaintiffs. The original application was made ex parte and the Interim Orders granted provided that the orders might be varied or revoked by the Court upon application within 48 hours on notice of the Plaintiffs or the defendants.

Those ex-parte orders were:

"IT IS ORDERED THAT:

1. That the First through Sixth named Defendants cease and desist from holding themselves out as being duly

appointed Directors of the Board of the Tonga Rugby Football Union and that they forthwith cease and desist from acting in that capacity unless and until they are duly appointed as Directors pursuant to the Rules of the Constitution of the Tonga Rugby Football Union.

2. That any and all actions taken by the First through Sixth named Defendants in their purported capacity as duly appointed Directors of the Tonga Ruby Football Union are deemed void and of no effect unless and until such actions are ratified by a Board of Directors of the Tonga Rugby Football Union duly appointed under the Rules of the Constitution of that Union.

3. That Siosaia Fonua is confirmed as the Chief Executive Officer of the Tonga Rugby Football Union in accordance with the Rules of the Constitution of the Union, having been employed by a duly constituted Board of Directors of the Union on or about 23 September 2006.

4. Notwithstanding anything contained in Rule 7 of the Constitution of the Tonga Rugby Football Union, that the Tonga Rugby Football Union by its Chief Executive Officer summon meetings, to be held within 10 days from the date of this order, of the Council of Delegates and the Tongatapu and Tautahi Rugby Unions - as members of the Tonga Rugby Football Union, for the purposes of appointing the representatives of those bodies to the Board of Directors-of the Union to hold office for the balance of the four year term which would have commenced in January, 2008 and will expire at the end of December 2011 or until their office is otherwise vacated in accordance with the Rules of the Constitution of the Tonga Rugby Football Union.

5. Notwithstanding anything contained in Rule 15 of the Constitution of the Tonga Rugby Football Union, that no Annual or Special General Meeting of the Tonga Rugby Football Union be held prior to the appointment of a Board of Directors properly constituted in accordance with the Rules of the Constitution of the Tonga Rugby Football Union.

6. These orders may be varied or revoked by this Court upon application within 48 hours on notice of the Plaintiffs or the Defendants.

7. The Plaintiffs are to serve a copy of this order together with the Writ of Summons, Statement of Claim and Directions Notice on each Defendant forthwith."

The crux of the matter was the claim that neither the defendants NOR any other persons had been appointed as members of the Board of Directors of the Tonga Rugby Football Union since the expiration of the four year terms of office of the

previously appointed directors at the end of 2007. In other words that the Board of Directors was not properly appointed under the Constitution of the Tonga Rugby Football Union incorporated.

Given the evidence now before the Court I find that it is inappropriate to hold that the constitutional validity of the appointments of the defendants to the Board could or should be determined on an ex parte basis. There are issues of fact in dispute as to what was said at various Board meetings and what was decided. There is even an issue as to what is the valid Constitution. There is an issue as to whether the 1st Plaintiff had resigned or not from his position as Chairman of the Board of Directors as the Chairman of the Council of Delegates. There are issues as to whether Board meetings were properly convened and issues as to whether proper quorums were present.

All of these and other matters are directly relevant to the question of the appointment of the defendants to the Board.

They involve, as stated, the resolution of facts in dispute and the interpretation of the Constitution of the Rugby Union. Those and other matters could only be properly resolved upon trial and it would be inappropriate and unfair to determine those matters on an ex parte basis. The Plaintiffs themselves have said that Constitutional rules may not have been complied with and have said that the appointment of two of the directors "is under some not inconsiderable doubt". There is a further issue as to whether the Court appointed Administrator should be involved in these proceedings as he has the control and administration of the Tonga Rugby Football Union.

For all of these reasons the ex parte orders of the 29th January 2009 are set aside.

The Plaintiffs had previously filed a Statement of Claim seeking various declaratory orders. This matter will have to proceed on that basis.

Order

The ex-parte order of the 29th January 2009 are set aside.

Costs of the application for ex-parte orders and for the application to set aside those interim orders are to be costs in the cause.

R v Piutau

Supreme Court, Nuku'alofa
Andrew J
CR 142/2007

21 November 2008; 19 February 2009

Criminal law – grievous bodily harm – issue as to whether harm was grievous – found guilty
Criminal law – bodily harm charge – issue as to identification – found not guilty

On 21 October 2006 at Ha'ateiho, Kovula Takaua was stabbed in the chest with a knife and suffered severe wounds to his back; and on 9 September 2006 at Ha'ateiho, Latu Silatolu was hit on the chin with an 'ikale beer bottle. The accused was charged with two counts: count 1, grievous bodily harm in relation to the incident of 21 October; and count 2, bodily harm in relation to the incident of 9 September. He pleaded not guilty to both.

Held:

1. Count 1, the defence relied upon was that the wounds did not amount to grievous bodily harm. The Court was satisfied that but for surgical intervention the complainant would have bled to death, and therefore the wounds suffered amounted to grievous bodily harm.
2. The Court was satisfied beyond reasonable doubt that the accused was guilty as charged of count 1.
3. With respect to count 2, the Court was not satisfied beyond reasonable doubt that it was the accused who caused the bodily harm to the victim. The accused was found not guilty and discharged on count 2.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown : Mr Little
Counsel for the accused : Mr Tu'utafaiva

Judgment

The accused pleaded not guilty to two counts namely;

1) Grevious Bodily Harm contrary to ss 106(1) and 2(B) of the Criminal Offences Act.
2) Bodily Harm contrary to s 107(1) of the Criminal Offences Act.

Particulars alleged were:

1st Count: on or about 2l October 2006 at Ha'ateiho, you did willfully and without lawful justification stab the chest of KOVULA TAKAUA with a knife and caused severe wounds to his back.

2nd Count: on or about 9th September 2006 at Ha'ateiho you did willfully and without justification cause harm to LATU SILATOLU's right chin by hitting him with a 'ikale beer bottle.

In relation to Count 1 there is no dispute that the victim was cut with a knife on 2 occasions. The medical evidence disclosed:

"operating findings:

(i) Axillary wound was very deep, reaching the ribs but not entry into chest cavity.
(ii) The major axillary blood vessels were missed by few millimeters.
(iii) Multiple smaller vessels were cut, accounting for the blood loss."

The complainant was suffering from severe shock and loss of blood. I accept that, but for surgical intervention he would have bled to death.

The defence have submitted that the wounds suffered from the stabbing to the chest do not amount to grievous bodily harm. That submission is based on s 106(2)(b) of the Criminal Offences Act and the definition therein of 'grievous bodily harm' including 'the destruction or permanent disabling of any external or internal organ, member or sense'.

But that is only one definition of grievous bodily harm. Section 102(2) has 5 definitions of grievous bodily harm all in the alternative and s 106(2)(c) includes any severe wound.

The fact is that this was a severe wound. Numerous blood vessels were cut. Severe shock was caused from loss of blood and there was loss of consciousness. I would conclude that but for surgical intervention the complainant would have bled to death. The axillary wounds were very deep, reaching the ribs.

I am satisfied B.R.D. that the wounds suffered amounted to Grievous Bodily Harm.

That was really the only defence relied upon.

- The complainant has identified the accused as the one who attacked him. He saw the complainant with a knife in his hand.
- The complainant was able to get the knife off the complainant until he passed out.

- It was not suggested that the accused has wrongly identified the complainant or that he was mistaken.
- It is not suggested that anyone else stabbed him.
- A witness observed the fight and saw the accused with a knife in his hand. She saw the victim with blood on him.
- A further witness saw the fight and saw the victim and the accused fighting.
- A further witness saw the fight and saw the victim carried away with blood on him. A further witness saw this.
- The knife was located at the scene. The accused later identified it as his.

I have no reason to doubt any of the evidence of the eye witnesses.

In a Record of Interview the accused said he was drunk. He said he was not sure if he stabbed the accused. Then at Question 27 he was asked:

> "So TONGAHIGH the major injuries to KOVULA was caused when you stabbed him with this knife.
> A. Yes."

All of this evidence is overwhelming. The accused has not given any evidence disputing it and makes no denial.

For all of these reasons I am satisfied B.R.D. that the accused is guilty as charged.

COUNT 2.

It is alleged that the accused struck the victim i.e. punched him, and struck him with an Ikale bottle. There is no doubt that a fight took place. There is no doubt that the victim suffered bodily harm.

The issue is one of identification. The accused says that he was too drunk and does not know what happened. The victim says he identified the accused.

The evidence of identification in this case is that the defendant was accused of being the offender by one ILAIASI TOLI who based his identification of the defendant on the description given by the complainant. I remind myself of the inherent dangers of identification evidence and the very real possibility that mistakes can be made. In this case, I think that this kind of identification is open to error. There is no further evidence of identification and also there is some doubt because the complainant stated that someone got out of the van and he was surprised when he was punched and hit with the 'Ikale bottle. But in cross examination he told the Court that the Defendant was sitting on the drivers seat of the van and he was the driver. As submitted "so if he was the driver (as confirmed by Question and Answer 14 of the Record of Interview), then it may well be he was not the person who got off the van and wounded the complainant.

For these reasons I am not satisfied beyond reasonable doubt that it is shown that the accused is guilty of Count 2 and he is found NOT GUILTY and discharged on Count 2.

To'a v Inu anors

Supreme Court, Nuku'alofa
Shuster J
CV 837/2004

10 and 11 January 2009; 20 February 2009

Tort – claim against police – unlawful arrest, false imprisonment, and assault – claim not proved and therefore dismissed

On Saturday 16 June 2004 the plaintiff claimed the first and second defendants arrested the plaintiff at about 1600 - 1700 hours near to his neighbour's property. Officers placed the plaintiff into the rear of a police van and then they moved his car without permission; thereby allegedly committing a trespass to his vehicle. The plaintiff claimed he was not informed of the reason for his arrest. He also claimed the arrest was made on private property. He further claimed the period he spent in custody was unreasonable and therefore unlawful and that he lost his self esteem and also his dignity, he also lost the company of his wife and family during his time in custody. The plaintiff claimed the actions of the two police officers, the first and the second defendants, were oppressive, arbitrary and, unconstitutional, and that, the third and the fourth defendants were vicariously liable for their torts. As a result of his treatment during these dates, the plaintiff claimed he was entitled to both aggravated and to exemplary damages. The plaintiff claimed damages for unlawful arrest, imprisonment and assault. The details were as follows: inconvenience and loss of wife's company, $2,000; false imprisonment, $5,000; assault, $1,000; aggravated damages, $500; exemplary damages, $3,000; and costs, and interest at 10% from date of judgment.

Held:

1. The Court found as a fact that the plaintiff was arrested by police officers who were on duty at around about 5pm on Saturday 26th June 2004. The plaintiff was informed of the reason for his arrest and that he knew his arrest was for the alleged theft of Tongan goods and that knowledge was itself sufficient, to make the arrest lawful.
2. A police officer was obliged to care for the property of every man and woman taken into police custody under arrest and every police officer had a duty to observe the law. The plaintiff's wife could not drive so the police officers had a duty to ensure the safety of the plaintiff's car, and all its

contents and that duty extended to include looking after the safety of the plaintiff's wife.

3. The Court could not find any evidence that the plaintiff was unlawfully assaulted. Further, there was no evidence led of anything oppressive, arbitrary or unconstitutional by or towards the plaintiff, so the claim for exemplary damages failed.
4. The Court found that the plaintiff failed to prove his case against the defendants, so the claim was dismissed and the defendants were clearly entitled to their costs to be taxed by the Chief Registrar.

Cases considered:

Anderson v Both [1969] 2 QB 216
Dallison v Caffery [1965] 1 QB 348 (CA)
John Lewis & Co Ltd v Tims [1952] AC 676
R v Brosch [1988] Crim LR 743
R v Innwood 57 Cr App R 529 (CA)

Statute considered:

Police Act (Cap 35)

Counsel for the plaintiff : Mr Fifita
Counsel for the defendants : Mr Little

Judgment

This case is a claim for damages for the unlawful arrest, imprisonment and assault of the plaintiff- MAEA TOA. A statement of claim was filed by the plaintiff in the Supreme Court on 22nd November 2004. The various certificates of service reveal the writ and the statement of claim were served on each of the defendants on 29-30th November 2004. A Statement of Defence was filed (albeit out of time) with the leave of this court on 9th March 2005.

The Claim for Damages

The plaintiff's claim for damages is listed as follows:-

1. Inconvenience and loss of wife's company $2,000.00
2. False imprisonment $5,000.00
3. Assault $1,000.00
4. Aggravated damages $500.00
5. Exemplary damages $3,000.00
6. Costs and incidentals to these proceedings
7. Interest at 10% from judgment- until the damages are paid
8. Any other order(s) the court deems just

Chronology

On 11th September 2008 a trial date was set for 10th and 11th February 2009 as a firm fixture with a PTC date on the 30th January 2009 and confirmed at a PTC. On the 27th January 2009 the Crown Law Office asked for witness summonses for

Inspector of Police SOANE NAUFAHU. Perusing this file- it is evident there have been numerous adjournments, date fixes, and chambers hearings concerning this matter. There have been a number of dates in which the case had been officially set down for trial then there have been late applications for an adjournment.

It is also fair to say that essentially the applications for an adjournment; were as a result of witness problems. Any reasonable man in possession of all the fasts might conclude there has been a substantial delay in the hearing of this matter, but it is also fair to say the delays were caused by all of the parties- to this action.

The latest question of a possible further delay to this long running case- arose on Tuesday 10th February 2009, when the case was called in court for trial. On 2nd February 2009 the Supreme Court Registry received an application from the defendants to amend their statement of defence; they also asked for permission to cease to act for the first defendant essentially, because he could not be traced.

The defence application to amend the statement of defence was opposed by a notice from the Plaintiffs lawyer dated 3 February 2009 and is on file. However I cannot trace a request for a chambers hearing, to air this matter, pre trial. I also must place on record the defendants request to amend and to cease to act, might well have been overlooked, because of a recent bereavement which had affected the whole of our Supreme Court staff that week.

On Tuesday the 10th February 2009- the trial date, I told both parties to the proceedings; in chambers and again in open court that I was not prepared to delay this trial any further; because it is now four years and four months since the plaintiff first issued, and served his writ. Various witness subpoenas had been issued, and I wanted the case to proceed to trial immediately- without any further delay because further it has been evident for quite some time that the first defendant cannot be located (or contacted) because he is living overseas.

It is thought the first defendant is now living in New Zealand- and he has not returned telephone calls or responded to various e-mails from the Crown lawyers. I am satisfied after hearing representation from counsel, and having read the affidavit of Peter Little that the defendants counsel, has made every reasonable effort to locate, ex-PC INU, but to no avail. I have been told the ex-Tongan police officer may have overstayed and, or he may well have re-settled in New Zealand, or even moved on. What I know is certain; ex PC INU is no longer a serving Tongan Police Officer, he is no longer within this court's jurisdiction and that the case must proceed without further delay.

It is settled law the third and the fourth defendants would remain vicariously liable for the torts of its police officers, were the plaintiff to be found by the court to be successful in this claim.

The Plaintiff's Case

The plaintiff is MAEA TOA and at the time of this alleged incident he lived at LAPAHA with together with his wife and his family. He describes himself as a planter and he grew crops at HA'ASINI for a living and they sold the crops at markets.

On Saturday the 16th June 2004 the plaintiff claims, the first and second defendants arrested the plaintiff at about 1600 -1700 hours near to his neighbour's property. Officers placed the plaintiff into the rear of a police van and then they moved his car without permission; thereby committing a trespass to the plaintiffs

vehicle. The plaintiff claims he was not informed of the reason for his arrest. He also claims the arrest was made on private property.

He claimed he asked PC INU if he could drive his own vehicle back to his allotment, but the request was refused. The plaintiff claims PC INU the first defendant could not start the plaintiff's vehicle; but Inspector NAUFAHU the second defendant was able to start the plaintiff's car; so he drove the car to the plaintiff's residence. The plaintiff says in court and in his statement of claim he did not consent to either of the police officers moving or driving his vehicle.

The plaintiff claims he was subsequently taken and lodged at the MUA police station. The plaintiff claims he was questioned while he was held initially at the MUA police station, by PC INU in relation to a suggestion that he had been seen sitting in a van (at around noon) by the road in 'ALAKIFONUA the previous week in the vicinity of a crime which had occurred around about the same time. The plaintiff claims he told the officers, he had stopped the vehicle at the roadside because his brother in law MONU FINAU had to get out of the car to answer a telephone call from MONU'S mother, who was calling from the United States.

After a brief detention at MUA police station the plaintiff says he was taken by PC INU to see MAGISTRATE TATAFU. He says he asked the Magistrate for his handcuffs to be removed. He said the Magistrate said the police would take them off. Quote, "When he would be locked in the cell." He testified he was with the Magistrate for about 15-20 minutes.

The defendant says he was then taken back to MUA Police Station and claims he was questioned about (1) a housebreaking; and (2) the slaughter of a cow. He denied involvement in either of these alleged crimes. The plaintiff claims the police handcuff which were placed on his wrists were shaken by PC INU and, as a result of the shaking they tightened and hurt him.

The plaintiff claims the placing of the handcuffs on his wrist was an assault and that assault was therefore unlawful. The plaintiff said in evidence he did not consent to either- his arrest or to his imprisonment. He claims from 1700 hours on Saturday June 26th to 1000 hours on Monday 28th June 2004 he was never questioned, and he did not record any statement about any crime or any offence(s) He was released on Monday 29th June 2004 at around 10.00am and taken home by the police.

The plaintiff claims the period he spent in custody was unreasonable and, therefore unlawful. The plaintiff claims he lost his self esteem and also his dignity, he also lost the company of his wife and family during the material time whilst in custody.

The plaintiff claims the actions of the two police officers the first and the second defendants, were oppressive, arbitrary and, unconstitutional, and that, the third and the fourth defendants are vicariously liable for their torts. As a result of his treatment during these dates, the plaintiff claims he is entitled to both aggravated and to exemplary damages.

What Constitutes an Arrest

In general- an arrest is constituted by a physical seizure or the touching of the arrested person's body, with a view to his detention. *R v BROSCH* [1988] Crim LR 743 but there may be an arrest by mere words *ANDERSON v BOTH* [1969] 2 QB 216 an arrest is constituted when any form of words is used which is calculated to bring to the suspect's notice, and does so, that he is under compulsion, and he therefore

submits to that compulsion and in *R v INNWOOD* 57 Cr App R 529 (CA) the CA said there is no magic formula, there is only an obligation to make it plain to the suspect, by what is said, and done, that he is no longer a free man.

Different procedures might apply or; be needed according to the persons age, ethnic origin, knowledge of the language, intellectual qualities physical or mental disabilities. It is trite law a police officer may use reasonable force in order- to effect or carry out or effect- an arrest.

The Consequences of an Arrest

Where a private citizen (and also a PC who is off duty) makes a lawful arrest either at common law or under statute, he should take the arrested person before a justice of the peace, or a police officer,- not necessarily forthwith - but as soon as is reasonably practicable.

Authority: - the cases of *John Lewis & Co Ltd v Tims* [1952] AC 676 a decision of the House of Lords and *Dallison v Caffery* [1965] 1 QB 348 (CA) (Civil Div.)

The Evidence

The court heard evidence from the plaintiff and his wife Mele TOA, of the circumstances surrounding the plaintiff's arrest and his detention by the police on the 26th June 2004 at around 5pm.

- The plaintiff accepted that he was stopped by the police, and that he was put into the rear of the police vehicle by a police officer.
- The plaintiff told the court he could not see who drove the police vehicle because he was placed in the back of the van.
- The plaintiff says he was not told of the reason for his arrest at the scene.
- The plaintiff said in his evidence he heard his wife ask the officers the reason for his arrest.
- The plaintiff accepted in cross examination that his wife was told the reason for his arrest and that was- for stealing Tongan goods and the officer said to her further that, "the plaintiff was present in the vicinity-both where and when goods were stolen."

Applying the above leading cases on what constitutes an arrest, and, looking at the consequences of an arrest, I find as a fact the plaintiff was arrested by police officers who were on duty at around about 5pm on Saturday 26th June 2004.

Upon hearing the sworn evidence of both the plaintiff and his witness Mele TOA, I am satisfied that the Plaintiff was informed of the reason for his arrest and that he knew his arrest was for the alleged- theft of Tongan goods and that knowledge was itself sufficient, to make the arrest lawful.

I turn now to look at the issue of the alleged trespass to the plaintiff's car. It is trite law and has been the law for many years that a police officer is obliged to care for the property of every man/woman taken into police custody- under arrest and every police officer has a duty to observe the law. Mele Toa also testified she could

not drive. Because police officers have a duty to protect both life and property and I was told that the arrest was around 5.00pm (perhaps it was getting dark) would the police officer happily leave a woman alone with or inside a car that did not start? The answer must be No.

In this case in my view the officers did the right thing. They used their common sense, and because they were now legally "bailee's" of the plaintiff's car, had they left it on the road and in the hands of someone who could not by her own admission — drive- damage or theft from the car might result- for which the officers might be found liable.

Once the officers had arrested the plaintiff, they then had a duty to ensure the safety of the plaintiff's car, and all its contents and that duty might also extend to include looking after the safety of a female person Mele Toa.

The police officers were entitled to start the car and to remove it to a place of safety which was the plaintiff home address. Accordingly I reject any assertion that there was, a trespass to the plaintiff's vehicle by the police officers driving the vehicle back to the plaintiff's property. As the plaintiff had been lawfully arrested, it follows he could not have driven his vehicle whilst he was in police custody.

Evidence of an Assault

The plaintiff told the court that he was handcuffed and that PC INU at a point in time shook the handcuffs and they were tight. The plaintiff told the court, and I accept that the handcuffs were ONLY placed on him when he was transported from the police station at MUA to see the Magistrate while he travelled in the vehicle and for his return to the police station.

It is accepted police practice (throughout the world) to handcuff each and every prisoner whenever they travel, or are transported inside a police vehicle. Handcuffing of a prisoner is done (1) to prevent the prisoner from escaping, and (2) in order to protect the lives and the property of everyone. The need for protection would extend to include the protection of the police driver- and to all police escorts- effectively handcuffing is used to prevent unnecessary harm or risk to everyone; including the prisoner and his escort.

Additionally, if a prisoner were to escape from lawful police custody, then that would no doubt probably result in "the escape"- becoming a disciplinary offence for all of the officers concerned. So on balance on the evidence before me I could find no evidence that the plaintiff was unlawfully assaulted. I heard no evidence of any intentional assault or battery towards the plaintiff by any police officer.

The Trip to See the Magistrate

In this case the plaintiff was arrested by the police on suspicion of committing a crime; that is to say he was arrested on suspicion of committing an offence of theft. Historically a police officer is a special class of person, who by virtue of his office can arrest any person, found committing an arrestable offence, or on suspicion of committing an arrestable offence and the officer generally derives his powers of arrest- under statute.

In Tonga if an officer does effect an arrest of- any person; unless he has a judicial warrant for that person's arrest- he must take that person before a Magistrate as soon as is practicable, under section 22 of the Police Act.

> 22(1) A police officer making an arrest without warrant shall without any unnecessary delay, and subject to any provisions under any Act as to bail or recognizance, take or send the person arrested before a Magistrate there to be charged, (or before a police officer of the rank of sergeant or above, or before the police officer in charge of the police station.)

What does it mean "without any unnecessary delay." Well it means as soon as is reasonably practicable? It means having regards to all the circumstances of the case- and this is looked at by the court, on a case by case basis. So a court would look at all the circumstances of the case, what time of the day or the night was the arrest made? What is / was the availability of the Magistrate? What is the time frame for gaining access to an official vehicle for the safe transportation of the arrested person, to see the Magistrate; and where does the meeting with the Magistrate take place? These are all questions of fact and are to be decided upon by- a case by case basis.

The plaintiff accepts that about half-an-hour after he was taken to the police station at MUA on the 26th June 2004, he was placed in handcuffs and was taken police vehicle to see a Magistrate- by PC INU. The plaintiff said in evidence he did not know the name of the Magistrate but testified that he was with the Magistrate for some 15-20 minutes. In his statement of claim however, the plaintiff accepted he appeared before Magistrate Tatafu. The plaintiff claimed that during his time with the Magistrate- he asked the Magistrate for the handcuffs to be taken off his wrists. He said both in his evidence before me, and in his statement of claim

> "The learned Magistrate said that the police would take it off when he would be locked in the cell" (paragraph 20)

That statement and the admission by the plaintiff most clearly indicates, the Magistrate decided to remand the plaintiff in custody on the 26th June 2004- and to the police cells at Mua as is normal practice. The remand by my calculations would be at approximately 6.00pm on Saturday 26th June 2004.

This remand by the Magistrate was; and is a judicial act the fact the plaintiff was at the Magistrate's home for 15-20 minutes indicates quite clearly the Magistrate carried out a proper inquiry into this case, as he is required to do. In other words; I find as a fact that Magistrate Tatafu met with PC INU and the plaintiff. The Magistrate officially heard the police officers application on behalf of the plaintiff on the 26th June 2004.

I find as a fact the Magistrate physically saw the plaintiff in the flesh and in person on the 26th June 2004 and as a result of what the Magistrate was told; by the investigating officer he decided to remand the plaintiff into custody, and that is- and was and always will be a judicial act. From that point on; AND it is trite law--the plaintiff was lawfully in custody- there can be no claim for false imprisonment because the police officer MUST act upon the Magistrate's order.

This information also appears in the plaintiff's statement of claim.

I Take Judicial Notice

Because the following day 27th June 2004 was a Sunday, and being a Sunday, it was a day of rest in the whole of the Kingdom of Tonga; I have to ask would the

Tongan Police Force have been criticized if they had interviewed the plaintiff, or if they had continued with their investigation into the alleged theft of the Tongan goods by questioning witnesses ON A SUNDAY? The Magistrate will certainly have known the next day was a Sunday when he initially remanded the plaintiff in lawful custody.

Prisoners' Food

I turn to look at the question of who is responsible for supplying prisoners, with food and water- to persons in the custody of the police- be they in custody on remand or whilst they are at the police station being questioned by police AND whilst under arrest. It is trite law that it is the duty of the police to properly and to adequately feed, cloth and provide medical assistance to every prisoner who is being held in police custody, particularly whist they are ordered remanded by a Magistrate.

Prisoners are to be fed not less than three meals a day and are to be given an adequate supply of clean drinking water. Further the supply of food and water to each prisoner- and the time it is served- is to be clearly recorded in the police station diary and or in a custody record held for that purpose for every prisoner from now on- without fail this would help the police in the long run in claims such as this.

I heard evidence, that it is the custom in the Kingdom- that the plaintiff was visited, by his wife and that she brought the plaintiff- food at around lunch time on Sunday 27th June 2004, The plaintiff's wife told me and I accept- she saw her husband and she informed me she stayed with him for about an hour around noon on Sunday 27th June 2004. I heard no more or little evidence about the supply of food at other times, but the plaintiff told me he did get a good supply of water.

I also heard evidence and it is not disputed- the police released the plaintiff from custody **without charge** on Monday 28th June 2004, and the police transported the plaintiff to his home address, and dropped him off at home at around 10.00am.

A Citizen's Duty

I remind everyone; every citizen has a duty to assist the police in their investigations into allegations of crime(s.) However-citizens cannot be compelled to come to a police station otherwise than by arrest. In this case I accept the evidence of the plaintiff, that he was arrested by uniformed police officers at about 5.00pm on Saturday 26th June 2004.

I accept the evidence that the plaintiff was taken before a Magistrate in accordance with section 22(1) of the Police Act. I accept the evidence the plaintiff was remanded by the Magistrate and that remand would be until the next available court date which would be Monday 28th June 2004, because courts do not sit on Sundays; unless the plaintiff was released in the meantime by the Magistrate or the police.

This court has to conclude, that having considered their position the police decided to release the plaintiff around about 10.00 on Monday 28th June 2004, AND without charge. This they are entitled to do- and MUST do if they have found no evidence against him or decided other than to lay charges. If they do this then they must immediately notify the Magistrate of their decision.

It is important to note the fact the plaintiff was no charged, does not mean, the arrest was unlawful. Considering all the evidence adduced in this case I have come to the following conclusions.

Damages and Relief Sought

1. Inconvenience

This head of damage, for inconvenience and the loss of the plaintiff's wife's company, clearly fails because no cause of action was pleaded.

2. False Imprisonment

Because the police officers complied with section 22(1) of the Police Act by taking the plaintiff before a Magistrate, within 30 minutes of the time of his arrest, and the Magistrate remanded the plaintiff in custody, this action must fail.

3. Assault

I heard no evidence of an unlawful assault and can find no evidence of any assault other than an officer taking hold of the plaintiff by the arm in order to effect an otherwise lawful arrest.

4. Aggravated Damages

I heard no evidence entitling me to award aggravated damages to the plaintiff - so this claim fails.

5. Exemplary Damages

I agree with the Defendants submission, on the evidence placed before this court, there was no evidence led of anything oppressive, arbitrary or unconstitutional by or towards the plaintiff, so this claim also fails.

Ruling

I find the plaintiff has failed to prove his case against the defendants, so this claim is dismissed- and the defendants are clearly entitled to their costs to be taxed by the Chief Registrar.

To'a v Inu anors

Court of Appeal, Nuku'alofa
Ford P, Burchett, and Moore JJ
AC 02/2009

2 July 2009; 10 July 2009

Tort – unlawful arrest, false imprisonment, and assault – appeal against dismissal of claim – insufficient evidence – claim upheld

For the facts and the Supreme Court judgment, see *To'a v Inu anors* [2009] Tonga LR 57

The appellant appealed against the decision of the Supreme Court that dismissed the claim.

Held:

1. The onus lay on the respondents in the present case to prove that lawful authority existed for the appellant's imprisonment. They did not do that. In a matter where a person's liberty was at stake the law required strict compliance with any alleged authority to infringe that individual liberty. Inferences by a trial judge based on unsatisfactory evidence were insufficient to establish the lawful authority required to be proven in order to justify the tort of false imprisonment. For this reason, the appeal must succeed.
2. With respect to the assault claim based on the application of handcuffs, the primary judge displayed a predilection to personal knowledge of facts gained from his past experience with the police and held that it was accepted practice throughout the world to handcuff "every prisoner whenever they travel" but there was no evidence before the Court about the practice in Tonga in relation to the transportation of suspects in police vehicles. Given the fact that no evidence was called on behalf of the respondents to try and justify the use of handcuffs, the appeal must also succeed on this ground and the appellant was entitled to damages for the assault resulting from trespass to the person.
3. The appellant had sought a new trial but the Court considered that the justice of the case could best be met by allowing the appeal and making an own assessment in relation to damages. To this end, the Court invited counsel to file additional submissions on damages and costs.

4. The Court applied the principles outlined in the *Hurrell v Naufahu* and fixed an award of general damages for false imprisonment and assault in the sum of $1500 and aggravated damages in the sum of $1000. It was not a case for exemplary damages. The appellant was awarded costs on the appeal and in respect of the lower court hearing in an amount to be agreed or taxed.

Cases considered:
Edwards v Pohiva [2003] Tonga LR 231
Fifita v Fakafanua [1998] Tonga LR 127
Hurrell v Naufahu anors [2009] Tonga LR 319 (CA)
Liversidge v Anderson [1941] UKHL 1; [1942] AC 206; [1941] 3 All ER 338

Statutes considered:
Bail Act 1990
Magistrates' Courts Act (Cap 11)
Police Act (Cap 35)

Counsel for the appellant : Mr Fifita
Counsel for the respondent : Ms Mafi and Ms Lavakei'aho

Judgment

Introduction

[1] The appellant has appealed against a judgment of Shuster J. dated 20 February 2009 in a civil case where he was the plaintiff and the respondents the defendants. The claim was one for damages based on alleged unlawful arrest, false imprisonment and assault. Although the judgment records the dates of hearing as 10 - 11 January 2009 that is incorrect. The case went to trial on 10 - 11 February 2009.

[2] The appellant sought damages under various heads totalling $11,500.00 together with costs and interest. The first and second respondents were police officers and it was accepted that if the plaintiff was successful in his claim then the third and fourth respondents would be vicariously liable for the tortious acts of the police officers.

[3] In his judgment, the primary judge concluded that the plaintiff had failed to prove his case against the defendants and, accordingly, the claim was dismissed and the defendants were awarded costs to be taxed by the Registrar.

[4] One unusual feature of the hearing was that on 2 February, 2009 eight days before the trial commenced, counsel then acting for the four respondents filed an application for leave to amend the statement of defence and to withdraw as counsel acting for the first respondent. The latter application was based on the fact that the first respondent had left the police force and moved to New Zealand to live but his whereabouts in New Zealand could not be traced. Counsel for the appellant filed a notice of opposition to the application on 3 February 2009 but, for reasons explained in the

judgment, the applications were not considered by the trial judge until 10 February 2009, the morning of the hearing. In his judgment the judge said:

> *"On Tuesday the 10th February 2009 -- the trial date, I told both parties to the proceedings in chambers and again in open court that I was not prepared to delay this trial any further because it is now four years and four months since the plaintiff first issued and served his writ. Various witness subpoenas had been issued, and I wanted the case to proceed to trial immediately -- without any further delay because further it had been evident for quite some time that the first defendant cannot be located (or contacted) because he is living overseas."*

[5] There was debate before us as to whether the primary judge had allowed the two applications sought by the respondents. There was no formal order made and sealed one way or the other but the judge allowed the respondents to adduce evidence contrary to the admissions made in their original statement of defence. Quite responsibly, counsel for the respondents accepted before us that they were bound by the admissions made in their original statement of defence.

The facts

[6] The 46-year-old appellant, a married man with six children, grows crops. The incident giving rise to the claim occurred on Saturday 26 June 2004. The appellant and his wife, who were then living in Lapaha, had been in Nuku'alofa selling produce at the market. As they were returning home that evening they were stopped by the first two respondent police officers who were in a police van close to a neighbouring allotment. The appellant overheard one of the officers say to his wife that they were arresting him for stealing Tongan goods. The appellant was placed in the police van and then, because his wife could not drive, one of the officers drove her home in the appellant's vehicle. The police van followed and, after picking up the officer who had driven the appellant's wife home, it proceeded on to the Mu'a Police Station.

[7] The appellant claimed that he was then questioned at the Mu'a Police Station by the first respondent in relation to a suggestion that the previous week he had been sitting in a van (at around noon) by the roadside in the vicinity of a crime which had occurred about the same time. The appellant claimed to have told the officer that he had stopped his vehicle at the roadside because his brother-in-law, Monu Finau, had to get out of the car to answer a telephone call from his mother who was calling from the United States.

[8] Approximately half an hour after his arrival at the Mu'a Police Station, the appellant was placed in handcuffs and taken in a police vehicle by the first respondent to see a magistrate at the magistrate's home. He asked the magistrate for the handcuffs to be taken off his wrists but the magistrate replied that they would be taken off "when he would be locked in the cell". The appellant was asked if the magistrate had told him anything else and he replied: "The magistrate told me that I will be delayed because I had to confess." He was not challenged on that statement.

[9] On the following day, which was a Sunday, the appellant was visited at the police station by his wife who bought him food at around lunchtime. Then on Monday 28 June 2004 at around 10 a.m. the police released the appellant from custody without charge and transported him to his home.

[10] In his statement of claim the plaintiff alleged that after they had arrived back at the police station following the visit to the magistrate, the first respondent continued questioning him about the alleged offence and when the appellant insisted he knew nothing whatever about the offence, the first respondent shook the plaintiff's hands and moved the handcuffs causing severe pain to his wrists. The primary judge correctly noted, however, that the appellant had not given evidence to this effect. What he said in evidence was that the first respondent handcuffed him and shook his hands and tightened the cuffs causing pain but that evidence appeared to relate to the point in time immediately prior to his being taken to the magistrate's home.

The findings

[11] There was no direct evidence on exactly what the magistrate had ordered but the primary judge concluded that the appellant had been taken before magistrate Tatafu in accordance with section 22(1) of the Police Act and the admission by the appellant that the magistrate had said that the police would remove the handcuffs "when he would be locked in the cell" indicated that the magistrate had decided to remand the appellant in custody. He held that that was a judicial act and from that point on the appellant was in lawful custody and therefore there can be no claim for false imprisonment.

[12] In relation to the claim of assault arising from the application of the handcuffs, the primary judge stated:

> *"It is accepted police practice (throughout the world) to handcuff each and every prisoner whenever they travel, or are transported inside a police vehicle. Handcuffing of a prisoner is done (1) to prevent the prisoner from escaping, and (2) in order to protect the lives and the property of everyone. The need for protection would extend to include the protection of the police driver -- and all police escorts -- effectively handcuffing is used to prevent unnecessary harm or risk to everyone; including the prisoner and his escort. Additionally, if a prisoner were to escape from lawful police custody, then that would no doubt probably result in "the escape" becoming a disciplinary offence for all of the officers concerned."*

The judge concluded that he could find no evidence of an unlawful assault.

Discussion

[13] The principles applicable to the tort of false imprisonment were considered by this court in *Edwards v Pohiva* [2003] Tonga LR 231, 236:

> *"The law relating to the tort of false imprisonment is well established. It is a form of trespass to the person. As stated by Lord Bridge in* Hague v Deputy Governor of Parkhurst Prison *[1990] UKHL 8; [1991] 3 All ER 733 at 743:*
>
> *"The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it."*
>
> *It is a tort of strict liability. There is no onus on a plaintiff to prove that the imprisonment was unlawful or malicious. Once the plaintiff establishes the fact of imprisonment, that is sufficient to make out a prima facie case and the onus then falls on the defendant to prove that the detention was lawful. It may be so, for example, if it is pursuant to an order of the court or the exercise of statutory powers. An action for false imprisonment will succeed or fail depending on whether the defendant can, as a matter of law, justify the detention or imprisonment."*

[14] In *Fifita v Fakafanua* [1998] Tonga LR 127, 128, this court drew attention to the dissenting judgment of Lord Atkin in *Liversidge v Anderson* [1941] UKHL 1; [1942] AC 206; [1941] 3 All ER 338 at 362 which, as noted, has since been generally recognised to be a masterly statement of the law, in which his Lordship referred, as "one of the pillars of liberty", to the principle "that in English law every imprisonment is prima facie unlawful, and that it is for a person directing imprisonment to justify his act."

[15] The fact of imprisonment was clearly established. The issue is whether or not lawful authority existed to justify it. That requires a consideration of the terms of section 22 of the Police Act. Section 22 provides:

> *"(1) A police officer making an arrest without warrant shall, without unnecessary delay and subject to any provisions under any Act as to bail or recognizance, take or send the person arrested before a magistrate there to be charged or before a police officer of the rank of sergeant or above or before the police officer in charge of the police station.*
> *(2) If it is not practicable to bring the person arrested before a magistrate having jurisdiction within 24 hours after he has been so taken into custody, the police officer of the rank of sergeant or above or the police officer in charge of the police station shall inquire into the case and shall grant or withhold bail in accordance with the Bail Act 1990."*

[16] Section 22 has been considered by this court on other occasions. In *Fifita* (supra) it was noted that the provision was enacted for the specific purpose of safeguarding the rights of the citizen and that any authority given by this law to infringe individual liberty should be construed strictly. What section 22 provides is that an arrested person is to be taken before a magistrate without unnecessary delay *to be charged* (emphasis added). In other words, by the point in time when the police officer takes

the arrested person before a magistrate the police should have already made up their mind that he is going to be charged with a criminal offence and the charge then has to be laid before the magistrate.

[17] Once a suspect has been charged then the provisions of the Bail Act (No.27 of 1990) come into play. That Act creates a presumption in favour of bail. A person charged with an offence is to be released on bail unless the magistrate or senior police officer concludes that bail should not be granted for one or other of the reasons set out in section 4 of the Bail Act.

[18] The procedure involved in having an arrested person charged before a magistrate is covered by Part II of the Magistrates' Courts Act (Cap 11). Section 13 in this Part provides that the person desiring to institute a prosecution must apply in person to the clerk for a summons and at the same time state clearly the nature of the offence complained of and the time and place in which it was committed. Section 14 then provides that the clerk is to make out a summons which is to state concisely the offence for which the defendant is charged and is to require the defendant to appear at a specified time before the magistrate's court to answer the charge in the summons. Section 16 then provides that every summons, before being issued, shall be read by the magistrate who shall affix his signature and the seal thereto. We were told from the Bar that the summonses are kept in booklet form and after they have been signed by the magistrate, the original is handed to the defendant and the carbon copy remains in the booklet with the Magistrates' Court.

[19] What we have, in other words, are these complementary statutory provisions in the Magistrates' Courts Act, the Police Act and the Bail Act prescribing the procedures to be followed from the point of arrest covering the laying of charges and the grant of or, in appropriate cases, the withholding of bail.

[20] It is axiomatic from these statutory provisions that the requirement in section 22 of the Police Act that an arrested person is to be taken or sent before a magistrate to be charged means that the police officer is to take or send the person before a magistrate's court where the clerk is to make out a summons in Form 1 in the schedule to the Magistrates' Court Act and then have it signed by the magistrate and sealed and served on the accused. At the same time, the magistrate is required to deal with the issue of bail under the Bail Act.

[21] Section 22 of the Police Act does not, in our view, envisage that it is sufficient simply for an accused person to be taken before a magistrate at his home. This requirement is reinforced by the wording of section 22 of the Police Act when it was first enacted. As noted in *Fifita* (supra) at 131, subsection (2) originally included the reiteration: "but where a person is kept in custody he shall be brought before a *magistrate's court* as soon as practicable" (emphasis added). There may be rare or emergency situations where a magistrate is equipped and prepared to issue a summons and deal with bail at his home but they should be very much the exception rather than the rule.

Conclusions

[22] The onus lay on the respondents in the present case to prove that lawful authority existed for the appellant's imprisonment. They did not do that. Instead, the primary judge made an inference that the magistrate had made some form of order from the pleading in the statement of claim that the magistrate said the handcuffs would be removed "when he (the appellant) would be locked in the cell." The judge said that the appellant also made that admission in evidence before him but the transcript does not reveal that. What the appellant said, according to the transcript of his evidence was:

> *"And the magistrate told me to come with them to the police station then the handcuff will be taken off."*

[23] As noted above, the appellant also alleged that the magistrate told him that he would be delayed because he had to confess. He was not cross-examined on that allegation but even if the statement was made it could not be relied upon as lawful authority for detaining the appellant. In a matter where a person's liberty is at stake the law requires strict compliance with any alleged authority to infringe that individual liberty. Inferences by a trial judge based on unsatisfactory evidence are insufficient to establish the lawful authority required to be proven in order to justify the tort of false imprisonment. For this reason, the appeal must succeed.

[24] Turning to the assault claim based on the application of the handcuffs, the primary judge held in [12] above that it was accepted practice throughout the world to handcuff "every prisoner whenever they travel" but there was no evidence before the court about the practice in Tonga in relation to the transportation of suspects in police vehicles. In another case that came before us this session where judgment is also being delivered this morning, *Hurrell v Naufahu* (AC 09/09), we were critical of the same judge for acting on his personal experience and observations "as a former police officer and chief police officer with over 10 years experience." In the present case, he again seems to display a predilection to personal knowledge of facts gained from his past experience with the police. The comments the judge made in [12] above seem to infringe against the principle we expand on in *Hurrell*. Had such evidence been given by a defence witness then counsel for the appellant would have been able to cross examine that witness and no doubt an attempt would have been made to distinguish between the position of a "prisoner" on the one hand, which was the description referred to by the primary judge, and a "suspect" on the other, such as the appellant in the present case who was never charged with the commission of a crime -- let alone a crime of violence.

[25] As stated in Blackstone's Criminal Practice (1993) D1.7:

> *"Handcuffs should only be used where they are reasonably necessary to prevent an escape, or to prevent a violent breach of the peace by a prisoner . . . it would seem that where handcuffs are unjustifiably resorted to, the use will constitute a trespass even though the arrest itself be lawful."*

[26] Given the fact that no evidence was called on behalf of the respondents to try and justify the use of handcuffs in the present case, the appeal must also succeed on this ground and the appellant is entitled to damages for the assault resulting from trespass to the person.

Damages

[27] The appellant had sought a new trial but we consider that the justice of the case can best be met by our allowing the appeal and making our own assessment in relation to damages. To this end, we invited counsel to file additional submissions on damages and costs. We found the submissions helpful and we are grateful to counsel for complying with what was a rather tight timeframe.

[28] The appellant was arrested and taken into custody at the Mu'a Police Station at 1700 hrs on 26 January 2004. He was taken before a magistrate at 1730 hrs on the same day and was eventually released without charge at 1000 hrs on 28 January 2004. As noted in [10] the appellant claimed in his statement of claim that he remained in handcuffs back at the police station after he had been taken before a magistrate but the evidence did not support that allegation.

[29] Counsel for the appellant, in his written submissions, invites the court to award $3000 for unlawful imprisonment; $1000 for assault (the handcuffing); $500 aggravated damages and $3000 exemplary damages. Counsel for the respondent submits that an appropriate award would be "within a range" of $1000 -- $1500 for general damages and $500 -- $1000 for aggravated damages but there should be no award for assault, special damages or exemplary damages.

[30] In relation to aggravated damages, the basis of the respondent's acknowledgement of liability is summed up in the following submission from counsel:

> *"Although these experienced police officers were acting under the direction of the Magistrate to remand the appellant in custody, they should have ensured as a primary objective that they had legal authority to keep the appellant in police custody even after it was found that there was no reasonable grounds of suspicion to keep him there."*

[31] We have taken into account the submissions made by counsel in support of their various contentions. In particular, we have noted the emphasis counsel for the appellant placed on the fact that Sunday is a very special day in Tongan society, especially for families, and the appellant would have endured shame and embarrassment in the knowledge that his six children were aware that their father "a respected figure in their family" was being kept like a criminal in police custody.

[32] Applying the principles outlined in the *Hurrell* case (supra) we fix an award of general damages for false imprisonment and assault in the sum of $1500 and aggravated damages in the sum of $1000. We agree with counsel for the respondent that it is not a case for exemplary damages. We have noted the respective submissions on costs. The appellant is awarded costs on the appeal and in respect of the lower court hearing in an amount to be agreed or taxed.

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Taunauta anors v Malupo

Supreme Court, Nuku'alofa
Shuster J
AM 25/2008

13 February 2009; 20 February 2009

Defamation – appeal against damages awarded – excessive – damages reduced

On 13 May 2008, two police officers attended the home of the respondent and her husband as a result of a domestic dispute. The respondent said her husband threw something at her van and as a result of that she called the police to her home for help. When the police officers arrived at the scene, they were said by the respondent to have asked her whether the respondent was the one that had been served with the summons, but kept on running away for the court case. The officer also asked whether the respondent was the one staying in a defacto relationship with "the bald head guy". The husband was then angry at the respondent. The respondent claimed the police officer's comment was defamatory and warranted damages claimed at $5,000. The Magistrates' Court ordered the appellants to pay the respondent $1,000 with court costs of $600. The appellant appealed against the level of the award of damages, not an appeal on the Magistrate's findings of fact or on the award of costs.

Held:

1. A Higher Court would only interfere with the factual findings of a lower court in the clearest of cases, for example if the appellant court was able to conclude the Magistrate's decision was unsound, or that the Magistrate clearly came to the wrong conclusion.
2. This was a very low level defamation case. Every police officer had a sworn duty to protect and keep the peace. Every police officer had the legal right to look for suspects, to trace persons wanted for offences, and serve process according to law.
3. The Tongan tradition was that an apology was usually offered by any wrongdoer, and an apology was usually accepted. The respondent spoke to the officer in charge of the police station and the officer suggested the respondent should lay charges and that was exactly what the respondent did. If the officer were to apologize later, then one side to the dispute may construe any attempt to apologize, as either attempting to pervert the course of public justice, or as an admission of liability.

4. The appeal against the level of damages awarded by the Magistrate was allowed. This was a defamation case at the very lowest end of the scale therefore the order for $1,000 was quashed.
5. The appropriate amount of damages was assessed at $25.

Case considered:
Pa'ila v Ma'u (2002) TLP 114

Statute considered:
Defamation Act (Cap 33)

Counsel for the appellants	:	Mr Kefu
Counsel for the respondent	:	Mr Fifita

Judgment

This Appeal concerns a ruling in the Magistrates Court- in civil case no. 106/07- a case involving an allegation of Defamation. The Appeal is against the level of the award of damages, not an Appeal on the Magistrates findings of fact or on the award of costs of $600.00 in the lower court.

The Claim

> The plaintiff claims from you $5000.00 for defamation in which KAUTAI TAUNAUTA (an officer of the second defendant which is a department of the third defendant) told the plaintiff that they had been looking for her, as she was the one who stayed in defacto with the bald guy. The plaintiff strongly denied ever staying in defacto with anyone, but you repeatedly said the same thing to her, and were heard by VILIAMI TOKI and the plaintiff's husband. TOKI told you that it was a different woman, not the plaintiff but you kept saying that it was the plaintiff. What you said was untrue.

The trial in the Magistrate's court concluded on 19th August 2008 when the Appellants were ordered to pay the Plaintiff (now respondent) $1,000.00PA with court costs of $600.00PA.

Formal Notice of Appeal against the Magistrates Ruling ON THE LEVEL OF DAMAGE ONLY was signed on 29th August 2008 by Mr. AMINIASA KEFU, counsel for the appellants and the Notice of Appeal was subsequently served in the Supreme Court.

The Appeal was assigned to me by Ford CJ on 5th February 2009; I listed the case for hearing on 13th February 2009 at 09.30. The substantive hearing of the appeal took place on Friday 13th February 2009 with judgment reserved to 09.30 20th February 2009. I shall mention later in my Judgment the question of what I consider to be fairly substantial delays in this case.

Six Grounds of Appeal were Adduced

1. That the nature of the Defamation was based upon a mistake, by the first defendant and that it was not intentional. There was a police investigation and the officer was investigating another case where the person was living in a defacto relationship. A complaint had been made concerning an assault and the police had been looking for someone with the same name. The nature of the statement made was more like an enquiry so in brief that if the context of the enquiry of the respondent in this case.
2. That the statement was made in the presence of only the respondent's husband and another policeman at the scene PC Toko. They had been called to the scene as a result of a domestic dispute and the respondent had called the police. The first appellant assumed she was the person he was looking for. At the trial, only the husband of the complainant was called to give evidence. PC TORI was not called to give evidence of the extent of the defamation.
3. The husband was cross-examined. He said he did not believe the officers statements. Unfortunately for this appeal the transcript is not complete- it does not show the record of the cross examination of the husband, it only records the evidence-in-chief. Counsel did cross examine the husband. The husband did admit in cross examination he did not believe the statement. It minimises any damage.
4. In minimizing the claim- at the time the husband heard the words, he was in an agitated state. He was drunk and angry on that evening. He admitted during cross examination that he was a jealous and a possessive husband. The complainant's husband was also cross examined by the Crown and this issue of an affair, was only raised when he was drunk or he had been drinking. The matter was only raised in the context of a domestic dispute.
5. Counsel's submission in minimizing the damages. Shortly after the domestic dispute both the complainant and her husband attended the police station. Then they continued to live together as man and wife up to the date of the trial. Not much danger damage has occurred.
6. Crown Counsel was not present when- the learned Magistrate gave his judgment on 19th August 2008. It seems like the learned Magistrate used the incorrect bench mark. He used the figure of $1,000.00 from the criminal defamation fine; when he came to assess the damages for

> this case. In using that bench mark the learned Magistrate equates the statement as of a criminal nature, warranting a penalty at the maximum level. The defamation in this case was not close to criminal, it was trivial- and was based upon a mistake. There was also a limited audience the husband. In context the husband admitted it was not true. It was a domestic dispute and they continued to cohabit as man and wife. Damages are excessive. I also seek costs in this case.

When Mr Kefu had concluded his submission the court clarified the original claim in this case was $5000.00- and the Magistrate allowed only $1,000.00 as his assessed damages; with court costs of $600.00 against these three Appellants.

The Respondents Oral Argument

In response to the Appellant's formal application, Mr Fifita argued- that good reputation is a definitive right, and family is the most important unit in society. Mr Fifita argued that during the whole time, and during the course of the trial the first appellant did not go and apologise to the respondent. The respondents counsel stated the apology has never been done. When the respondent was taken to the police station, she said "I will press charges for ruining my reputation." Saying this in front of her husband is not right. There must be love, he is possessive and he is jealous. Family needs love. From the findings of the Magistrate as my learned friend pointed out the respondents counsel says $1,000.00 is the correct amount. There was no cross appeal and an award of over $1,000.00 would be more appropriate, plus court costs. It was a lenient award in this case. When the learned Magistrate was using his discretion- he accepted in the Tongan Community and he assessed damages to a Tongan woman. He dismissed with costs.

In response to a question from the bench, on the level of costs awarded in the lower court, counsel for the respondent confirmed the trial was in fact adjourned from time to time.

Mr Kefu Responded

Counsel raised the point that the question raised concerning an apology was in the transcript. The reason the appellant did not apologize at the time, was because the respondent was very emotional and the apology would have had no effect. Shortly after that the appellant thought an apology would not be accepted- and anyway- counsel did mention the apology in his submission to the Magistrate in the lower court. The respondent was too emotional she was agitated and that is why no apology was offered by the first appellant.

THE COURT ASKED- if either counsel was able to assist it in determining - how many times this particular case has been adjourned in the lower court before and during the trial. Mr Kefu's record revealed from his records- there were six adjournments prior to the trial; and then ten adjournments during the trial until the final ruling.

I heard oral argument from both counsel for the appellants and the respondent in this matter on 13th January 2009 and reserved my Judgment until 09.30 hours on the

20th January 2009. Though I accept the Appeal is only against the level of the award of damages, not on the Magistrates findings, or the award of costs in the lower court some comment on the merits of the case are definitely warranted.

I have considered carefully all that was said by counsel in their submissions to the Supreme Court and I have studied carefully all the paperwork submitted from the lower court. I am also grateful to counsel for assisting me in identifying an area which I feel needs urgent reform and modification. That is to say I am greatly concerned that there were many delays in the trial of this matter in the lower court. There have also been delays in bringing this case from the lower court to the Supreme Court for the appeal. In my view this matter should have been dealt with- a long time ago; again I consider the maxim-justice delayed is justice denied.

Defamation - Defamation Act Cap 33

Section 2(1)

- Defamation of character consists of- in speaking or in writing printing or otherwise putting into visible form, and matter damaging the reputation of another, or exposing another to hatred, contempt, or ridicule, or causing him to be shunned.

Section 2(2)

- The reputation by any person of defamatory matter concerning another also constitutes defamation of character.

The Evidence

Applying the facts of the case to the law- the evidence in the lower court reveals that:-

- In this case on the 13th May 2008, two police officers attended the home of both the respondent and her husband as a result of a domestic dispute.
- The lower court was told the respondent had had an argument with her husband VA'IANGA MALUPO, which happened sometime during the evening/ night.
- The respondent said her husband threw something at her van and as a result of that she called the police to her home, for help.
- When the police officers arrived at the scene, they were said by the respondent to have asked her the defamatory question, i.e. whether I (the respondent) was the one that had been served with the summons, but kept on running away for the court case.
- The officer also asked whether I am the one (respondent) staying in a defacto relationship with the bald head guy.

And in evidence in chief- the respondent says

- My husband then attacked me, and he said-
- LOOK AT WHAT YOU ARE DOING. This the respondent claims was defamatory and warranted damages claimed at $5,000.00PA (The claim)
- The respondent accepted they (husband and wife) went voluntarily to the police station, she said to the lower court- the difference with her husband- was compromised.
- The respondent told the Magistrate at the police station she spoke to the Inspector on duty, and she said the Inspector's answer was that the most satisfying thing for her to do- was to lay charges. He was not called to test the truth of that statement.
- The respondent says she still has problems with her husband because, he thinks she is having a relationship with someone. (to the date of trial)
- The respondent told the lower court- she felt ashamed of the lie.
- The respondent told the court a man called PILA TOKI was present when the police officer was defamatory.
- The witness PILA TOKI was not called as a witness to give evidence at the trial in the Magistrates Court.

The Husband's Evidence

Vaiinga Malupo

The witness is 49 and a pig seller. He told the Magistrate he married the respondent in 1978 and they have 13 children. He told the lower court, he was upset in thinking that what happened-was true. He told the lower court in the evening he argued with Lavinia, and as a result she called the police and two police officers came over to their home. He said while the officers were talking with PILA TOKI; the first defendant asked his wife Lavinia whether she was the one served with a summons, and kept running away. He clarified to the court- it was about her complaint against the bald head guy who she stayed in a defacto relationship with. The witness said he was really upset thinking that he was staying with his wife, and at the same time she was haying a defacto relationship with another man. He said he was really mad at his wife. The court asked the reason why they had separated so many times, the husband replied- whenever he went out they fought. The court record is silent on whether the respondent and or her husband admitted drinking on the day in question.

The Police Officer's Case

Kautai Taunauta

Is a serving police officer and he has worked for 15 years in the Criminal Investigation Department. He testified that he did not intend to defame LAVINIA with the question he asked at the scene. He said he only asked the question because

he had heard her name was LAVINIA MALUPO, which name also related to a different person. The officer went on to explain to the court in his testimony- that he was looking for a different LAVINIA, the reason for asking what he said- was he heard that the respondent's name was Lavinia Malupo. No one called the other officer who attended the scene on the 13th May 2008, with PC TAUNAUTA to give evidence of the respondents demeanour- or the effect of the words spoken to the respondent- or to her husband.

At Common Law

I need to remind everyone; that every citizen has a duty to assist the police in their investigations into allegations of crime(s) and the preservation of peace in the community. That duty also extends to assisting each and every one of the Kingdom's law enforcement officials- who are trying to trace suspects involved in crime, and the duty also extends to help assist law enforcement officials attempting to identifying suspects for the serving of court process on any person who is or may be resident, or domiciled within the Kingdom, be it by way of assisting in serving any lawful warrant, summons, witness subpoena or writ on any such person.

This matter may have been complicated further- and more substantially, if it was revealed during the trial that there were in fact two persons with the same name of LAVINIA MALUPO. What if one of those persons was in fact living with a man with a bald head; just as the officer alleged and that was the only way to trace her. Would that not then have then been a perfectly reasonable question for any officer to ask of any honest citizen under common law?

Both the lower court and the Supreme court were told that there was an altercation at the home of the respondent at the night in question; and that the respondent called the police to her home- because of the actions of her husband. The evidence in the lower court reveals two police officers attended the respondent's home address as requested by the respondent to investigate her complaint against her spouse.

I do not know and the record is silent- if either of the two officers had had prior dealings with this respondent prior to the incident on the 13th May 2008. That would be a central question. I do not know if the officers carried out any CRO or warrant checks, when they were present at the scene.

The court record is also silent on the question of whether the respondent or her spouse had consumed any large quantity of alcohol; but I was told by Mr Kefu in the appeal- that they had and that is not shown on the court record. History proves in almost all domestic disputes, tempers run high, and people are unreasonable and the police have a difficult job to do to keep the peace whenever alcohol is involved. Essentially the court record does not reveal any evidence of the state of intoxication or not, of the respondent and her husband, and that is disappointing because it is very material in considering an award for damages. In my view the court should have enquired into this the effect of alcohol- of its own volition and recorded same accurately, this was not done in this particular case.

Much has been said by Mr Fifita of the sanctity of the family unit and I fully agree, but a cohesive family unit does not easily separate at a whim as the evidence in the lower court reveals. The Tongan tradition is to work together in order to settle disputes.

Conclusion

As an Appellant Judge I come to this conclusion- that I believe this police officer the first appellant who has 15 years' police service when he said in his evidence in the lower court that he did not intend to defame the respondent. From what I have been told, and I accept from an analysis of the evidence- it reveals quite, clearly the said defamatory words used were demimeos.

Applying the case of *Pa'ila v Ma'u* (2002) TLP 114 which states - a Higher Court will only interfere with the factual findings of a lower court in the clearest of cases- for example if the appellant court was able to conclude the Magistrate's decision was unsound- or that the Magistrate clearly came to the wrong conclusion.

In this particular case I find that the decision of the Magistrate was unsound- and accordingly I will allow the appeal against the quantum of damages as assessed by the Magistrate in August 2008.

In my view this is a very low level defamation case. I justify my decision- because every police officer has a sworn duty to protect and keep the peace. Every police officer has the legal right to look for suspects, to trace persons wanted for offences, and serve process according to law.

I fully accept and I agree with Mr Fifita that the Tongan tradition is that an apology is usually offered by any wrongdoer, and an apology is usually accepted- in true Tongan tradition. In this case the respondent said she spoke to the officer in charge of the police station and the officer suggested the respondent should lay charges; and that is exactly what the respondent did.

If that was the case then if the officer were to apologize later, then one side to the dispute may construe any attempt to apologize, as either attempting to pervert the course of public justice; or as an admission of liability.

For all the above reasons this appeal against the level of damages awarded by the Magistrate on the 19 August 2008 in this case MUST be allowed. Because the circumstances reveal, this is a defamation case at the very lowest end of the scale; I must quash the order for $1,000.00 and go on to consider an appropriate amount of damage based upon the evidence before me.

Because of the delay in this and other cases which have recently come to light, I will also see fit to recommend that in order to prevent what I will call inordinate delay's occurring in the lower courts, through unnecessary adjournments (as in this case with 16 such adjournments) that the appropriate authorities consider the question of imposing FIXED COSTS in the lower courts.

Order

- The decision of the lower court in relation to the quantum of damages in this case in the sum of $1,000.00 as awarded by the learned Magistrate on 19th August 2008 is quashed.
- I substitute an appropriate amount of damage which I assess at $25.00 (TWENTY FIVE PA'ANGA)
- Costs of this appeal are awarded to the appellants- to be taxed by the Chief Registrar.

Malupo v Taunauta anors

Court of Appeal, Nuku'alofa
Ford P, Burchett and Salmon JJ
AC 07/2009

3 July 2009; 10 July 2009

Defamation – appeal against reduction in damages – imputation of unchastity to a woman – damages restored

For the facts and the Supreme Court judgment, see *Taunauta anors v Malupo* [2009] Tonga LR 75

10 The appellant appealed the judgment that reduced the damages assessed by the Magistrates Court (from $1000 to $25).

Held:

1. The Defamation Act, s 16(1)(d) provided that if defamatory words "impute unchastity to a woman or girl, it shall not be necessary for the plaintiff to prove that he [she] has sustained any monetary or other actual loss by reason of the publication of such defamatory matter". That was a statutory indication of the seriousness, rather than triviality, of such an imputation, which was made actionable per se.
2. The most sensitive area of the relations between husband and wife was
20 attacked, and the magistrate, who heard and saw the witnesses, had accepted the reality of the complaint.
3. The lower court fell into error by overlooking s 16(1)(d), and it was not open to the Court to reverse the view of the facts taken by the Magistrate. Therefore the appeal was allowed with costs; the Court's orders were set aside; and the award of the Magistrate which, though at the upper end of the permissible range, was restored.

Case considered:

Taufa v Ma'u [1994] Tonga LR 97

Statute considered:

30 Defamation Act (Cap 33)

Counsel for the appellant : Mr Fifita
Counsel for the respondents : Mr Kefu

Judgment

[1] This is an appeal from a judgment of Shuster J setting aside, on an appeal under s 74 of the Magistrates' Courts Act, a decision of a magistrate awarding to the Appellant the sum of $1,000 plus costs for defamation.

[2] The Appellant, a married woman and mother of a number of children who was aged 40 years, brought her claim in these circumstances. She was involved on 13 May 2008 in a domestic dispute with her husband, resulting in the police being called by her to their home. When two police officers arrived, one of them, the Respondent Taunauta, asked her, in the presence of her husband and the other officer, "whether she was the one staying in de facto with the bald headed guy." That elicited an immediate response, hostile to the Appellant, from her husband:

> *"Look at what you're doing."*

Officer Taunauta insisted, saying:

> *"You came and lodged a complaint against the bald head guy that you stayed in de facto with."*

The Appellant's evidence to the magistrate included, after repeating the foregoing words : "He told me not to lie for it was me."

[3] The Appellant told the magistrate on 19 August 2008 she "still [had] problems with [her] husband because he still thinks that [she was] having a de facto relationship with the man alleged by Taunauta", and "has sworn at [her] saying 'slut, whore and bitch'". She said her husband was "a jealous man" and it is clear there were previously some problems between them, for she had called the police.

[4] The husband also gave evidence before the magistrate which confirmed the defamatory statement by the police officer and that, as a result, as he said : "I feel that my wife is not rightful to me".

[5] It is claimed, for the Respondents, that in cross-examination he said he did not really believe the defamation of his wife. Two things should be said as to this:

(1) The alleged admission is not in the transcript, and a correction of the transcript on an appeal from a magistrate heard on the transcript, can only be made by affidavit if at all – see *Taufa v Ma'u* [1994] Tonga LR 97 at 98 - 99;

(2) Mixed feelings about beliefs are common, and if the admission was made, it does not follow the husband would not also, as he said in chief, have feelings against his wife based on, or perhaps even in an argument unfairly taking advantage of, the allegation.

[6] The magistrate held the Appellant was defamed and the officer did not apologise. He also held "the plaintiff's ... relationship with her husband" was affected, referring to the evidence that he was a jealous man. He awarded, as has been said, $1,000 plus costs which he assessed at $600.

[7] Shuster J, did not refer to s 16 of the Defamation Act, and described the defamation as a "defamatory question", overlooking the express evidence that the officer insisted upon his observation, telling the Appellant not to lie about it. The judge concluded the "defamatory words used were de minimis", and allowed the appeal, substituting for the magistrate's award of $1,000 an award of $25 and awarding costs to the Respondents (appellants in the Supreme Court).

[8] But s 16(1)(d) of the Defamation Act provides that if defamatory words "impute unchastity to a woman or girl, it shall not be necessary for the plaintiff to prove that he [she] has sustained any monetary or other actual loss by reason of the publication of such defamatory matter". That is a statutory indication of the seriousness, rather than triviality, of such an imputation, which is made actionable per se.

[9] In any case, the most sensitive area of the relations between husband and wife was here attacked, and the magistrate, who heard and saw the witnesses, had accepted the reality of the complaint.

[10] In our opinion his Honour fell into error by overlooking s 16(1)(d), and it was not open to him to reverse the view of the facts taken by the Magistrate. Therefore the appeal must be allowed with costs; his Honour's orders must be set aside; and the award of the Magistrate which, though at the upper end of the permissible range is within it, should be restored.

Kingdom of Tonga v Palu aka Tapueluelu, Palu aka Tapueluelu v Kingdom of Tonga

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 10/2008

15 July 2008; 25 February 2009

Employment law – wrongful dismissal – Superintendent of Prisons – appeal and cross appeal

The respondent/cross-appellant was dismissed from the position of Superintendent of Prisons on 11 October 2001. He claimed he had been wrongfully dismissed. The appellant/cross-respondent appealed against the judge's failure to strike out the remainder of the statement of claim; while the cross-appeal was against the order to strike out its central claim that the cross-appellant was wrongfully dismissed.

Held:

1. The Court of Appeal found that after the examination of the issues there was no ground for the exercise of a discretion to permit a reopening of the issue where it was rightly decided that the respondent/cross-appellant had propounded a case, based ultimately on the denial to him of natural justice, which simply could not be stigmatised as bound to fail. The cross-appeal succeeded.
2. The appeal treated the issue of the suspension and the claimed right to a pension as subsidiary to the respondent/cross-appellant's case for wrongful dismissal. Now that the Court decided to allow the cross-appeal, the appeal should be dismissed.
3. The respondent/cross-appellant had an arguable case in respect of the period of suspension and the backdating of his dismissal, whether or not these were separate issues, or should be seen as aspects of his claim for damages for wrongful dismissal.
4. The following orders were made: that the appeal be dismissed and the cross-appeal be allowed; that the order made below striking out the respondent/cross-appellant's claim for wrongful dismissal be set aside, and in lieu thereof it be ordered that the application to strike out the statement of claim be dismissed with costs; that the appellant/cross-respondent pay the respondent/cross-appellant's costs of the appeal and cross-appeal.

Cases considered:

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170
Annetts v McCann (1990) 170 CLR 596
Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 221 CLR 1
'Asitomani v Superintendent Of Prisons [2003] Tonga LR 84
Brimaud v Honeysett Instant Print Pty Ltd (1988) 217 ALR 44
Clairs Keeley v Treacy [2004] WASCA 277
Geddes v Magrath (1933) 50 CLR 520
Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648
Jarratt v Commissioner of Police for New South Wales (2005) 224 CLR 44
Nominal Defendant v Manning (2000) 50 NSWLR 139
Palu v Kingdom of Tonga [2005] TOSC 33
Ridge v Baldwin [1964] AC 40
Tu'akoi v The Deputy Premier (1958) 2 Tonga LR 196
Wentworth v Rogers (Supreme Court of NSW, Sperling J, 28 April 1995, unreported)

Statute considered:

Prisons Act (Cap 36)

Counsel for the appellant/cross-respondent : Mr Little
Counsel for the respondent/cross-appellant : Mr Tu'utafaiva

Judgment

1. This is an appeal, in which (by leave) the Respondent filed a cross-appeal, from a decision striking out part of a statement of claim in a wrongful dismissal action brought by the Respondent as plaintiff following his dismissal on 11 October 2001 from the position of Superintendent of Prisons. The Appellant is appealing against the judge's failure to strike out the remainder of the statement of claim; while the cross-appeal is against the order to strike out its central claim that the Cross-Appellant was wrongfully dismissed.

2. The application which led to the striking out was not filed until 12 March 2008, in a proceeding in which the statement of claim had been filed on 20 December 2004 and, following the dismissal on 11 May 2005 of an earlier application to strike out the statement of claim, a statement of defence had been filed dated 9 June 2005: The grounds of the application of 12 March 2008, which relied on Order 8 Rule 8, were that the statement of claim "(a) discloses no reasonable cause of action, (b) is frivolous or vexatious, (c) is an abuse of process" because, in brief, the cause of action alleged is in contract, but the plaintiff was appointed to the civil service of the Crown pursuant to statute, not contract, and subject to dismissal at any time in the manner provided for by section 21 of the Prisons Act, as occurred. Upon the earlier strike-out application, abuse of process was argued on the basis the claim really sought judicial review out of time, although Thomas J, before whom the matter came (as *Palu v Kingdom of Tonga* [2005] TOSC 33), noted the defendant referred to "the

claim for breach of contract [as] minimal", an acknowledgement that there was such a claim. His Honour, however, remarked that the "statement of claim taken at its face value establishes breaches of both express and implied conditions of employment". Thomas J then concluded;

> "The real basis of the claim of the plaintiff is that his rights of natural justice were infringed [with] respect to both his suspension and dismissal and that accordingly the implied conditions of his contract of employment have been breached... [T]he plaintiff is entitled to his day in court. The application is dismissed [with costs]."

3. Against that background, it is surprising that the defendant felt able, and was permitted apparently without objection, to bring the further application to strike out the statement of claim which has given rise to this appeal. Of course, a strike-out application is interlocutory, so that a decision in respect of it does not involve a res judicata, and the second application here relied on a fresh argument. But it was not an argument that arose for the first time almost three years later— it was the basis of the defence filed within one month. Parties are generally expected to bring their full case forward when they make an application, and not to make another application for the same relief merely on the basis they now have a new argument. To let them do so unchecked by the applicable rules of practice, and without requiring applicants who cannot bring themselves within those rules to show why an unusual exercise of discretion should be made in their favour, would raise proper concerns about the need for finality in litigation, and the evil of allowing a litigant with a long purse to exhaust an opponent's resources by repeated interlocutory applications. In their joint judgment in *Clairs Keeley v Treacy* [2004] WASCA 277 at paragraph 7, Steytler J (as Steytler P then was), Templeman and McKechnie JJ said:

> "Because the order made by the Court in December 2003 was interlocutory, it is open to the plaintiffs to apply to lift the stay. However, on an application to vary an interlocutory order it is not generally permissible for the party against whom the order was made to re-argue the original application on the basis of material which was available then, but which was not put before the Court. As was said by the majority of the High Court in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, at 178:
>
> > 'A further order will be appropriate whenever *inter alia*, new facts come into existence or are discovered which render its enforcement unjust...' "

Their Honours endorsed the principles stated in the following passages they cited from *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 and *Wentworth v Rogers* (Supreme Court of NSW, Sperling J, 28 April 1995, unreported noted in (1996) 70 ALJ 613). In the former case, McLelland J said (at 46):

> "In the present case I am dealing with an interlocutory order of a substantive nature made after a contested hearing in contemplation that it would operate until the final disposition of the proceedings. In such a case the ordinary rule of practice is that an application to set aside, vary or discharge the order must be founded on a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the court on the hearing of the original application..."

130 In the latter case, Sperling J said:

> "I hold that, as a general rule, an interlocutory order made after a hearing at which each side has the opportunity to put its case should not be set aside, varied or discharged, except to accommodate a change of circumstances or where evidence has become available which was not available at the earlier time. By the same token, where an application for interlocutory relief has failed, a further application for the same relief should, as a general rule, not be entertained, subject to the same qualifications, at least after a hearing on
140 the merits, particularly where the application is designed to finalise the principal proceedings, *such as an application for summary judgment or for a permanent stay*." [emphasis added]

Accepting this general rule "as a rule of practice" (the description of it adopted by Mason P in *Nominal Defendant v Manning* (2000) 50 NSWLR 139 at 143), the joint judgment in *Clairs Keeley v Treacy* noted (at paragraph 13) that "ultimately, as McLelland J said in *Brimaud v Honeysett Instant Print Pty Ltd* [at 46] ... the court should do whatever the interests of justice require in the particular circumstances of the case", ie the court retained an ultimate discretion. The difficulty in the present
150 case is that there is no indication an exercise of discretion was sought or considered, and little ground for its exercise to permit the application to proceed can be discerned in the material before the court.

4. As we have noted, the defendant in the second application to strike out relied on the contention that the statement of claim nailed its colours to the mast of contract (albeit a contract dependent on statute), whereas the plaintiff was only ever employed pursuant to statute, and subject to dismissal at any time under section 21 of The Prisons Act. Although Andrew J was not convinced of the correctness of the view that an employee under this Act may be dismissed at will on the basis of the common law as it was applied to a servant of the Crown in England, he considered the plaintiff
160 could not show he had been wrongfully dismissed because, in the "end result... [four] serious matters of misconduct were established and the plaintiff's dismissal was in accordance with the Act and the decision to dismiss was approved by cabinet". But there are grave problems with this reasoning, particularly in a strike-out application based on the proposition that the statement of claim "discloses no reasonable cause of action". At the hearing of such an application, the allegations of fact in the pleading

must be accepted. In Halsbury, 4 ed reissue, vol 36 (1), at section 81, the rule is stated:

> "In judging the sufficiency of a pleading for this purpose [ie the purpose of ascertaining whether it discloses a reasonable cause of action], the court will assume all the allegations in it to be true and to have been admitted by the other party."

5. The suggestion that the plaintiff was dismissed upon the basis of four established charges of misconduct and in accordance with the Act is quite contrary to what is pleaded in the statement of claim. To enable it to be understood how his Honour nevertheless reached the conclusion stated in his reasons; it is necessary to reproduce certain provisions of The Prisons Act and to recount (as briefly as may be) some of the detailed facts set out in the statement of claim. Sections 20 and 21 of the Act provide, with respect to suspension and dismissal:

> "20 Subject to any rules that may be made hereunder [paragraph 4(f) of the statement of claim pleads, and paragraph 8 of the statement of defence admits, the application of the ESTACODE, although neither pleading expressly affirms that the relevant provision was "made hereunder" within the meaning of section 20] the Minister of Police may *for misconduct or inefficiency* [emphasis added] reduce any prison officer to a lower grade and may for a like reason suspend any prison officer.
>
> 21. The Cabinet on the recommendation of the Minister of Police or of any court of inquiry constituted according to section 15 may dismiss any prison officer."

Sections 15 and 16, the former being headed "Court of inquiry for major offences by prison officers", provide:

> "15. The Minister of Police and the magistrate for the district or any person or persons (not exceeding 3 in number) whom the Cabinet may nominate in any particular case shall form a court of inquiry into any charges of breach of discipline or offences brought against any prison officer except those of a petty nature the punishment for which may be provided for by rules made under this Act. The Minister of Police and in his absence the magistrate or such other person as the Cabinet may appoint shall be the president of such court and shall have all the power of a magistrate in regard to summoning and enforcing the attendance of witnesses, the punishment of witnesses for non-attendance or for refusing to answer any question relevant to the inquiry.

> 16: The court referred to in section 15 shall have power to hear and determine all charges of —
>
> (a) intoxication, or
>
> (b) serious breaches of good order or discipline or of any prison rule,
>
> which may be brought against any prison officer and where no punishment is expressly provided for an offence may impose a fine not exceeding $50 or imprisonment for any term not exceeding 2 months."

Notwithstanding that section 20 refers to cases of "misconduct or inefficiency", which on general principle would at least arguably require the observance of the rules of natural justice, paragraph 9 (h) of the statement of claim pleads that "[w]ithout notice or hearing the Minister' of Police under his [communication] dated 22/10/1998 suspended the Plaintiff without pay effective from 22/10/1998 on 14 allegations". Even if the Minister was claiming to act under some implied power, and not under section 20, a suspension without pay, and based on a number of allegations against the employee suspended, would commonly attract the same obligation. Thereafter, on 11 November 1998, Cabinet established a court of inquiry under section 15, later reconstituted to hear eleven charges against the plaintiff, formulated after an investigation that followed the suspension. After commencing its inquiry in November 1999, the court of inquiry (really an administrative tribunal although styled a court in the Act) gave its decision on 3 May 2000. It acquitted the plaintiff on charges except charge number 8, on which it fined him the small sum of $T25. Importantly, it did not recommend the plaintiff's dismissal under section 21.

6. In July 2000, the Minister of Police applied for judicial review of all the decisions of the court of inquiry acquitting the plaintiff. Paragraphs 14(i), (j) and (k) and 16 of the statement of claim are not only pleaded allegations which must be accepted on an application to strike out on the ground that no reasonable cause of action is disclosed, but they are all also admitted in the filed statement of defence. They show that the plaintiff was dismissed by Cabinet on 11 October 2001 on the recommendation of the Minister of Police with stated effect to date back to 11 November 1998, nearly three years earlier. It is pleaded (paragraph 29(c)) that "the Defendant failed to exercise its right to dismiss the plaintiff in a fair and reasonable manner". The first requirement of fairness is, of course, to give a person to be affected by so grave a decision an opportunity to answer what is alleged against him and to contend for a wholly, or for a partially, different decision. Although, as we have pointed out, a statement of defence has been filed, it is not suggested any opportunity was provided before the Minister of Police made his recommendation to Cabinet, notwithstanding it involved the taking of a quite different attitude to the matter from that taken by the court of inquiry Cabinet had chosen to set up. It is not, and not only for that reason, a case where the plaintiff would not have had anything worthwhile to say, had he been accorded his right to natural justice. . In fact, it is admitted on the pleadings (see paragraphs 14 (k) of the statement of claim and 24 of the statement of defence) that after the decision of Cabinet the plaintiff was sent by the Acting Superintendent of Prisons letters "specifying the alleged grounds of dismissal", which was stated to be "largely based on the proven facts that the Plaintiff is unfit for further service due to his being found guilty on Charge No. 8. Furthermore; the Minister of Police is

legitimately permitted on [sic] s. 21 of The Prisons Act to make recommendations to His Majesty's Cabinet for dismissal of any prison officer". As has been noted, Thomas J, in *Palu v Kingdom of Tonga*, read the statement of claim as really based on the infringement of the plaintiff's rights of natural justice with respect to both his suspension and his dismissal, so that implied provisions of his contract of employment have been breached.

7. Almost six months after the plaintiff's dismissal, the Supreme Court, on 2 April 2002, delivered its decision on the Minister's application for judicial review of the acquittals by the court of inquiry. It ruled the challenges to seven acquittals failed, but the decisions upon three involved errors of law. Of course, as the Supreme Court had heard a judicial review matter, it could only decide questions of law, and then exercise a discretion whether or not to return any question in respect of which an error of law had occurred to the court of inquiry for its decision. The Supreme Court, in its discretion, decided not to return the three questions to the court of inquiry, but simply to declare the acquittals relating to those questions unlawful. That is not at all the same thing as entering convictions, which the court of inquiry might or might not have done upon reconsideration. At the end of the day, the plaintiff remained convicted (and fined $T25) upon one charge, upon which his dismissal had not been recommended by the court of inquiry. If the plaintiff's action were allowed to go to a hearing, it would be open to the Supreme Court to consider, not only whether he had been denied natural justice so as to have a valid claim for breach of an implied term of his employment, or for breach of an implied obligation of the Minister and/or Cabinet in the exercise of their respective powers under section 21, and for breach of an implied obligation of the Minister in his purported exercise of power under section 20, but also whether an infraction, considered to warrant a fine limited to $T25 and not attracting from the court of inquiry constituted to consider the matter a recommendation of dismissal, could have been a proper basis for the recommendation of the Minister. In considering the last question the Court would have to bear in mind also the allegation in the statement of claim, made with appropriate particularity, of malice on the Ministers part. If authority be needed to show that this might invalidate the attempt to exercise the power, it will be found in *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44 at 61.

8. So the judge's conclusion that the plaintiffs claim for, wrongful dismissal was met by a finding that he was guilty of four charges of misconduct, putting him in a position where he "cannot be shown ... [to have] been wrongfully dismissed", is incorrect: (a) because the plaintiff has never been "found guilty of [four] charges of misconduct"; (b) because his dismissal was not even claimed by the defendant to have been based on a finding of guilt on four charges, but only one; and (c) because, in any case, it could not be said, on an application to strike out his claim summarily, that it was hopeless for him to contend the recommendation and decision under section 21 were each vitiated by breaches of the principle of natural justice, and otherwise.

9. The defendant's argument that the liability of a Crown employee at common law to be dismissed at will (see *Ridge v Baldwin* [1964] AC 40 at 65-66) applied to the plaintiff, an argument which mirrored the second ground stated for the dismissal set out earlier in these reasons, was rightly rejected by Andrew J (and its rejection should have led to the conclusion the plaintiff's dismissal was arguably based on a ground

that was unavailable at law, since it was not claimed to have been *wholly* based on the finding of guilt by the court of inquiry, and the only other basis claimed was the Minister's (unlawfully asserted) uncontrolled power to recommend dismissal). In *Tu'akoi v The Deputy Premier* (1958) 2 Tonga LR 196, the Privy Council (Hammett CJ) considered the proposition that, as at common law in England, a police officer could be dismissed at pleasure, and pointed out that the position is in fact governed, not by common law, but by section 34 of The Police Act, which is in much the same terms as section 21 of The Prisons Act. In *Tu'akoi*, no natural justice question was raised, but the Privy Council, in affirming the validity of each of two dismissals, expressly noted there was "no suggestion that ... the Acting Minister of Police acted in bad faith or with malice in making his ... recommendation to the Cabinet". That is a clear point of distinction from the present case, where such an allegation is made. But to return to the question whether it would be right to regard the position of Superintendent of Prisons as subject to dismissal at will, it is necessary to consider whether the law, in its modern state, can sustain such a proposition. A quite recent decision of the High Court of Australia which has already been referred to on a different point, *Jarratt v Commissioner of Police for New South Wales* provides guidance. There, Gleeson CJ said (at 51):

> "The common law rule concerning service at pleasure was established long before modern developments in the law relating to natural justice, and the approach to statutory interpretation dictated by those developments. It was also established at a time when public service was less likely to be subject to statutory and contractual regulation than at present. We are here concerned, not with the pristine common law principle, but with a statutory scheme of office-holding and employment."

Just as in the present case section 21 of The Prisons Act confers on Cabinet a power to dismiss on a recommendation of the Minister of Police, so in *Jarratt*, Gleeson CJ pointed out (at 56):

> "Section 51 of the Act [the *Police Service Act* 1990 (NSW)] confers upon public officials (the Governor, acting on the recommendation of the Commissioner submitted with the consent of the Minister) a power to remove the applicant from public office, and thereby prejudice the applicant's rights and interests. In *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ it was said that it can now be 'taken as settled' that the rules of natural justice regulate the exercise of such a power 'unless they are excluded by plain words of necessary intendment'."

In applying Gleeson CJ's proposition to section 21 of The Prisons Act, it may be noted that, not only is there no exclusion of the rules of natural justice "by plain words of necessary intendment", but the power available on the Minister's recommendation is treated as an equivalent alternative to the power similarly

available on the recommendation of a court of inquiry at which the officer whose dismissal is in question will have had a full opportunity to be heard before the making of its recommendation. It is an unlikely setting for a power of dismissal untrammelled by any concern to observe the requirements of natural justice. But Gleeson CJ continued (at 56-57):

> "We are not here concerned with the monarch's 'prerogative' power to dispense with the services of a subject at pleasure. We are concerned with a statutory scheme for the management of the Police Service and for the employment of its members, likely to have been intended to embody modern conceptions of public accountability. Where Parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, Parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain. This principle of interpretation is an acknowledgment by the courts of Parliament's assumed respect for justice."

In a joint judgment McHugh, Gummow and Hayne JJ expressed (at 61-62) the same view of the application of the rules of natural justice, and added (at 62) some comments about what their observance entailed: "at the least that, when the Commissioner was contemplating a recommendation of removal of the applicant, the applicant should have been notified of the proposal, advised of any specific allegations against him and the content of any adverse report, and given an opportunity to respond to those allegations and any criticisms of his performance as a Deputy Commissioner". Their Honours then added (at 63):

> "Upon the footing that the purported removal of the applicant from his statutory office was invalid, the authorities in this Court indicate that the refusal to allow the applicant to perform his duties for the balance of his term and receive his remuneration was without justification and amounted to, or was 'analogous to', wrongful dismissal. The reasoning in the authorities appears sufficiently from the statement of Starke J in Lucy v The Commonwealth (1923) 33 CLR 229 at 253...:
>
> > 'The relation between the Crown and its officers is contractual in its nature. Service under the Crown involves, in the case of civil officers, a contract of service — peculiar in its conditions, no doubt, and in many cases subject to statutory provisions and qualifications — but still a contract. And, if this be so, there is no difficulty in applying the general law in relation to servants who are wrongfully discharged from their service. A servant so treated can bring an action against

> his master for breaking his contract of service by discharging him. The: measure of damages in such an action is not the wages agreed upon, but the actual loss sustained, including, of course, compensation for any wages of which the servant was deprived by reason of his dismissal.'
>
> This reasoning indicates why, in the present case, the award of damages by Simpson J did not cut across the principle that, where there has been a denial of procedural fairness in the exercise of statutory or prerogative powers, the law does not recognise a cause of action for damages and confines the complainant to public law remedies.
>
> In assessing damages in a case such as the present and by analogy to an action for wrongful dismissal, it may well be urged that account has to be taken that at some time in the balance of his term the applicant may have been liable for removal under procedures which did meet the requirements of the Act. However, statements of Rich J and of Starke and Dixon JJ in *Geddes v Magrath* (1933) 50 CLR 520 at 530-531, 533-535 appear to suggest the contrary and that the presence of a power of removal would be disregarded in assessing damages against the respondents."

10. The reference in the passage we have cited from the judgment of Gleeson CJ in *Jarratt* (at 56-57) to "legitimate expectations" suggests yet another basis on which the plaintiff's resort to the principles of natural justice could not simply be brushed aside in a summary application. Having faced the court of inquiry, to be fined a small sum on one charge only, which was not considered to warrant a recommendation of dismissal, it was arguable that he had a legitimate expectation the Minister, who had effectively referred all the charges to the court of inquiry, would not himself override its decision by making to Cabinet a recommendation of dismissal without giving him an opportunity, after notice of the grounds propose to be relied on by the Minister, to urge reasons why the matter should rest where the court of inquiry had left it: cf *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1.

11. It is plain, after the examination of the issues which we have undertaken, that there was no ground for the exercise of a discretion to permit a reopening of the issue decided by Thomas J, who rightly decided that the plaintiff had propounded a case, based ultimately on the denial to him of natural justice, which simply could not be stigmatised as bound to fail. The cross-appeal must succeed.

12. The appeal treated the issue of the suspension and the claimed right to a pension as subsidiary to the plaintiff's case for wrongful dismissal. Now that we have decided to allow the cross-appeal, this approach suggests the appeal should be dismissed. So far as the pension question is concerned, we think that follows, and no more need be

said. So far as concerns the suspension, there is a little more to say. Even independently of the basis on which we have held the cross-appeal succeeds, the decision of Ford J (as the Chief Justice then was) in *'Asitomani v Superintendent Of Prisons* [2003] Tonga LR 84 suggests that the plaintiff, failing all else, would be entitled to recover at least a sum equivalent to the wages he should have received for the whole period of his suspension, except, perhaps, some limited period which might be regarded as a reasonable period pending the conclusion of inquiries. Ford J in *'Asitomani* at 91 held all but the initial period of three months of a suspension without pay for 535 days was a "grossly excessive period" that was "wholly beyond the bounds of what could be termed 'reasonable'" and "became unlawful after the initial three months". In the present case, of course, the period was much longer, and the plaintiff pleads that, during this period, he was not permitted by the Minister either to take alternative employment or to travel overseas. As for the suspension being continued without pay and the eventual dismissal being backdated to its commencement, Ford J said (at 92):

> "I do not overlook the fact that the dismissal was said to be backdated to 11 March 1999 but, as the learned authors of Chitty on Contracts, 26 ed (at 3924) note, '...disciplinary suspension cannot be justified by reference to the employer's contractual right to dismiss for misconduct ...'
>
> No authority has been cited to me by Crown counsel to suggest that the Crown can evade liability for wages during the period of the unlawful suspension by backdating the dismissal and, indeed, no such submission, was even propounded. In its statement of defence, the Crown acknowledges that the plaintiff was dismissed on 29 August 2000."

It is clear that the plaintiff has an arguable case in respect of the period of suspension and the backdating of his dismissal, whether or not these are separate issues, or should be seen as aspects of his claim for damages for wrongful dismissal.

13. The following orders should be made:

a) that the appeal be dismissed and the cross-appeal be allowed;
b) That the order made below striking out the plaintiffs claim for wrongful dismissal be set aside, and in lieu thereof it be ordered that the application to strike out the statement of claim be dismissed with costs;
c) That the Appellant/Cross-Respondent pay the Respondent/Cross-Appellant's costs of the appeal and cross-appeal.

Tu'ivai v Kingdom of Tonga

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 10 and 11 of 2007

18 July 2008; 26 February 2009

Practice and procedure – appeals against strike out of statements of claim – discussion of malicious prosecution – appeals dismissed

The appellant brought two actions against the respondents. In one case he alleged that he was maliciously prosecuted in a particular criminal proceeding, and in the other, he alleged he was maliciously prosecuted in another criminal proceeding. The Supreme Court struck out the statements of claim in each of the two actions. The appellant appealed the decision to strike out. The appeals were heard together.

Held:

1. The reference to a "sour relationship" with Mr Fa'oa, the head of police prosecution, did not go anywhere near showing a ground for an allegation of malice on the part of the police officer who initiated a prosecution many years after the cause of the sourness was alleged to have arisen.
2. The appeal in AC 10 of 2007 in relation to being maliciously prosecuted was dismissed with costs.
3. In relation to the second statements of claim, a conclusion of malice could not be drawn on the matters in the pleading.
4. The appeal against the striking out of the appellant's statement of claim in AC 11/2007 failed.

Cases considered:

A v State of New South Wales (2007) 230 CLR 500
Banque Commerciale S.A. en Liquidation v Akhill Holdings Ltd (1990) 169 CLR 279
Burgess v Beethoven Electric Equipment Ltd [1943] 1 KB 96
Cabassi v Vila (1940) 64 CLR 130
Calveley v Chief Constable of the Merseyside Police [1989] 1 AC 1228
D'Orta-Ekenaike v VLA (2005) 214 ALR 92
Elguzouli-Daf v Commissioner of Police of the Metropolis [1995] QB 335
Feeney v Rix [1968] 1 Ch 693
Gibbons v Duffell (1932) 47 CLR 520

Herniman v Smith [1938] AC 305
Hill v Chief Constable of West Yorkshire [1989] AC 53
Hunter v Chief Constable of West Midlands Police [1982] AC 529
Jagroop v Sokai [2001] Tonga LR 234 (CA)
Kaufusi v Kingdom of Tonga [1999] Tonga LR 118
Krakowski v Eurolynx Properties Ltd (1995) 183 CLR 563
Mann v O'Neill (1997) 191 CLR 204
Middleton v O'Neill (1943) 43 SR (NSW) 178
Rex v Tu'ivai [2006] TOSC 34
Riches v Director of Public Prosecutions [1973] 2 All ER 935
Rogers v The Queen (1994) 181 CLR 251
Sea Culture v Scoles (1991) 32 FCR 275
Tu'ivai v R [2006] Tonga LR 264 (CA)
Tu'ivai v R [2007] Tonga LR 31 (CA)
Wallingford v The Directors, etc, of the Mutual Society (1880) LR 5 HL 685
Walton v Gardiner (1993) 177 CLR 378
Watson v M'Ewan [1905] AC 480

Statute considered:
Customs and Excise Act (Cap 67)

Rules considered:
Supreme Court Rules 2007

Mr Tu'ivai in person in each appeal
Mr Kefu for the respondent in each appeal

Judgment

1. Before the Court of Appeal are appeals against decisions to strike out statements of claim in each of two actions in the Supreme Court brought by the Appellant against the Respondent alleging (inter alia), in the one case, that he was maliciously prosecuted in a particular criminal proceeding, and in the other, that he was maliciously prosecuted in another criminal proceeding. The appeals were heard together.

2. In Appeal number 10 of 2007, the Appellant presented his case, not by reference to the Statement of Claim that was struck out, but by reference to a proposed Third Amended Statement of Claim annexed to an affidavit sworn by him on 30 June 2008. However, there is little relevant difference between the documents, so we shall consider the latest form of pleading in accordance with the Appellant's wishes, without further discussion, calling it simply the statement of claim.

3. What the statement of claim identifies as "Claim No. 1" is set out in paragraph 3. Paragraph 3 does not state one claim, but consists of a number of claims revolving around the Plaintiff's contention that 600 cartons of Bounty rum imported by him from Fiji were wrongly forfeited upon his conviction by a jury of a charge of attempted evasion of the customs duty due in respect of those cartons of rum. The

conviction has twice been affirmed by this Court which, in doing so, held as well that the rum was forfeited, as a consequence of the offence, by the direct operation of the *Customs and Excise Act*. The statement of claim raises, as a bar to the forfeiture, a letter said to have been authorised by the Minister of Finance, which contemplated disposal of the rum through a duty-free store. It alleges the seizure of the rum constituted "trespass and/or conversion" by the Police", and that the charge of attempting to evade customs duty was made by an indictment which contravened the Constitution of Tonga and which the Crown Prosecutor was estopped from preferring, and it adds that the police were negligent in failing to act on the letter already referred to. The losses suffered are alleged to include "the value of the said rums [sic]" and the damages claimed include the amount of the fine imposed following the criminal trial, T$20,000, which was affirmed by this Court on appeal. All of these issues were raised at the trial, or upon the appeals, and were determined adversely to the Appellant. In these circumstances, the claims pleaded amount to an abuse of process upon the principle stated by Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 542. See also *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Rogers v The Queen* (1994) 181 CLR 251; *D'Orta-Ekenaike v VLA* (2005) 214 ALR 92 at 109; and *Sea Culture v Scoles* (1991) 32 FCR 275 at 279. The principle embraces the proposition that, where an issue has already been determined in criminal proceedings, it is an abuse of process to raise that issue in a civil proceeding by way of a collateral attack on the finality of the criminal proceedings.

4. What is called "Claim No. 2" is set out in paragraph 4, which pleads the execution of an unlawful search warrant at the home of the Appellant. The unlawfulness of the warrant is alleged to have flowed from the breach of a constitutional duty binding the police "to take care of the plaintiff" and "protect" him, and from the exonerating effect of the letter pleaded in Claim No. 1. So far as the lawfulness of the search warrant is concerned, this, as well as the effect of the letter, was an issue in the criminal trial and appeals. Claim No. 2 no more escapes the principle of *Hunter* than does Claim No. 1.

5. What is called "Claim No. 3" appears to be founded on Claim No. 2, alleging that the taking of documents under the search warrant was also unlawful, and caused damage to the Appellant including his incurring the fine of T$20,000. Again, this issue was involved in the criminal trial and appeals, with the same result.

6. What is called "Claim No. 4" refers to the Appellant's arrest on the occasion when he was charged. This arrest is described as "baseless" and "ulawful". The only ground for such a description that can be gleaned from the pleading is that the ultimate conviction was on an amended count, not upon the charges as originally formulated by the police. That, of course, is far from unusual. The original charges and the amended count refer to the same importation and the same false customs entry document. The fact that a particular charge is withdrawn or fails does not in itself provide any basis for an assertion that the arrest was unlawful.

7. What is called "Claim No. 5" alleges that the interview recorded by the police in the record of interview was not voluntary, and that it denied the Appellant's right of silence. Again, liability to the fine, as well as imprisonment for failure to pay it as ordered, are alleged to be part of the Appellants damages. But the issue of the

voluntariness of the admissions recorded in the record of interview was a live issue on the appeals, although no *voire dire* had been sought at the trial. This Court rejected the Appellant's attempt to exclude on appeal the admissions made by him during the interview. In that situation, it would fly in the face of *Hunter* to allow a collateral attack to be made by the present proceeding on the decision in the criminal appeals.

8. What is called "Claim No. 6" alleges that "[a]fter the said interview" (ie,. the one recorded by police officers), the Appellant was charged by a summons in a Magistrate's Court with five indictable offences, shortly described as knowingly dealing with forged documents *(The Criminal Offences Act*, s. 172), conspiracy to deal with forged documents (ibid, ssl5, 172), abetting an offence of forgery (ibid, s 15), conspiracy to induce by false pretence the execution of "an important document" (this appears to be a grossly inaccurate paraphrase of some charge under ss 15 and 165, ibid), and conspiracy to bribe a customs officer (ss 15, 51, ibid); that the prosecution of these charges was malicious and/or an abuse of process and/or without due care and/or reckless "as they were all issued to the plaintiff before the police prosecution were looking for evidence"; that a "reasonable prosecutor' must look for his evidence before charging an accused; that the charges were all withdrawn or dismissed, no evidence being proffered; that "[t]hese unlawful conducts of the Defendant's servants" violated the Appellant's rights under clauses 1 and 14 of the Constitution; and that the five charges "were done as an unlawful aggravated conducts of the said police officers in addition to" the seizure of the rum, unlawful entry and taking away of documents, arrest and questioning of the Appellant and the charging of him.

9. The gist of Claim No. 6 appears to be the allegation of malicious prosecution. But the only basis for the necessary finding of malice to ground this claim is that the five charges "were all issued to the plaintiff before the police prosecution were looking for evidence". That alone could not show malice. The police evidence pleaded as unlawfully obtained was the very evidence, or part of it, adduced in the successful prosecution upon the indictment as amended. In the first appeal decision, *Tu'ivai v R* [2006] Tonga LR 264 (CA) at para 8, this Court commented, concerning the amended indictment presented at the hearing, that "it is clear that the charges he originally faced involved the same series of actions and the same documents as were relied upon for the charge in respect of which he was ultimately convicted". And the issue of the lawfulness of the obtaining of that evidence, once again, was squarely raised in the prosecution and determined against the Appellant.

10. However, it is necessary to turn to certain "particulars" added to the pleading of Claim No. 6, which may be summarised as follows:

> 1) That the five charges were an abuse of process "as these charges were baseless and no evidence gathered by the police at all before charging the plaintiff'. (This particular is, of course, repetitious of part of the pleading.) The particular goes on to allege delays and adjournments "of Court hearings and the said trial for two and a half years because the police requested the Court from time to time for these adjournments so they can try to get evidence

against the plaintiff and/or...." (the intention appears to be to link all of the particulars by the expression "and/or"). It is not suggested by the Appellant that objection was taken to the adjournments or any of them, or indeed that they were not by consent.

2) "That the police prosecution was in Negligence by failing to [gather] enough evidence before charging the plaintiff." It will be seen this retreats from the allegation in particular 1 that "no evidence ... at all" was gathered.

3) "That these said (5) charges were made maliciously as 'Unga Fa'oa was at all material time[s] the head of the police prosecution which he has sour relationship with the plaintiff since from in or about 1989. In 1989 Mr Fa'oa among other police officers arrested the plaintiff from Talamahu Market (for parking at a wrong parking) and assaulted him (plaintiff) at the police station. The plaintiff sued the police for the said assault and recovered T$2,000.00 as damages. Since then the relationship between the plaintiff and Mr Fa'oa were [sic] sour." The particular continues by asserting (although it was not suggested in the document or shown in argument in this Court that there is any legal basis for the assertion) that Mr Fa'oa knew all complaints regarding import duties "should be prosecuted under [the] *Custom[s] and Excise Act",* not the *Criminal Offences Act.* We can see no basis in the Acts for this limitation on the powers of the police and the Crown.

Then comes a surprising fresh allegation: "That the Custom officer Kelemete Vahe whom he [sic] made the Custom complaint to the police in regarding this 600 cartons of rums already knew that the Minister of Finance as the Controller of Custom already made a final decision regarding this matter but he still made the said complaint to the police. Mr Kelemete Vahe is among the senior corrupted officers of the Custom and was involved in receiving moneys and goods from the plaintiff in his other earlier imported containers of Bounty Rums. That Mr Vahe among other senior officers of the Custom invited the plaintiff from in or about 1998 to import Bounty Rums from Fiji and they were cleared from Queen Salote Wharf without import duties paid. Therefore he (Mr Vahe) is estopped to complaint [sic], after all these times he was involved in the allowing the plaintiff to continue in importation of his Bounty Rums without paying any import Duty.

11. The allegation about Mr Vahe in particular 3 focuses on the assertion of an estoppel. But it is an estoppel that could not possibly be established. However, the

extraordinary allegations made concerning Mr Vahe and the Appellant himself would certainly be relevant should the issue of reasonable or probable cause for the prosecution of the Appellant come into question. It is not pleaded that Mr Vahe was a prosecutor for the purposes of the tort of malicious prosecution, but it is alleged he made on behalf of the Customs Department the relevant complaint to the police, and if the facts set out in particular 3 are correct, it seems, at the least, probable that he provided information sufficient to establish reasonable or probable cause.

12. Claim No. 6 continues a theme of two of the earlier claims — that the police and the prosecution authorities were negligent. See Claim No. 1 and the second particular of Claim No. 5. A proceeding making such a claim is not admissible in law. In *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335 the question was "whether the Crown Prosecution Service ('the CPS') owes a duty of care to those it is prosecuting", use the words of Steyn LJ (as Lord Steyn then was) at 342. His Lordship referred (at 347) to the availability of the remedy for malicious prosecution and to the "analogy" of the position of the police, citing *Hill v Chief Constable of West Yorkshire* [1989] AC 53, where, as he said, "the House of Lords ... held ... that as a matter of public policy the police were immune from actions of negligence in respect of their activities in the investigation and suppression of crime." The Court of Appeal (Steyn, Rose and Morritt L.JJ) was unanimous in applying the analogy of *Hill* and holding the Crown Prosecution Service owed no relevant duty of care or, if it did, it was "immune from liability in negligence" (per Steyn LJ at 350). Morritt J pointed out (at 352) that if negligence were available, it would subvert the protection built in to the independent torts of malicious prosecution and misfeasance in a public office, supplanting them with a mere want of reasonable care. See also *Calveley v Chief Constable of the Merseyside Police* [1989] 1 AC 1228; and *Jagroop v Sokai* [2001] Tonga LR 234 (CA) where (in para 6) the Court held that the application in general in Tonga of the principles stated in *Hill* and *Elguzouli-Daf* was "not to be doubted".

13. Returning to the pleading, the final claim (called "Claim No. 7") begins by alleging "the Defendant's prosecutor" (not, it will be noticed, "the police" or a particular police officer which or who appears to be the target of Claim No. 6) issued a new indictment, count 3 of which charged an attempt to evade customs laws contrary to s 210(1)(e) of the *Customs and Excise Act.* It is alleged this was "by surprise"; without serving it on the Appellant, and it was "never read to the plaintiff' at the start of the trial (an assertion which is directly contrary to the finding of this Court made in the same para 8 of its judgment on appeal that we have cited in para 9 of this judgment). However, the pleading confesses and attempts to avoid the service of the amended indictment on his counsel, alleging that was "null and void" as counsel was in a position of "conflict of interest", having been the Minister of Police at the time the prosecution was originally begun. All this was raised when the Appellant appealed to this Court against his conviction, was fully considered, and was rejected. There had been no complaint at the trial. Plainly, the pursuit of this claim now is a collateral attack on the decision in the criminal proceeding, barred by the principle of *Hunter*.

14. Claim No. 7 goes on to allege that "[t]he Defendant's prosecutor" (again, not "the police" or any police officer) "either maliciously did the said conducts and/or without

due care (by recklessly and/or negligently) to it said conducts [sic] and/or abusing the process". Contraventions of clauses 11, 12, 13 and 94 of the Constitution are then alleged. There is a complaint about the unavailability of transcript at the initial hearing of the appeal, but this was the basis on which the Appellant was permitted a second hearing in order that he might advance any argument to which the transcript might be relevant: *Tu'ivai v R* [2007] Tonga LR 31 (CA). The estoppel alleged to have arisen out of the letter said to have emanated from the Minister of Finance was raised yet again — but this, too, was an issue in the criminal proceeding and on appeal from the conviction. Quite apart from the application of the principle of *Hunter*, there is no prospect that any of the alleged contraventions of the Constitution could be established.

15. Under the heading PARTICULARS, (1) a claim of negligence was repeated against "the Crown Prosecutors"; (2) the amendment to the indictment, as upheld by this Court on appeal, was alleged to have been an abuse of process and to have been contrary to the letter previously referred to; and (3) the prosecutor was said to have been in breach of clauses 11, 12, and 13 of the Constitution on grounds that repeat those argued upon appeal from the criminal conviction.

16. The Appellant claims general damages of T$1,000,000, together with aggravated and exemplary damages of a further T$1,000,000 and special damages of many millions.

17. The successful application to strike out the third of the four statements of claim successively relied on by the Appellant was made under Order 8 Rule 8(1)(a) and (b) of the *Supreme Court Rules* 2007. But in argument, both below and in this Court, the question of abuse of process, which invokes the Court's inherent jurisdiction, was also raised. In Halsbury, 4th ed. reissue, vol. 36(1), paras 81 and 82, it is made clear that the Court's inherent power to deal with pleadings which are embarrassing or an abuse of process is "complementary" to the jurisdiction given by such a rule, evidence being admissible on the questions arising under the inherent power, although not, of course, on the question posed by the rule whether the pleading makes out a cause of action. In Tonga Order 8 Rule 8(1)(d) expressly adds abuse of process to the scope of the rule, and para (c) may add other matters falling within the inherent jurisdiction. Halsbury, in footnote (7) to the abovementioned para 81, suggests the omission of a reference to it in the application "will not prevent an applicant from relying on the court's inherent jurisdiction".

18. Claim No. 6 makes an allegation of malice and, as we have noted, the gist of it appears to be a cause of action for malicious prosecution. The prosecution of the charges in the Magistrate's Court, brought by a police officer, it is pleaded in Claim No. 6, "was malicious … as they were all issued to the plaintiff before the police prosecution were looking for evidence". We have already found the fact pleaded to be insufficient; but in particular 3 of the added particulars, a further basis is stated for the allegation of malice — "as 'Unga Fa'oa was … the head of the police prosecution which he has sour relationship with the plaintiff since from in or about 1989": References follow to an alleged assault by Mr Fa'oa on the plaintiff in 1989, for which the plaintiff recovered T$2,000.00 damages, and to the proposition that it was wrong, as Mr Fa'oa knew, to charge the plaintiff under the *Criminal Offences Act*.

The balance of particular 3 makes it plain that the prosecution was not brought on the unprompted initiative of the police, but in response to a complaint from a Mr Vahe, an officer of Customs. Serious allegations are made against Mr Vahe, but it is not pleaded that he "initiated" the proceedings in the sense required for the tort of malicious prosecution: *A v State of New South Wales* (2007) 230 CLR 500 at 502, which would involve that he "play[ed] an active role in the conduct of the proceedings", being "'actively instrumental' in setting the law in motion", a requirement that would not be satisfied simply by reporting incriminating facts to the police: see Flerning on The Law of Torts, 6 ed. (1983) at 579. Citing the more recent 9th ed (1998) of Fleming at 676, Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ ("the joint judgment") in *A v State of New South Wales* at 512, said:

> "To incur liability, the defendant must play an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion."

Nor is it pleaded that Mr Fa'oa initiated the proceedings, whether by laying an information or otherwise, but simply that he was "the head of the police prosecution". The head of such a group would not necessarily be the one who initiated a particular prosecution. As this Court affirmed in *Kaufusi v Kingdom of Tonga* [1999] Tonga LR 118 at 124—125, in a similar situation, "the appellant had to nominate in his pleading the individual person or persons whom he alleged to have instigated his prosecution; and, he had to further allege that they did so with malice, before any claim of the respondent's vicarious liability could be contemplated". The same judgment had earlier (at 124) made it clear that, in the pleading, the allegation of malice must be made, "not in any merely abstract sense", but in a "specific, factual sense". However, although Claim No. 6 neither identifies the instigator of the prosecution nor pleads that that person did so with malice, ie. with a dominant motive the law regards as malicious, in a specific, factual sense, we shall assume for the purposes of these reasons that the prosecuting police officer is pointed to with sufficient clarity.

19. In Claim No. 7, it is pleaded "the Defendant's prosecutor" issued an amended indictment, count 3 of which charged the attempt to evade Customs laws. This claim focuses on Crown counsel, not the police, and malice is alleged neither clearly, nor in any sense specifically or factually. There is simply nothing to show what is intended to be put forward as constituting malice on the part of Crown counsel.

20. In the course of a comprehensive review of the tort of malicious prosecution, the joint judgment *A v State of New South Wales* at 531 states:

> "What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose *other* than the proper invocation of the criminal law — an 'illegitimate or oblique motive'. That improper purpose must be the sole or dominant purpose actuating the prosecutor."

Their Honours, having referred, as illustrative motives, to spite, ill will, a desire to punish, and a desire to stop a civil action brought against the prosecutor, added:

> "But because there is no limit to the kinds of *other* purposes that may move one person to prosecute another, malice can be defined only by a negative proposition: a purpose *other* than a proper purpose."

A v State of New South Wales was not concerned with the state of the pleadings, but the statement of the unlimited variety of purposes that may constitute malice illuminates the question touched upon by this Court in *Kaufusi v Kingdom of Tonga* of the degree of specificity required in the pleading of malice. For the analogous pleading of the dishonest state of mind involved in fraud has been held on high authority to require specificity and particularity for just the reason that fraud may take too wide a variety of forms for it to be safe, in the interests of justice, to face a defendant with a pleading of it at large. In *Banque Commerciale S.A. en Liquidation v Akhill Holdings Ltd* (1990) 169 CLR 279 at 285, Mason CJ and Gaudron J said:

> "It has long been recognized that fraud may take a variety of forms and is, on that account, incapable of precise definition. … That variety effectively deprives a party who may or may not have acted fraudulently from ascertaining precisely what must be negatived. Indeed, it is this feature of fraud which underlies the rule of practice ... that fraud must be pleaded specifically and with particularity."

And their Honours (at 287) referred to a "bare and unparticularized assertion" of fraud in a pleading as not making relief for fraud "available on the pleadings". The passage at 285 was referred to with approval by Brennan, Deane, Gaudron and McHugh JJ in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 573. In *Middleton v O'Neill* (1943) 43 SR (NSW) 178 at 184, Jordan CJ said "a statement of claim is demurrable if it merely alleges fraud without pleading the facts alleged to constitute it". Powerful statements in the well known House of Lords decision in *Wallingford v The Directors, etc, of the Mutual Society* (1880) LR 5 HL 685 at 697, 701, 705 and 709 underpin these more modern authorities.

21. The effect of the principle was in England for some time obscured by a interpretation which the Court of Appeal gave to the then Order XIX, r.22 of the Supreme Court Rules in *Burgess v Beethoven Electric Equipment Ltd* [1943] 1 KB 96. That rule provided:

> "Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."

The Court of Appeal construed the rule as unaffected by any requirement to plead a cause of action with particularity. Subsequently, as we shall show, a change in the Rules rectified the position, but before proceeding to explain that, we draw attention to the terms of rule 22. Consistently with the similarity we have found in certain features of fraud and malice which underlie the importance the law gives to the particularity required for a pleading of fraud, and we conclude for a pleading of

malice, r. 22, in making its contrary provision, refers together to malice and :fraudulent intention. In other words, it treats them as relevantly similar cases: We turn to the sequel. By the time *Feeney v Rix* [1968] 1 Ch 693 came before Cross J and, subsequently, before the Court of Appeal (at 698), a new rule, Order 18, r. 12(1)(b), provided that "every pleading must 'contain the necessary particulars of any claim … including … (b) where a party pleading alleges any malice, fraudulent intention … particulars of the facts on which the party relies". Cross J and the Court of Appeal applied the new rule very fully, Winn LJ (at 702) referring to "ordinary principles, apart altogether from the express wording of [the rule]". Thus *Burgess v Beethoven* provides no bar to the application of the principles we have discussed.

22. The primary matters of fact on which rests the allegation of malice made against the police officer who brought the charge are the assault in 1989, the ensuing legal proceedings and the "sour relationship" with Mr Fa'oa. But this is to dredge up events going back to 1989, and nothing is shown to have happened since that would support a conclusion of malice. As has already been pointed out, the prosecution succeeded, although on an amended indictment. The fact that the police saw the matter as involving forgery, a false customs declaration having been made, while Crown counsel considered a charge of attempted evasion of customs duty to be more appropriate, provides no ground for an inference of malice. We agree with Mr Kefu's submission on this point. But, in any case, the reference to a "sour relationship" with Mr Fa'oa does not go anywhere near showing a ground for an allegation of malice on the part of the police officer who initiated a prosecution many years after the cause of the sourness is alleged to have arisen. Certainly, if Mr Fa'oa had anything to do with the choice of the Criminal Offences Act as containing appropriate provisions breaches of which should be charged, there is no basis, in the face of the plain terms of the statutes, for the conclusion that his dominant purpose was to be regarded in law as malicious.

23. The appeal in AC 10 of 2007 is dismissed with costs.

24. In the second appeal, AC 11 of 2007, the Appellant appeals against both the refusal of leave to file a third amended statement of claim and the striking out of his filed statement of claim with costs. The respondent's case, below and on appeal, was not limited to an argument that the pleading and the proposed pleading failed to make out a cause of action, but included claims that they were frivolous and vexatious and each amounted to an abuse of process. When the appeal came on for hearing, the Appellant relied on yet another redraft of his statement of claim as the form of pleading he wished to uphold and, as in the earlier appeal, we shall consider the arguments by reference to this document, calling it simply "the statement of claim".

25. The statement of claim arises out of the investigation of a complaint made against the Appellant by a senior Crown Prosecutor, Mr Pouono, who was then prosecuting in the Customs matter out of which the appeal in AC 10 of 2007 arose and who considered a payment of T$400.00 received by him from the Appellant to be a bribe. The Appellant was suspended as a law practitioner by Webster CJ, the complaint having also been made to the President of the Law Society and referred to the Chief Justice, and a police officer brought a charge upon which the Appellant stood trial. His defence acknowledged the payment, alleging, however, it was not a bribe but a

payment of "lunch money" gratuitously made in recognition of co-operation previously received from Mr Pouono in a civil matter. The Appellant was acquitted by Ford J (as he then was), sitting without a jury, on the ground that the relevant intention (which, on Mr Pouono's evidence, was entirely a matter of inference) had not been made out, and the Appellant's evidence that the payment was a gratuitous payment of lunch money should be accepted. Mr Tu'ivai then brought, his action for malicious prosecution, abuse of process, negligence, and contraventions of clauses 1, 10 and 14 of the Constitution.

26. Paragraph 2 of the statement of claim pleads that "Mr 'Ofa Pouono (a Senior Counsel) at the Solicitor General Department and Police Officers Inspector Halatanu and Deputy Commissioner of Police 'Unga Fa'oa' were at all material times employed by the defendant. Paragraph 3 then pleads Mr Pouono On 27 May 2005 "made an unfound [sic] and/or malicious complaint to the Defendant's Ministry of Police at Nuku'alofa Police Station alleged [sic] that the Plaintiff had been bribing him (on the said day) with a cheque of TOP $400.00 so that he use his authority as counsel [in the Customs prosecution] to adjourn the said criminal case forever or sine die".

27. Paragraph 4 alleges Mr Pouono wrote a complaint to the President of the Tonga Law Society based on this matter, which led to the Appellant's immediate suspension as a law practitioner. (Paragraph 7 of what is called "Claim No. 1" states that the President reported the complaint to Webster CJ who suspended the Appellant.) Paragraph 4 goes on to plead that the suspension contravened clauses 1, 10 and 14 of the Constitution because it was a punishment before sentence according to law (see clause 10; cf clause 14). But, of course, the suspension of a professional practitioner based on some serious allegation of misconduct is not a punishment (that is a matter left to the criminal law), but is a protective measure taken in the public interest. In any case, the pleading discloses that this decision was not taken by Mr Pouono (who merely reported the matter to the Law Society) but by Webster CJ on the referral of it to him by the President.

28. Paragraph 6 pleads that Police Inspector Halatanu and another officer, on 7 June 2005, took the Appellant to the Central Police Station for interview. "Under the supervision and/or advise [sic] of Deputy Commissioner 'Unga Fa'oa, Police Inspector Halatanu charged the Plaintiff with the criminal offence of bribing Mr 'Ofa Pouono (a civil servant) with the said cheque contrary to section 51 of *Criminal Offences Act*." The only person here clearly pleaded to have initiated the prosecution in the sense required for the tort of malicious prosecution is Police Inspector Halatanu who "charged the Plaintiff" — Mr Pouono is not pleaded to have done more than report the matter, as alleged in paragraph 3, to the police as a complaint eleven days earlier, and Deputy Commissioner Fa'oa's involvement is suggested only by the expression "[u]nder the supervision and/or advise of Deputy Commissioner 'Unga Fa'oa". Yet paragraph 7 proceeds to plead that all three "were experts and well, experienced Law Officers in Criminal prosecutions [who] knowingly and deliberately Abusing the said process and/or maliciously and/or recklessly without due care and Negligently prosecuted the Plaintiff with the said charge even [though] they found no basis and no sufficient evidence and/or evidence beyond reasonable doubt (because the plaintiff, is a Law practitioner) against the Plaintiff in the said charge".

29. Under the heading 'Claim No. 1", the pleading sets out "PARTICULARS FOR MALICIOUS PROSECUTION AND/OR ABUSING OF THE PROCESS AND/OR". Paragraph 1 of these makes a similar allegation against 'Unga Fa'oa of assault in 1989 and the subsequent recovery of damages by the Appellant against the Ministry of Police to that made in the other statement of claim, but this time it is alleged that Unga Fa'oa and Inspector Halatanu "were among the police officers that arrested the Plaintiff and assaulted him", and it is alleged that since then "the relationship between the plaintiff and the said two officers were [sic] sour". Particular 2 then alleges that on 2 December 2003, Fa'oa "was in charge of the Ministry of Police CID and Prosecution Dept. in arresting the Plaintiff with Hon. Veikune and charged the plaintiff with (5) Indictable and felony offences...". Particular 3 alleges the Appellant on 23 December 2003 filed an action against Fa'oa (amongst others) and the Kingdom of Tonga arising out of that prosecution, and particular 4 alleges both the criminal and the civil case were at all material times "going on".

30. Paragraph 5 of the particulars turns back to Mr Pouono, alleging he attended the Law School of the University of the South Pacific in *Vanuatu* with 'Unga Fa'oa, both graduating BA LLB. In their first year, 'Ofa Pouono was aged about 22, 'Unga Fa'oa being "much older" and "more like a big brother for him". Particular 6 indicates Mr Pouono went on to receive a scholarship and obtain a Master's degree in law, a fact which seems to be urged as demonstrating he would have known the payment of T$400.00 was not a bribe "but for the lunch money and/or shout the plaintiff promised to give Mr Pouono when they settled the civil claim", it is alleged Mr Pouono "maliciously twisted the story in his complaint to the police".

31. Finally, the last of these particulars (No. 8) alleges "the said baseless prosecution ... was maliciously done and/or deliberately abusing the process, by Mr 'Ofa Pouono, Inspector Halatanu and Deputy Commander [sic] 'Unga Fa'oa due to the long sour relationship since from in or about 1989 and the plaintiff naming Mr Fa'oa as 1st Defendant in [the above mentioned civil action]. The twisted story complaint of Mr Pouono to the Police was used by Mr Fa'oa and Inspector Halatanu as stepping stone for this Malicious Prosecution and/or the abusing the process".

32. There follow "PARTICULARS FOR ALTERNATIVE CAUSE OF ACTION IN ABUSING OF PROCESS AND/OR NEGLIGENCE AND/OR". Particular 1 refers to Inspector Halatanu as "leading investigator for Mr Pouono's complaint", and particular 2 says of 'Unga Fa'oa that "he did continue the approval for the go ahead with the pursuing the said investigation and the prosecution". Both are alleged to have acted by "abusing the process and/or without due care for the consequences [to the Appellant]". Particular 3 refers to Mr Pouono; it indicates his story was alleged to be "twisted" because of his inference that a sum of T$400.00 was more than "lunch money" and was intended to be a bribe; but this particular does not relate him to the criminal proceeding, only to the complaint to the Law Society.

33. Under the heading "Claim No. 2", a further cause of action is pleaded as follows: "That the said Inspector Halatanu with another police officer were [sic] in or about the 7th May, 2005 Falsely Imprisoned the plaintiff and/or by trespass to person by taking, him to the Nuku'alofa police station against his will for questioning regarding the said complaint of Mr 'Ofa Pouono …" This cause of action was added, without

any particulars, when the Appellant sought leave below to amend further his statement of claim, and has been repeated in the document dated June 2008 on which this Court was told the Appellant wished to rely. Its bare allegations reveal no clear basis on which the arrest is claimed to have been unlawful. The judge at first instance, having struck out the filed statement of claim, exercised his discretion against allowing the further amended statement of claim to be filed.

34. So far as the statement of claim pleads malicious prosecution, it faces a number of difficulties. First, we have earlier cited *A v State of New South Wales* at 512 for the proposition that, to incur liability for the initiation of the proceedings, a person "must play an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion". The statement of claim focuses on Mr Pouono, Deputy Commissioner Fa'oa and Inspector Halatanu; but, of these only Inspector Halatanu is alleged to have arrrested, questioned and charged the Appellant. He is also referred to, in a later part of the pleading, as the "leading investigator for Mr Pouono's complaint". Mr Pouono made a complaint to the President of the Law Society and to the police, but it is not pleaded he controlled or attempted to control the pursuit of either complaint through referral to the Chief Justice (which was the action of the President of the Law Society) or the laying of a charge under the *Criminal Offences Act* (which was the action of Inspector Halatanu). Seen as a witness only in a proceeding brought by a police charge, and continued by the Crown, the law protects him from a civil claim based on his evidence in Court or on the earlier statement outlining that evidence for the purposes of the prosecution: *Watson v M'Ewan* [1905] AC 480 at 486, 488; *Gibbons v Duffell* (1932) 47 CLR 520 at 525; *Cabassi v Vila* (1940) 64 CLR 130 at 141; *Mann v O'Neill* (1997) 191 CLR 204 at 213. It is alleged that Inspector Halatanu was under the supervision and/or advice of Deputy Commissioner Fa'oa, but this is too exiguous a link with the relevant action taken by the Inspector to make the Deputy Commissioner a person who initiated the prosecution.

35. Secondly, liability for malicious prosecution would require that the Appellant plead and establish that Inspector Halatanu "acted without reasonable and probable cause": *A v State of New South Wales* at 503. The nature of this question, which ultimately is not one for the jury, was elaborately discussed in *A v State of New South Wales*, in which the joint judgment concluded (at 539):

> "Where a prosecutor has no personal knowledge of the facts underlying the charge, but acts on information received, the issue is not whether the plaintiff proves that the state of mind of the prosecutor fell short of a positive persuasion of guilt. As explained earlier in these reasons, it is whether the plaintiff proves that the prosecutor did not honestly form the view that there was a proper case for prosecution, or proves that the prosecutor formed that view on an insufficient basis."

Earlier, their Honours had referred (at 530) with approval to the statement of Lord Atkin in *Herniman v Smith* [1938] AC 305 at 319:

> "It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution."

The gift of a quite substantial sum by an accused in very serious criminal proceedings to Crown counsel then acting in those proceedings fell squarely within Lord Atkin's words, notwithstanding a defence was open which, in the event, was upheld, although not without an adverse observation expressing "obvious concern" about the "ethical issues" the defence raised: *Rex v Tu'ivai* [2006] TOSC 34 at para 39. There is a further consideration that points in the same direction. Balkin and Davis on the Law of Torts, 3rd ed. (2004) at section 25.14, footnote 90, refers to *Riches v Director of Public Prosecutions* [1973] 2 All ER 935, where the Court of Appeal "held that an allegation of want of reasonable cause in an action against the DPP stood no chance of success when the committing magistrate, the trial judge and the jury all shared the view of the evidence held by the DPP". Here, the matter was raised by senior Crown counsel; the committing magistrate and the President of the Law Society thought respectively that the complaint should go to trial and that it should be referred to the Chief Justice; and Webster CJ found sufficient substance in it to warrant the Appellant's suspension from practice.

36. Thirdly, the issue of malice: the pleading puts forward a number of matters, but assuming all of them were proved, the Appellant would inevitably fail to make out a case to go to the jury, for a conclusion of malice in fact could not be drawn on such material. And, of course, once it is accepted that the prosecutor was actually Inspector Halatanu, the weakness of the case on malice becomes even clearer. What the Appellant is really putting forward, as a case to go to the jury on malice, is that Inspector Halatanu should be held to have acted for the dominant purpose of revenge for a long past episode since which nothing has occurred to support a conclusion of continuing malice, and in which the Inspector's part did not rise above what is conveyed by the allegation that 'Unga Fa'oa and he "were among the police officers that arrested the Plaintiff and assaulted him" in 1989; and that since then "the relationship between the plaintiff and the said two officers [was] sour". This is not inference, but thinly veiled assumption. Nor is it improved by the allegation that Deputy Commissioner, Fa'oa supervised and advised Inspector Halatanu — an allegation devoid of the content of any particular advice, on any basis, much less of any instruction, to charge the Appellant. On both the issue of reasonable and probable cause and the issue of malice, this case cannot possibly succeed.

37. As was noted earlier, the Appellant also pleaded abuse of process. This tort, as Fleming, op. cit., 589, points out, is "probably the clearest illustration in our law of what civilians call an 'abuse of right' ". It lies where "a legal process, not itself devoid of foundation, has been perverted to serve some extraneous purpose, such as extortion or oppression". But no basis for the conclusion of perversion of the process is pleaded beyond what is alleged in an attempt to make out a case of malice to establish malicious prosecution. What is put forward could no more show a relevant perversion of the process than it could show malice in its initiation.

38. Then the Appellant pleads negligence. But authorities have earlier been examined (in connection with the appeal in AC 10) which leave no doubt that both the police and the Crown prosecution service are immune from attack pursuant to the law of negligence; their liability, in a proper case, must be found elsewhere, and is generally governed by the principles laid down in relation to the tort of malicious prosecution.

39. We have, already pointed out that clauses 1, 10 and 14 of the Constitution do not found any relevant claim in the circumstances pleaded.

40. It follows that the appeal against the striking out of the Appellant's statement of
620 claim fails. We see no ground to interfere with his Honour's discretionary decision to refuse leave to file a further version of the statement of claim which does not avoid the vices of that struck out, but seeks to add an entirely new claim the precise basis of which is either unstated or merely reflects the misconceptions underlying the other claims. As was the case in *Kaufusi v Kingdom of Tonga*, this action should, in the interests of justice, be terminated. The appeal is dismissed with costs.

Paasi v Toutai anor

Supreme Court, Family and Divorce division, Nuku'alofa
Shuster J
FD 117/2008

26 February 2009

Divorce – adultery proved – divorce granted
Custody – two children aged 6 and 7 – best interests of the child considered – custody awarded to mother

The parties were married on 14 January 2003. There were two children of the marriage, one born in 2002 and one in 2003. The petitioner husband filed for divorce on the grounds of adultery, and petitioned for custody of the two children. The respondent wife was pursuing maintenance from the petitioner in the Magistrates court.

Held:

1. If the Court was satisfied that the case for the petitioner had been proved, and it did not find that the petitioner had in any manner been accessory to or connived at or condoned the adultery, the Court should pronounce a decree for divorce.
2. The Court found that the respondent committed adultery and therefore the application for divorce was granted.
3. The Court took into account the ages of the children and also considered the number of hours each parent worked and considered who best could care for the two children without splitting the children up.
4. The Court granted custody of the two children to the mother (the respondent) and the father was to have reasonable access to both children.

Statute considered:
Divorce Act (Cap 29)

Counsel for the petitioner : Mr Edwards
Counsel for the respondent : Miss Fifita

Judgment

SUPREME COURT CASE FD 117-08- seeks first of all- petition for divorce on the grounds of adultery, and also an order from the court for the custody of two young

children of the marriage, Joseph and Lorraine PAASI and, that custody of the two children be granted to the petitioner Joseph Masao PAASI.

The petition was filed on 14th November 2008 in the Supreme Court Registry accompanied by a completed children's statement.

THE PETITION SEEKS TO SHOW:-

1. On 14th January 2003 the petitioner lawfully married the respondent Mele, at the Church of Tonga, Nuku'alofa.
2. After the marriage the petitioner and the respondent lived together as a husband and wife at 'UMUSI, MU'AFANGA, Nuku'alofa.
3. The petitioner currently lives at 'UMUSI and the respondent lives at NGELE'IA, KOLOFOOU (thus they currently live apart).
4. There are two children of the family-who are still living, they are:-

(1) Joseph Nathaniel Paasi (a male) born 14/03/2002

(2) Lorraine Maria Iva Paasi (a female) born 05/06/2003

The Ground for the Petition for Divorce

The ground on which this decree nisi is sought - is that the respondent has committed adultery with the co-respondent- on -the following dates and at the following places:-

1. On or about the 10th June 2008 (after 10pm) at the LEILANI Apartments, 'UMUSI, Ma'ufanga and
2. On or about the 26th June 2008 between 10pm and 12am at the Phoenix Motel, Fatafehi Road, Kolofo'ou

The Petitioner Prays

1. That the said marriage of the 14th January 2003- be dissolved and
2. That custody of the two children of the marriage be granted to the petitioner- with reasonable access to the respondent
3. The costs of these proceedings.

Notice of Opposition

A notice of opposition to the petition for divorce was filed in the Supreme Court Registry on the 17th December 2008. The Notice of opposition however admitted (outright) -paragraphs 1-6 of the petitioner's statement of claim.

The respondent ALSO admitted paragraph 7 of the petitioner's statement of claim - but stated additionally- as follows:-

1. In September 2005 the petitioner was having a relationship with 'Elenoa Ma'u from LAVENGAMALIE. The respondents complained to the police about her husband for having a relationship with 'Elenoa Ma'u. The

respondent did not want to pursue legal proceedings against 'Elenoa but wanted police help to stop her from telephoning her husband again.

2. In February 2008 she could not confirm the exact date but one night the respondent and her friends came along the parking lot facing the Billfish Bar and restaurant and saw the petitioner with another woman inside the petitioners vehicle having an affair. The respondent got out of her friends vehicle and shouted at the petitioner, one of her friends DR SEVENITINI TOMO'UA calmed her.
3. In April 2008 the respondent told the petitioner that she would move out with the two children from the marriage and from their matrimonial home because the petitioner did not stop his behaviour. Then the respondent and the children moved to reside at the LEILANI Apartments 'UMUSI Ma'ufanga because the petitioner continued having an affair.
4. After the allegation in paragraph 7 of the statement of claim happened, the respondent finished off the relationship with the co-respondent and there is no relationship what so ever after that.

The Respondent Prays

1. That the said marriage of the 14th January 2003 is continued.
2. In the alternative, if the petition is granted, that the custody of the children is granted to the respondent, with - reasonable access to the petitioner.
3. The costs of the proceedings.

The Childrens Statement and their Financial Provisions

If I am to consider custody of children- in respect of this application for a decree nisi, then the law says I am also obliged to formally consider the question of: - what is in the best interest of the two children?

In this case we have two young children who are currently staying with their mother. There is a boy and a girl. The boy was born on the 14/03/02 the girl was born on the 05/06/03

According to the petitioner's children's statement:-

- The petitioner currently works as a computer operator, he earns $1,700.00 net a month.
- The respondent works as a nurse and earns $405 per fortnight ($805 net a month)
- Since the parties separated; the petitioner says in his children's statement he has been providing groceries worth over $200 per fortnight and he says there had been other assistance provided for the children- by his parents.

- The petitioner said in his children's statement, he is prepared to provide maintenance of $50.00 per week- per child.

The Respondents Written Defence

In response to the plaintiff's statement of claim filing for divorce on the grounds of adultery, and petitioning for custody of the two children - the respondent filed (1) her defence and also (2) her children's statement- on 17th December 2008.

In that children's statement dated the 17th December 2008 the respondent admitted part of the petitioner's paragraph 3, but she denied the petitioner has been providing groceries worth over $200.00 per fortnight, and the children receiving any other assistance from the petitioner's parents.

I have been told, and I have also had confirmed that the respondent is currently pursuing maintenance from the petitioner, in the Magistrates court via case number CV 248-08.

Settlement

There being no realistic prospect of formal settlement in this matter by way of reconciliation, the case was listed for hearing; and it was also heard at short notice, during the afternoons of the 17th and 18th February 2008. At the conclusion of the evidence, I reserved my written judgment to Wednesday 4th March 2009- at 09.30.

The Law

Section 3(1) of the DIVORCE ACT CAP 29 states:-

> 3(1) Any husband or wife, who is at the time of the institution of the suit who is domiciled in the Kingdom, may present a petition to the Supreme Court, praying the court to dissolve the marriage UPON EVIDENCE
>
> (a) That since the celebration of the marriage, the respondent has committed adultery, or has been sentenced to a term of imprisonment of not less than five years.

Documentary Evidence

The court received formal evidence of a marriage ceremony between the parties, by way of the plaintiff exhibiting a marriage certificate number, A28901 shows clearly the parties full names, their dates of birth and their residence. Exhibit 1-is formal proof of the lawfulness of the marriage; further this is not in dispute.

Similarly the existence of the birth of two children, Joseph and Lorraine PAASI (known as issues of the marriage) were established by the production of birth certificates numbered 084669 and 084667 (Exhibits 2 and 3) these documents were not challenged and this is not in dispute.

The three documents clearly provide (1) proof of marriage and (2) consummation of the marriage. According to these records the marriage between the parties took place on the 14th January2003.

Section 3(1)(a) of the Divorce Act

- Section 3(1)(a) of the Divorce Act (Cap 29) provides adultery as a specific ground of divorce which if proved - entitles the petitioner to a Decree Nisi.
- If an allegation of adultery is made, the name of any co-respondent is required as per section 4 of the Act.
- This required notification of the co-respondent has been complied with in this case by the addition of the name of- SEKILOPENI FINAU a serving a soldier whose named has been included in the petitioner's statement of claim.

The Duty of the Court

In any petition for divorce alleging adultery, the law says:-

- It shall be the duty of the Court to satisfy itself in so far as it reasonably can, both as to the facts alleged, AND, as to whether the petitioner has been an accessory to or, has connived, or condoned the adultery (or not) and also to enquire into any counter charge which is made against the petitioner.
- If the court is satisfied on the evidence that the case for the petitioner has been proved, and it does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery, the court shall pronounce a decree for divorce.

The Evidence

In this case I heard oral evidence that the respondent came home after she had been out all night on the 4th April 2008, with quote, "love bites on her neck." Evidence was led the respondent was challenged by the petitioner as to how she got the love marks on her neck- without a satisfactory explanation. The court was told on the next morning — which was the 5th April 2008, the respondent packed her bags and left the matrimonial home- together with their two small children. The petitioner when he gave evidence he testified he did not hit the respondent saying he merely asked her how the love bites got to be on her neck. I believed him.

The petitioner also gave evidence he did not tell the respondent to leave or go away from the matrimonial home, with the two children. The petitioner told the court that he received certain information from his sister's babysitter; to the effect the respondent had in fact visited an apartment on the 10th June 2008- with another man: The petitioner was also informed by the same witness- she also went to the Phoenix Hotel on the 26th June 2008 with another man.

The court was told that after that revelation, the petitioner went along to see the co-respondent SEKILOPENI FINAU, who at the time was a serving soldier- at his place of work. The petitioner told the court he visited the co-respondent at the Navy Camp where he confronted Private FINAU about him having any connection / relationship with his wife. He testified FINAU said yes, and he said Finau also apologised to him. I believe him.

The petitioner' sister's babysitter; (the informant) - Lolia gave evidence that she went to a defence force base camp dance- with the respondent and also with the co-respondent. They were all drinking and after the dance they all went back to an apartment.

She told the court private FINAU and the respondent slept in the lounge while she slept in another room. She testified the respondent only left during the morning and when it was light. The witness told the court- she slept in another room while the respondent slept with the soldier and I believed her evidence.

The respondent also admitted in her evidence-she slept with a soldier on the 10th June 2008, at the LEILANI Apartments, and in her oral evidence the respondent admitted having sexual intercourse with the soldier.

It was also admitted in her opposition to the plaintiffs statement of claim paragraph 7 that the respondent told the petitioner that she will move out with her two children from the matrimonial home and they did move apparently they move to the LEILANI apartments. They are still living apart.

The Welfare of the Children

At the present time the respondent looks after and she fully cares for the two children Joseph and Lorraine. The petitioner- the father told me in evidence he works on average 65 hours a week but he does not work on a Sunday. The mother told me she worked 45 hours a week- as a nurse.

The petitioner / father told me if he were granted custody of the two children he would hire a babysitter to look after the children, while he was at work.

Both parents said they would make all necessary arrangements for the children's proper education. The mother says Joseph wants to attend Ngele'ia primary school in class two- from his school- in Ha'apai; whilst Lorraine is waiting to attend the Tonga Side School at Ngele'ia this year 2009. She currently attends Kindergarten.

Ruling on the Application for a Decree Nisi

I have fully considered the submissions in this case both oral and written. I have considered whether adultery has been proved in this case.

I find as a fact that the respondent and the Co-respondent SEKILOPENI FINAU did in fact commit adultery on the 10th June 2008-

Because that assertion has been proved to the satisfaction of this court then the petitioner's application for a Decree Nisi- must of necessity be granted.

I also find on the evidence placed before me the petitioner did not connive or abet the adultery in any way.

Order

The petitioners application for a DECREE NISI based upon my findings - on the facts that the respondent committed adultery with SEKILOPENI FANAU on 10th June 2008 IS HEREBY GRANTED.

Ruling on the Custody of the Children

In a case such as this- it is inevitable that one side- or the other will suffer. It is well accepted that children need the care and the assistance of both a loving mother

and a father. Whenever a marriage breaks down, as this marriage has done- then all the parties will inevitably suffer.

When it comes to the court considering granting custody of the children; to either party- on the breakdown of the marriage; it is settled law that the court looks at:- " what is the best interest of the child- that matters" NOT what is or may be in the interest of one; or either of the child's natural parents.

Courts generally place younger- smaller children with their mother- ostensively- because of the natural affinity which younger children have with their mothers, unless the court finds there is a good and a sufficient reason- not to do so.

Having heard all the facts in this particular case, I have no doubt both these parents love their children and would equally care for them, in a proper manner; and that both parents would arrange for the children's well being- in true Tongan tradition.

I must decide on who is to have the custody of these two siblings- without seeing them. I take into account the ages of the children and also consider the number of hours each parent works; (or not) and consider who best- can care for the two children without splitting the children up. In this context I have been told one parent- the plaintiff /father works 65 hours per week in the IT Industry- the respondent / mother is a nurse and she works 45 hours a week. Both parties appear to be quite well paid by Tonga standards.

If the petitioner were to be granted custody of the two children, I was told he would have to hire a babysitter while he is away at work- because of the ages of the children. I have no doubt in my mind the father works hard, and that he would provide a good standard of living for his children because he is so well paid, but, on the other hand- a babysitter is- and could never serve to be a substitute for a natural mother- perhaps more particularly- a mother who is also a nurse. On balance looking at all the facts of this case and; in the absence of any evidence to show the respondent mother is a bad parent towards her children I make the following order-

Order

- I grant custody of the two children (1) Joseph PAASI and (2) Lorraine PAASI to the mother (the respondent) at this time
- The father is to have reasonable access to both children and
- The ACCESS TO THE TWO CHILDREN IS to be agreed by the parties- by mutual CONSENT
- The parties are ordered comply with the Magistrate's Court Ruling on the question of Child Maintenance.
- I direct the hearing in the Magistrates Court of case CV 248-08 is to be listed and is to take place within 14 days of today's Order.

It would perhaps be very appropriate for the parties to meet and consent to the quantum of maintenance BEFORE the lower court hearing in case CV248-08

COSTS: - The costs in this case, shall be costs in the cause.

Toki anor v Simiki

Supreme Court, Nuku'alofa
Shuster J
CV 59/2008

18 February 2009; 27 February 2009

Damages – formal proof after collision – claim properly made out and damages awarded

On 10 August 2007 there was a collision between the defendant's three-ton truck and the plaintiff's van. The defendant was convicted in the Magistrates' Court of careless driving and was ordered to pay $200 compensation to the plaintiff. Compensation was paid on 18 December 2007. The plaintiffs made a claim for damages. The defendant did not respond within the time period therefore judgment by default was entered on 28 August 2008 with the formal proof hearing to be held. The plaintiffs' claimed damages as follows: loss of vehicle, $13,000; injuries pain and suffering by the second defendant, $10,000; injuries pain and suffering by the daughter HEFA, $4,000; injuries pain and suffering by the daughter ANA, $1,000; and costs.

Held:

1. The Court was satisfied that the claim made by the plaintiffs against the defendant was properly made out. The claim was properly evidenced in Court by both testimony and documentary evidence. The Court was satisfied the defendant had knowledge of all of the dates of the proceedings and fixtures.
2. The Court ordered judgment for the first plaintiff in the sum of $13,000, being the cost of the damage caused to the plaintiffs van L9797, for its replacement; judgment for the second plaintiff in the sum of $10,000 (to be adjusted to take into account the $200 awarded as compensation by the Magistrates Court making a total of $9,800); judgment for the plaintiffs in the sum of $4,000 damages in respect of the injuries to Hefa Fatongia Ola 'Ana Tonga Ta'e'iloa Tutanekai TOKI; judgment for the plaintiffs in the sum of $1,000 damages in respect of the injuries to 'Ana Tohu'ia TOKI; judgment for the plaintiffs in the sum of $2,016 being the hire of a replacement vehicle for one year from 10-08-07 - 10-08-08 as evidenced by Exhibit P-9; and costs against the defendant, which were to be taxed by the Chief Registrar.

Rules considered:
Supreme Court Rules 2007

Counsel for the plaintiff : Mr Edwards
The defendant did not attend the hearing

Judgment

This case is a claim for damages in respect of the loss suffered by the plaintiffs, and their two daughters, arising from a collision between a three-ton truck registered number J5774 (the truck) driven by the defendant, and- the plaintiffs 1993 Delica motor van registered number L9797 (the van) driven by HEFA FATONGIA 'ANA TONGA TA'E'ILOA TUTANEK.AI TOKI.

The said motor vehicle accident occurred at the intersection / roundabout of Tupoulahi and Salote road on the 10th August 2007.

The plaintiffs statement of claim indicates at paragraph 5, that the defendant was prosecuted in the Magistrates Court at FASI under case number 2151/07 on 6th December 2007 for careless driving. The Magistrate's court records indicate the defendant was convicted- and was fined $100 and he was ordered to pay compensation of $200 to the victim, and he was disqualified from driving from the 6th December 2007 the date of the court hearing. The conviction for an offence of careless driving in the Magistrate's court on the 6th December 2007 proves liability on behalf of the defendant.

According to the court records compensation of $200 was paid by the defendant on l8th December 2007 against receipt number R#88170 and I have seen proof of payment. Because the defendant has in fact paid the Magistrate's order for compensation in the sum of $200, then that amount must of necessity be deducted from the assessed damages by the Supreme Court.

An Ex-Parte Application Notice was served on the Supreme Court on 22 August 2008 at 2.18pm by the plaintiff's lawyer, asking for Judgment in Default under Order 14 Rule 1 of the Rules of the Supreme Court 2007, and for damages to be assessed upon hearing formal proof, on the grounds that the defendant has failed to file a statement of defence. The timing for the filing of a statement of defence- had expired at close of business on the 5th August 2008.

Judgment in default was entered on the 28th August 2008 in reliance upon Order 14 Rule l of the Supreme Court Rules 2007 with a date to be notified for formal proof of the plaintiffs claim. The Court Order was served personally on the Defendant on the 5th September 2008. A date was subsequently set for formal proof of the damages claimed by the plaintiffs, for 14.00 on the 18th February 2008.

The Claim for Damages

The plaintiffs claim for damages is as follows:-

1. Loss of vehicle - $13,000
2. Injuries pain and suffering by the second defendant - $10,000.00
3. Injuries pain and suffering by the daughter HEFA - $4,000.00

4. Injuries pain and suffering by the daughter ANA - $1,000.00
5. Costs of and incidental to these proceedings/action
6. Such further or other relief as the court deems just

Chronology

- A writ of summons was issued in the Supreme Court 2nd July 2008
- The formal Notice of Directions, writ of summons and the statement of claim were properly served upon the defendant on the 9th July 2008
- A certificate of service was served on the court on the 14th July 2008
- The time for filing a defence expired on the 5th August 2008
- No defence to the action was filed by 5th August 2008-the expiry date
- An Ex-parte application for judgment by default was issued and dated 19th August 2008
- Judgment by default was entered by the Court on the 28th August 2008
- A certificate of service regarding the Court Order and Bill of Costs was served on the defendant on the 5th September 2008
- Fixture request for date to hear formal proof of damages 19th January 2009
- Plaintiff bundle of Documents served 18th February 2009 Exhibits P1-P9

Evidence Both Documentary and Testimonial

- Evidence of the Marriage certificate of Viliami Tokai and Kalonikali Tutanekai certificate 22916 was adduced in evidence P-1.
- Evidence of the birth certificates of HEFA TOKI born 01-01-1988 was adduced by certificate 089121 P-2.
- Evidence of the birth certificate of ANA TOKI born 15-01-1997 was adduced by certificate 015510.P3.
- Evidence of the existence of the registration of the motor vehicle L9797 was adduced by production of form 1A a certificate of registration P4.
- Evidence of an Asco motor repair quotation number 1996 and evidence of its authenticity was adduced by the writer as Exhibit P5.
- Evidence of the injuries and the time Mrs. Kalonikali TOKI D of b 26-06-1964 spent in hospital was adduced

by a doctor's report signed and dated 14th December 2007 by Dr Kolini VAEA -P-6.

- Evidence of the injuries and the time Mrs. Lesieli TOKI D of b 01-01-1988 spent in hospital was adduced by a doctor's report signed and dated 14th December 2007 by Dr Kolini VAEA- P-7.
- Evidence of the injuries and the time Ms 'ANA TOKI D of b 15-01-1997 spent in hospital was adduced by a doctor's report signed and dated 14th December 2007 by Dr Kolini VAEA- P-8.
- Evidence of the use of a taxi hired by the plaintiffs from the l0 August 2007 to the l0 August 2008 as transport to replace their vehicle is exhibited by receipt No 0136518 dated 10th August 2008 in the sum of $2016.00 and given in evidence by the first plaintiff Exhibited P-9.

Damages and Relief Sought

Having heard evidence on oath from both the plaintiffs, in the absence of the defendant, and studying the plaintiffs bundle of documents dated 18th February 2009 which are EXHIBITS P 1-9- I am satisfied that the claim made by the Plaintiff's in this case- as against the defendant is properly made out. I am satisfied the claim has also been properly evidenced in court by both testimony and documentary evidence. I am also satisfied the defendant had knowledge of all of the dates of the proceedings and fixtures.

Order

I assess and award the plaintiff damages as follows,-

1. Judgment for the first plaintiff in the sum of $13,000.00, being the cost of the damage caused to the plaintiffs delica van L9797, for its replacement.
2. Judgment for the second plaintiff in the sum of $10,000.00 however this figure, has to be adjusted — to take into account the $200 awarded as compensation by the Magistrates Court in December 2007, making a total of $9,800.00.
3. Judgment for the plaintiffs in the sum of $4,000.00 damages in respect of the injuries to Hefa Fatongia Ola 'Ana Tonga Ta'e'iloa Tutanekai TOKI.
4. Judgment for the plaintiffs in the sum of $1,000.00 damages in respect of the injuries to 'Ana Tohu'ia TOKI.
5. Judgment for the plaintiffs in the sum of $2,016.00 being the hire of a replacement vehicle for one year from 10-08-07 - 10-08-08 as evidenced by Exhibit P-9.
6. Costs against the defendant, which are to be taxed by the Chief Registrar.

R v Guttenbeil

Supreme Court, Nuku'alofa
Shuster J
CR 144-08

26 and 27 February, 2 and 3 March 2009; 11 March 2009

Criminal law – offences of housebreaking, theft, and receiving – counts 2-6 proved

The defendant was charged with six offences alleging two offences of housebreaking, two offences of theft, and two offences of receiving stolen property. The offences relate to theft from a warehouse on or about 26 February 2008, theft from a school office on 7 March 2008, and receiving goods that were stolen. The defendant denied all the offences and put the prosecution to strict proof. He also alleged he had been assaulted by police officers and was detained in police custody for three weeks.

Held:

1. In respect of count 1, the evidence adduced at trial was not sufficient to prove all the elements of the offence of housebreaking. Therefore, the defendant was found not guilty of count 1.
2. It was not necessary to prove all the articles mentioned in the indictment to have been stolen. If it was proved that the defendant stole any one of them, then that was sufficient: *Machent v Quinn*.
3. After applying the relevant law and considering the principles enunciated in the case of *Machent v Quinn*, there was sufficient evidence adduced to convict the defendant on count 2 of the indictment of receiving stolen property.
4. In respect of counts 3 and 4, the evidence against the defendant was overwhelming including his fingerprints being found at the scene.
5. There was enough evidence adduced to convict the defendant on counts 5 and 6.
6. The Court found that the defendant was evasive and that he ran and evaded arrest. The Court did not find that the defendant was injured significantly, because no evidence was adduced of any injury to the defendant during the trial. If he ran he was likely to be chased. The Court did not believe that his confession or his VCS were coerced and as such they were voluntarily made.

Cases considered:
Machent v Quinn [1970] 2 All ER 255
R v Ayes 34 Cr App R. 159 CCA
R v Aziz and others [1995] 2 Cr App R 478
R v Barrick [1986] 7 Cr App R
R v Feely [1973] 1 QB 530
R v Ghosh [1982] 2 All ER 689
R v Glenister (1980) 2 NSW LR 559
R v Gomez [1993] 1 All ER 1
R v Loughlin 35, Criminal Appeal R.69
R v Parker 53 Cr App R 289 CA
R v Smart [1983] VR 265
R v Vye, Wise and Stephenson 97 Cr App R 134

Statutes considered:
Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)

Counsel for the Crown : Miss Fonou
The defendant was not represented

Judgment

The Defendant

The defendant is charged on an amended indictment filed in the Supreme Court on the 24-02-2009. He is charged with six offences alleging-

- Two offences of housebreaking,
- Two offences of theft, and
- Two offences of receiving stolen property.

The defendant was originally arraigned on 23 June 2008 when he pleaded Not Guilty to the original indictment as is legal right. The defendant was then bailed to attend court on the 27th June 2008, the 30th June 2008 and the 2nd July 2008. The defendant failed to attend court on any of these adjourned dates. He failed to offer an explanation for his non attendance via his lawyer Mr Pounou - so a bench warrant was issued on the 2nd July 2008 for his arrest.

The defendant was subsequently arrested by police on 24th February 2009, when the warrant was executed. On 24th February 2009 the accused appeared with his lawyer Mr. Pounou. Mr. Pounou asked the court for permission to withdraw from any further involvement in this case and as a result of his representation, his request was allowed. Accordingly I place on record the defendant had been represented by a lawyer of his choice- at the start of these proceedings.

The defendant was remanded in custody- for failing to attend court on the 02 July 2008. The hearing of this matter was therefore expedited, and the trial took place on the 26 and 27 February 2009- then 2nd and 3rd March 2009- with closing arguments heard on the 9 March2009.

Count One

HOUSEBREAKING, an offence contrary to section 173(1)(b) and (4) of the Criminal Offences Act (Cap 18). Particulars of which are: -

> KONI KUSITAFU on or about the night of 26th February 2008 at Ma'ufanga having entered EZI World Cargo bonded warehouse as a trespasser, you committed an offence therein.

Count two

THEFT, an offence contrary to section 143(b) and 145(b) of the Criminal Offences Act (Cap 18). Particulars of which are: -

> KONI KUSITAFU on or about the night of 26th February 2008 at Ma'ufanga did dishonestly and without any colour of right take from the bonded warehouse of EZI World cargo:- Property to a total value of $45,490.80, with intent to.permanently deprive EZI World Cargo of such property, and with the intention of converting it to your own use, or the use of any other person without the consent of EZI World Cargo.

Count three

HOUSEBREAKING, an offence contrary to section 173(1)(a) and (4) of the Criminal Offences Act (Cap 18). Particulars of which are: -

> KONI KUSITAFU on or about the 7th March 2008 at Ma'ufanga you did enter the Administration Office of Apifo'ou Secondary College, as a trespasser, with intent to commit an offence therein.

Count four

THEFT, an offence contrary to section 143(b) and 145(b) of the Criminal Offences Act (Cap 18). Particulars of which are: -

> KONI KUSITAFU on or about the March 2008 did dishonestly and without any colour of right take a student's cash collection box containing $20.00 from Apifo'ou College Administration Office which was under the custody of Father ANAUA FINAU with intent to permanently deprive him of such property, and to convert it to your own use.

Count five

RECEIVING, an offence contrary to section 148(1) and (5) of the Criminal Offences Act (Cap 18). Particulars of which are: -

KONI KUSITAFU on or about the 27th February 2008 at Mataika you did dishonestly receive five pieces of KIE waist mats belonging to LOMELI HEIMATOTO by undertaking to sell them to DENIS MA'AFU knowing or believing the same to be stolen.

Count six

RECEIVING, an offence contrary to section 148(1) and (5) of the Criminal Offences Act (Cap 18). Particulars of which are: -

KONI KUSITAFU on or about and between October 2008 and February 2009 at Houmakelikao you did dishonestly receive certain goods namely 10 door locks valued at $1,000 and one shower valued at $80.00 to the total value of $1,080 belonging to Black Pearl Suite by undertaking to sell them to SAITO MATAKAONGO knowing or believing the same to be stolen.

The Prosecution's Case

In their opening address the prosecution alleges the defendant committed the offences with which he is charged and they ask me to convict the defendant on all counts.

- Count 1:- The Crown says- during the night of the 26th February 2008 the locked and secured premises of EZI WORLD CARGO, a bonded warehouse was broken into, by someone cutting the fence and obtaining entry to the premises at the back by cutting through the wall of the warehouse, entering and stealing a large quantity of property- as listed in count 2 of the indictment.
- The Crown says the accused was either one of those persons who broke and entered the premises- or he received stolen property. They rely upon the doctrine of recent possession to show the defendant was in fact in possession of part of the proceeds of the crime. The defendant denies the offence.
- Count 2:- In relation to count two the prosecution infer and seek to use section 40 of the Evidence Act - the presumption being that the defendant has stolen the goods stored at EZI World Cargo because of recent possession, and they ask me to convict the defendant- on that basis. The defendant denied the offence.
- Count 3 and count 4:- The Crown rely upon the breaking and entering at the premises of APIFO'OU College, and the evidence for the break in is supported by the fact the accused's fingerprints were found and were properly identified as being the defendants, by the police. The Crown says the defendant's fingerprints were found on

window louvers which had been removed at the scene of the break in. The latent fingerprints were lifted and examined by police officers familiar with crime scene investigations. The Crown says this is strong evidence the accused committed this particular offence. The Crown says a collecting box was stolen which they say had approx $20.00 contained therein; and that constitutes the crime of theft. Neither the collecting box; nor the money was recovered. The Crown says this crime of theft is made out because it's supported by the defendants fingerprints found at the scene; they say this is very strong evidence that it was the accused who committed the offences. The defendant denied the offence.

- Count five:-The Crown say the defendant went with another man on 27th February 2008 soon after the HSB at EZI World Cargo, and they offered a woman by the name of DENISE MA'AFU five (5) KIE Tonga mats for sale- which she bought for a reduced sum. The Crown says because the defendant advertised the 5 Tongan mats, he assisted his co-accused - thus he assisted another person in the disposal of stolen property and by implication- he is also guilty as charged. The defendant denied the offence.
- Count 6:- the Crown says the defendant admitted in his VCS to advertising a box of door locks and a shower fixture to a man called SATIO MATAKAIONGO. The Crown say he approached SATIO because he knew Satio had a brother working in the construction industry, these were stolen goods offered for sale and they were valued at $1,080. The Crown says they rely upon the defendant's admissions in his VCS. The defendant denied the offence.

The Defendant's Case

The defendant as is his right under the law denies the offences as alleged in the indictment, and he puts the prosecution to strict proof. The defendant gave an explanation of his version of events, in a VCS both to the police and by his sworn evidence to this court. When a defendant gives evidence in court; his evidence is to be accorded the same respect and consideration as any other parties. The defendant denied the offences and he questioned the non production of various Tongan artefacts as exhibits to the court. The defendant also alleged he had been assaulted by police officers and he claims he was detained in police custody for three weeks.

He also questioned why other people had not been charged with these offences who had been implicated and who gave evidence against him. The defendant in his closing claimed he would be acquitted if he had a lawyer.

The Essential Elements of the Offences

173 HOUSE-BREAKING

(1) A person is guilty of housebreaking if—

(a) He enters any building or part of a building as a trespasser with intent to commit any crime; or

(b) Having entered any building or part of a building as a trespasser he committed or attempted to commit any crime in the .building or that part of it.

(2) Reference in subsection (1) to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.

(3) For the purposes of this section the word "enters" in subsection (1) means the putting of any part of the body of the person making the entrance, or any part of any instrument used by him, inside the building.

143 THEFT

Theft is the dishonest taking without any colour of right of anything (which by section 144 is declared capable of being stolen) with intent either—

(a) To deprive the owner permanently of such thing; or

(b) To deprive any other person permanently of any lawful interest possessed by him in such thing, -and with the intention of converting such thing to the use of any other person without the consent of the owner or person possessing such interest therein as aforesaid; "theft' and "steal" shall be construed accordingly.

148. RECEIVING STOLEN GOODS

(1) Any person who receives any property knowing or believing it to have been stolen or obtained in any way whatsoever under circumstances which amount to a criminal offence is guilty of an offence and is liable to the same punishment as if he had committed theft.

(2) Any person who receives any mail bag or any postal packet or any chattel or money or valuable security, the stealing or taking or embezzling or- secreting whereof amounts to an offence under the Post Office Act or this Act, knowing or believing the same to have been unlawfully stolen, taken, embezzled or secreted, and to have been sent or to have been intended to be sent by post, is guilty of an offence and is liable to the same punishment as if he had committed theft.

(3) Any person mentioned in subsection (1) may be indicted and convicted whether the principal offender has or has not been previously convicted, or is not amenable to justice.

(4) Any person who, without lawful excuse, knowing or believing the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in the Kingdom the person committing it would have been guilty of an offence, receives or has in his possession any property so stolen or obtained outside the Kingdom is guilty of an offence and is liable to the same punishment as if he had committed theft.

(5) For the purposes of this section and of any other written law relating to receivers or receiving, a person shall be treated as receiving property if he dishonestly undertakes or assists in its retention, removal, disposal or realisation, or if he arranges to do so

Leading Cases and Policy

In considering this my judgment, I have considered and I will apply the following leading cases widely known throughout the Commonwealth. These cases are routinely applied in most, if not all common law jurisdictions for offences; or allegations involving theft, or cases involving dishonesty. They can equally be applied in Tonga.

• *R v GLENISTER* (1980) 2 NSW LR 559 at 603-605 extensively covers the meaning of the word "fraudulently." The Court of Appeal of NSW in that case said at p.607: "We conclude that the mental element described as fraudulent is equivalent to dishonesty. It will be sufficient ... .that the Crown must prove that the accused acted dishonestly. It is unnecessary for him (the trial judge) to go further and define honesty. It is enough that he informs the jury (himself) that in deciding whether an application was or was not dishonest, they should apply the current standards of ordinary decent people." The court cited *R v Feely* [1973] 1 QB 530.

• *R v SMART* [1983] VR 265 at 295 (a decision of the Supreme Court) In determining whether the prosecution has proved the defendant was acting dishonestly (it) must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in way which he knows ordinary people consider as being dishonest, even if he asserts or he genuinely believes that he is morally justified in acting as he did. Per Lord Lane in *R v Ghosh*.

• *R v BARRICK* [1986] 7 Cr AR [s]. For allegations which concern Breach of Trust cases. It is trite law that a servant or agent owes a high duty of care to his employer to carry out his duties properly; and more important honestly. The higher up the scale one goes in a company, or organization, the higher the degree of responsibility is

imputed in him by law; because without that trust; the business world and all organs of a government would be in chaos.

• *R v GHOSH* [1982] 2 All ER 689. Is the well known test for Dishonesty, which states; "it is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest; even if he himself asserts, or genuinely believes he is morally justified in acting as he did."

• *R v GOMEZ* [1993] 1 All ER 1. Authority for the well-established test of appropriation and or, misappropriation of property. This is a Leading House of Lords case which all legal practitioners in Tonga should read, understand and apply in cases such as this.

• *MACRENT v QUINN* [1970] 2 All ER 255 DC. It is not necessary to prove all the articles or values mentioned in the indictment to have been stolen, if it is proved that the defendant stole any one of them also see *R v Parker* 53 Cr App R 289 CA per Donaldson at page 229 it is submitted that the jury must be agreed on which particular item, or value was stolen.

A Defendant's Good Character Directive

Modern Law says I must consider and apply to every case "a defendant's good character directive" that is to say good character cannot of itself provide a defence to a criminal charge, but it is evidence which I should take into account when I come to consider my verdict. See: *R v Vye, Wise and Stephenson* 97 Cr App R 134: *R v Aziz and others* [1995] 2 Cr App R 478.

The Burden and Standard of Proof

Certification: As this is a trial before a Judge sitting alone; I have directed myself in accordance with the Law on the Burden and Standard of Proof in a criminal case. If appropriate I have directed myself of the need to consider the evidence in respect of each charge and for the defendant separately. Where appropriate I have given the Accused, the benefit of any doubt. The prosecution brings this case; they must prove the case beyond any reasonable doubt so that I am sure he committed the offences. The defendant does not have to prove anything; because he is innocent until he is proven guilty.

Voluntary Caution Statement

I am also required to carefully consider a defendant's voluntary caution statement[s] also his charge statement and or his confession statement to determine whether they are voluntary; or not, in the true sense of the word.

- I find as a fact upon hearing the evidence that the confession Exhibit 1, is voluntary in the true sense of the word;
- As is the charge statement Exhibit 2;
- And the Confession Exhibit 3.

Prosecution Case

I heard a total of fourteen prosecution (14) witnesses who testified they knew he accused and had dealings with him concerning this particular case.

- At the conclusion of the trial I was asked by the Prosecutor to find the accused guilty as charged and at the conclusion of the trial I was asked by the defendant to find the accused not guilty.
- The defendant himself gave evidence on oath- and on Friday the 6th March 2009 told me he did not wish to call any witnesses to give evidence on his behalf.
- Closing submissions were made on the 9th March 2009 by both parties, and at that time the defendant said if he had a lawyer he would have been acquitted.

Inferences and Speculation

A court is not entitled to speculate, but it may draw inferences, there may be strong circumstantial evidence in which a court may say, when taken together will lead to the sure conclusion it was the defendant who committed the crimes. Circumstantial evidence can be powerful evidence, but it is equally important to examine it with care and to consider whether the evidence upon which the prosecution relies in proof of its case is reliable and if it does prove guilt; or, are there any other circumstances which are, or may be of sufficient reliability and strength to weaken or destroy the prosecution's case. Finally a court should be careful to distinguish between arriving at conclusions based upon reliable circumstantial evidence and mere speculation. Speculation in a case amounts to no more than guessing; or making up theories without good evidence to support them, neither the prosecution, the defence nor should I do that.

Analysis

In opening its case the prosecution intimated it relied on the doctrine of recent possession with regard to counts one, two and five.

Count 1 — Housebreaking relating to Ezi World Cargo Warehouse

In opening its case, the Crown proposed to rely on the doctrine of recent possession as enunciated in:-

- *R v Loughlin* 35 Criminal Appeal R.69, CCA which reads — "It is submitted that where it is proved that premises have been entered and property stolen therefrom and that very soon after the entry the defendant wasfound in possession of the property, it is open to the jury to convict him of burglary. And this of course applies equally to thefts other than in the course of a burglary)."

The doctrine of "recent possession" is provided for in the laws of Tonga in the Evidence Act, section 40 which reads —

- "Where a person is found in the possession of property proved to have been recently stolen he shall be presumed to have stolen it or to have received it knowing it to have been stolen unless he shall give some satisfactory explanation of the manner in which it came into his possession."

There is and can be no dispute that there was a housebreaking and theft on the night of the 26th February 2008 at Ezi World Cargo. The witnesses Fine Filimoe'ulie the supervisor of the Ezi World bonded warehouse, Maria Tutavake (the manager) and Inspectior Hausia all testified as to the circumstances of housebreaking and theft at the premises on the night in question. What is in dispute is whether the Accused was involved in the actual housebreaking? The prosecution says Section 40 of the Evidence Act presumes either Theft or Receiving, where recent possession of stolen property has been proved. Although it was submitted the Prosecution is entitled to invite the court to draw all inferences reasonably open on the evidence. The prosecution was of the view that evidence adduced at trial was not sufficient to prove all the elements of the offence of housebreaking in Count 1.

Finding of Fact

- The Crown are correct- and I find the defendant NOT GUILTY ON COUNT ONE OF THE INDICTMENT and he is acquitted on that first count.

(ii) Count 2 — Theft - in relation to goods stolen at Ezi World Cargo. The Crown argue that applying the provisions of section 40 of the Evidence Act, there is a presumption that the defendant has stolen or received goods knowing them to have been stolen- IF- it can be shown he is found in the possession of property proved to have been recently stolen – UNLESS – he shall give some satisfactory explanation of the manner in which it came into his possession.

Theft is complete where the following elements have been proved

- That the defendant dishonestly appropriates
- Goods (property) belonging to another
- With the intention to permanently deprive that other person
- And converting such goods to his use or to another's use
- Without the consent of the owner.

There can be no dispute that the goods listed in Count 2 were stolen from Ezi World Warehouse.

HOWEVER:- This court must ensure the defendant is made aware of the rule in *Machent v Quinn* [1970] 2 All ER 255. THE RULE MAKES IT QUITE CLEAR that it is not necessary to prove all the articles mentioned in the indictment to have been stolen. - If it is proved that the defendant stole any one of them, then this it is sufficient.

The Evidence

Some of the liquor - one and a half boxes of Whiskey and Pulse beer cans and other liquor items identical to those stolen from Ezi World Cargo - were seen in the possession of the defendant on the night of the break in, 26th February 2008. Pulotu Mahe testified the defendant came in a car on the night of the 26th of February 2008 and asked to leave a quantity of liquor at his place for safekeeping- he said "safe from his drinking buddies." The defendant returned the next day, 27th and he took the boxes with him.

The witness Denise Ma'afu corroborates Pulotu's MAHE's evidence — that on 27th she drove the Accused and his friend Papa Lo'amanu to Pulotu's house where they picked up some boxes from Pulotu's place. After collecting the boxes, she saw Papa drinking a Pulse beer. She took the defendant and the boxes and Papa to the house of the latter. Although Denise and Pulotu differ slightly on the time of the collecting of the goods, they agreed on the date which was the day following the alleged theft at Ezi World Cargo, the 27th of February, 2008.

Papa Lo'amanu testified that he had pleaded guilty in the Supreme Court, to a charge of receiving a carton of whiskey from the defendant Koni Kusitafu on 27th of February 2008.

The Prosecution asked the Court to find that because evidence adduced amount to an offence not specifically charged in Count 2, the Court exercises it discretion under section 42(3) of the Criminal Offences Act- and convict the defendant on an alternative verdict.

- "42(3) Where on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specially charged in the indictment but the allegations in the indictment amount to or include (expressly or by implication,) an allegation of another offence falling within the jurisdiction of the Court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specially charging that other offence."

The Crown says based on the evidence before it then the defendant could be convicted of receiving stolen property.

Finding of Facts

- I agree with the prosecution that there was, and there has been sufficient evidence adduced to convict the defendant on count two of the indictment- OF - Receiving stolen property, applying the relevant law- and considering the principles enunciated in the case of *Quinn*

(iii) Count 3: Housebreaking (at Apifo'ou College)

The elements the Prosecution needs to prove are —

- The defendant

- Did in fact enter a building or part of a building
- As a trespasser
- With intent to commit an offence therein. Ie: steal

There can be no dispute that the office of the school Apifo'ou College was forcibly opened, and that an amount of money went missing. What is at issue here was the identity of the offender and the amount of money stolen.

The witnesses for the Crown included police officers PC Valeliano Manu and Corporal Tevita Vailea. The Crown says these officers were expert fingerprinting officers who have had extensive training- both locally and overseas in their field of expertise. Including, but not limited to the lifting and identifying of fingerprints suspects- and the court accepted the officers as experts in their respective fields. PC Havea testified that one of the four prints lifted from the glass louvers at the scene matched those of the right forefinger of the defendant and they contained- over 12 prominent identifying points the required number of points. The officers also matched other prints belonging to the defendant- and they were certain they were the prints of the offender at the locus in quo.

The defendant contended that he had never been fingerprinted. This was contrary to the evidence of PC Alekisio Tonga and Corporal Vailea. PC Tonga testified he took the fingerprints of the defendant on the 23rd of March, 2008 (just after he was arrested) for comparison, and there was a distinct match to the locus in quo. Corporal Vailea produced the fingerprint form which bore the signature of the defendant and was dated 23rd March, 2008. These were the exhibits used to identify the offender. Several times during the trial the defendant requested the fingerprint evidence be sent abroad, for comparison simply because he did not trust the police.

(iv) Count 4— The Theft (at Apifo'ou College)

The evidence adduced revealed that the amount of money stolen from the students' collection boxes was in fact more than $20 dollars which the defendant has been charged. The evidence revealed collection boxes contained more in the vicinity of $700.

The witness- Father Anaua testified that each school class collected money to be donated to the poor as charity at this time of year — just before Easter. These collecting boxes were stored in the college office and the money was transferred into a few boxes whilst waiting to be transferred to the bank for deposit to their account.

The collecting boxes had been stored in a room that was accessed through a hole that had been broken in the wall. None of the money was recovered. Evidence revealed the defendant had also attended that college as a student.

The Court notes the Crown did not apply to amend the amount of money alleged to have been stolen- after Father ANAUA had testified there may have been $700 PA contained within the boxes.

Finding of Fact on Counts 3 and 4

- Because the police found fingerprint evidence on the louvers, which were removed to gain access to the college, and because I heard evidence they were the defendants fingerprints and that is evidence which I believe and I

accept, I can have no hesitation in accepting the crowns evidence that the defendant committed the offence.

- Further the defendant offered no explanation whatsoever for his fingerprints being found by police at the scene. I convict the defendant- on both counts 3 and 4- because the evidence against him is overwhelming.

(v) Counts 5 & 6 — Receiving

The defendant was charged under section 148 subsections (1) and (5)- with receiving stolen property. Subsection (1) relates to receiving generally; and the necessary mens rea namely knowledge or belief that the goods received were obtained by stealing or any other act amounting to a crime. Subsection (5) is put alongside subsection (1) to describe what acts amount to receiving. The second part of subsection (5) provides

> "...A person shall be treated as receiving property if he dishonestly undertakes or assists in its retention, removal, disposal or realisation, or if he arranges to do so."

The elements of receiving in subsections (1) and (5) that the Prosecution has to prove are—

i. The Accused knowing or believing the goods to be stolen
ii. Dishonestly
iii. Undertakes or assists
iv. In the retention, removal, disposa4 or realisation or
v. He arranges to do so

Count 5 — the defendant allegedly went with Papa LOAMANU to Denise MA'AFU's house at Mataika on 27th of February 2008 and offered to sell her 5 pieces of the Tonan waist mats- artefacts "kie Tonga" cheaply. They both spoke to her, but evidence revealed it was Papa Lo'amanu who advertised the Tongan Kie's to Denise telling her the mats belonged to the defendant. The Crown says although the defendant did not advertise the Tongan mats, the fact that he went together with Papa Lo'amanu to Denise, and the fact that mats were advertised as belonging the defendant, the Crown says the defendant did assist Papa Lo'amanu in the realisation or selling the mats and thus he is therefore guilty.

In *R v Ayes* 34 Cr App R. 159 CCA and paragraph 21-319 of Archbold 2004 edition— "to try and prove recent possession as evidence of guilty knowledge in the receiving charges where the only evidence against the defendant is that he was in possession of recently stolen property, the prosecution will try and infer guilty knowledge.

(a) If the defendant offers no account for his possession of the property
(b) If any explanations consistent with his pleas of innocence - is untrue.

The defendant said that the 5 kie pieces belonged to Papa Lo'amanu. Whereas Denise gave evidence that the pieces were advertised to her by Papa Lo'amanu - as belonging to the defendant. The Crown says the defendant therefore has not given a satisfactory account for his possession of the 5 kie mats, which were very recently stolen from EZI World Cargo.

Finding of Fact on Count 5

- I agree with the prosecution it has adduced sufficient evidence to convict the accused on count 5 in this indictment

In count 6 — The defendant admitted to advertising a box of shower and doorknobs to one Satio Matakaiongo. The defendant testified that he had approached Satio because he knew Satio had a brother who was a construction worker. He also testified that he knew Satio' s brother very well and he knew where he lived. The Crown says the defendant chose to approach Satio whom he hoped would sell the box of goods to his brother for a reduced price. The defendant when he was cross examined as to why he had not directly sold the goods to Satio's brother- said he just went to Satio so he would contact his brother. When it was put to him that the real reason he did not go directly and advertise the goods to Satio's brother because the brother's suspicion would immediately be raised about the goods, the Crown says the defendant evaded the question and he replied he had only said "yes" in the Interview to advertising the goods to Satio because he was still suffering from a beating he had received from the Police on his arrest. It was suggested by the Crown the defendant in advertising the box of goods to Satio he either knew or believed that the goods had been stolen, or obtained under circumstances— and that amounts to a crime.

Finding of Fact on Count 6

- I agree with the prosecution on the evidence the prosecution has adduced enough evidence to convict the accused on count 6

Ancilliary Matters

I wish to deal with certain other points which were raised during this trial-

The defendant throughout the trial maintained he was beaten by the police. Police officer Mosese Vi answered when he was cross examined by the defendant- about his alleged suffering at the hands of the Police the officer replied the defendant was "forcibly arrested" because the defendant was a suspect and he was very difficult to find. PC VI's testimony was corroborated by IP Hausia's. IP Hausia testified the defendant took to his heels in the bushes at Mataika, when he saw the police vehicle approaching they suggested the force used against the defendant in order to restrain and arrest him was reasonable.

Finding of Fact

- I believe the defendant was in fact evasive and that he took to his heals meaning he ran, and he evaded arrest.

- I do not believe the defendant was injured significantly, because no evidence was adduced of any injury to the defendant during the trial. If he ran he is likely to be chased.
- I do not believe that his confession- or his VCS were coerced and as such they were voluntarily made.

Allegation of Missing Exhibits

The defendant queried the absence of certain of the police exhibits in court. I feel it is right and proper to address this concern for the benefit of the defendant. With regard to the 5 kie mats, IP Hausia and Toni Heimatoto the brother of Lomeli the complainant gave evidence the 5 kie mats seized from Denis's Ma'afu's home were positively identified by Lomeli as part of his Tongan artefacts stolen from the EZI World Cargo warehouse. Lomeli's brother Toni Heimatoto testified he signed the property book at the police station for the release of the five Tongan artefacts towards the latter part of last year, and he had shipped the artifacts to Lomeli in New Zealand late last year. He testified he was also present when his brother Lomeli identified the five Tongan kie mats at the Police station.

The court indicates now: - AND it indicates forcibly- for the benefit of the defendant, that it is perfectly acceptable; and proper practice for police to return stolen exhibits to a complainant — more especially after a reasonable time has elapsed against receipt. The authorities can of course take photographs of perishable goods alleged to have been stolen- as direct evidence. Moreover in this particular case the defendant had deliberately failed to surrender to the custody of this court in July 2008- seven months previously. It is also perhaps fair to say the defendant might not have been arrested for quite some considerable time.

A reasonable man might ask himself so what else is the victim of a crime supposed to do? Must he wait for his property forever, and, are the police able and willing to store alleged stolen good, for long periods of time- awaiting the result of court cases? The evidence in this case reveals one of the victims of this particular crime lived overseas; and he wanted the return of all his stolen property (the Tongan artefacts)- which he is perfectly entitled to request.

I am; and moreover, I have been completely satisfied- the police were right in returning the stolen artefacts to their lawful owner in New Zealand on request. The defendant cannot rely upon such an argument - to support his case- when he was unlawfully absent from this court's jurisdiction. I have taken into account - all the parole evidence, adduced in relation to the defendants claim concerning the non production of the five stolen Tonga kie mats as evidence; (and or the alcohol) BUT I am completely satisfied these items existed -and that they were in fact stolen by the defendant- and they were returned to their rightful owner against receipt. Common sense has prevailed.

The box containing a shower and the door locks

The defendant maintained these items were taken into the interviewing room by a person called Leka, while the defendant was being interviewed. However the evidence given by the interviewing police officer PC Vi and the countersigning officer PC 'Otutaha point to the fact the box was at the police station before the

defendants arrest- and before his interview with the police. I chose to accept the evidence of the police officers.

The Crown say there were inconsistencies in the defendant's evidence which the Crown says pose questions as to the defendant's credibility. For example they say, he said, he and his wife were separated- but then he changed his story to them separating. The assertion is correct. Second, the Crown point to his acquaintance with Denise; contrary to Denise's testimony, the defendant maintained Denise was one of his drinking buddies and they were well acquainted. I find on balance the defendant was not a credible witness.

The Crown concluded their case to say- quote- by the defendant's own admission,

- He just happened to be at the wrong place at the wrong time.

The Crown says the defendant has not adduced satisfactory evidence as to how or why he came to be in possession of the stolen goods as alleged in Counts 1, Count 2 and Count 5 and Count 6- **and I agree**.

The Crown says it could also be inferred from looking at the circumstances of the defendant at the time of the alleged offending,

- That he was separated from his wife,
- He had 6 children to support,
- He was living with his elderly, unemployed mother- who also had to be fed,
- The defendant was unemployed and,
- Living in the home of Sifa Apo or Sifa Latu at Ngeleia,
- Where he was open to association with persons of questionable — if not criminal characters.

The crown says the evidence also revealed the defendant was very familiar with the two places where the offending took place

- Apifo'ou College and
- Ezi World Cargo,
- Both are located at Ma'ufanga,
- Where the defendant's home is situated.

ACCORDINGLY

I find the prosecution has proved its case against the defendant on -five out of the six charges which have been levelled against him.

I convict the defendant as follows:-

Count one. He is acquitted and discharged on count one
Count two. He is convicted of receiving mats and alcohol
Count three. He is convicted of Housebreaking
Count four. He is convicted of theft of a sum of money
Count five. He is convicted of receiving stolen property
Count six. He is convicted of receiving stolen property

In my opinion the prosecution has proved its case beyond reasonable doubt so that I am sure the defendant committed counts 2-6 of this indictment and he is accordingly convicted on those five counts.

R v Azuelo

Supreme Court, Nuku'alofa
Shuster J
CR 361/2007

17 and 18 March 2009; 18 March 2009

Criminal law – grievous bodily harm – defence of self-defence rejected – accused found guilty

A number of people were cruising around the town of Nuku'alofa, during the early hours of 3rd November 2007 and were in the accused's wife's car. At some stage the accused and the victim met and were standing together. The victim was stabbed twice and was taken to hospital. The accused was charged with the offence of grievous bodily harm. He claimed self-defence as a defence to the charge.

Held:

1. Circumstantial evidence could be powerful evidence, but it was important that it was examined with care, and the Court had to consider whether the evidence upon which the prosecution relied in proof of its case was reliable and whether it did in fact prove guilt. Furthermore, and before convicting on circumstantial evidence the Court should consider also whether it revealed any other circumstances which were of sufficient reliability and strength to weaken or to destroy the prosecution case.
2. The Court must consider the matter of self-defence in the light of the situation which the defendant honestly believed he faced at the material time.
3. The Court found that after stabbing the victim twice the accused ran away. Running away was evidence of guilty knowledge.
4. The accused's assertion of self defence was rejected as the force used by the accused was unreasonable and unlawful.
5. The accused was found guilty of causing grievous bodily harm.

Cases considered:

Fagan v the Metropolitan Police Commissioner [1968] 1 QB 439
R v Fa'aoso [1996] TOSC 3; [1996] Tonga LR 36

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown : Miss Tupou
Counsel for the accused : Mr Pounou

Extemporaneous judgment

The Defendant

The defendant was arraigned on 15th January 2008 before FORD CJ and pleaded Not Guilty to a single count indictment alleging an offence of grievous bodily harm; as is his legal right.

The defendant elected to be tried by a Judge sitting alone. The matter was adjourned on several occasions and, was finally set down for trial on Tuesday 17th March 2009. Delays in this case were primarily due to the absence of a material witness- the complainant- who we were told is currently overseas in New Zealand.

Count One:

GBH contrary to section 106 (1) and 2 (b) of the Criminal Offences Act (Cap 18) particulars of which are: -

> VIC JAVELOSA AZUELO - on or about the 3rd November 2007 at KOLOMOTU'A you did wilfully and without lawful justification caused grievous harm to PITA TAVAKE:- when you stabbed him in the stomach with a hunting knife.

The Brief Facts

The Crown alleges that in the early morning of the 3rd November 2007 the defendant was standing next to the victim in Kolomotu'a when he stabbed the victim twice- in the stomach. The Crown says the defendant then ran off to his home.

The Crown says - the defendant was angry at the time he committed this offence - because his wife had been out all night, with others- consuming alcohol and cruising around town.

The victim collapsed at the scene of the assault and was taken to the Vaiola hospital where he was operated on for his injuries found to be two stab wounds. He was detained and treated at the hospital for his injuries and subsequently released a number of days later and treated as an outpatient.

The doctor's medical report details the victim's treatment at the hospital. The victim lost three pints of blood and received a blood transfusion, but he did subsequently recover from his injuries.

The defendant was subsequently arrested by the police and interviewed under caution. He was then charged with the offence of Grievous Bodily Harm with which he appears in court today. In his defence the defendant claims self-defence; which if proved- is of course a complete defence to the charge.

The Burden of Proof

In this case the prosecution must prove the defendant is guilty.

- A defendant does not have to prove his/her innocence.

- In a criminal trial the burden of proving the defendant's guilt is, and always remains, on the prosecution throughout the trial

The Standard of Proof

How does the prosecution succeed in proving the defendant's guilt? The answer is - by making me sure of it, nothing less than that will do.

- So, if after considering all the evidence I am sure that the defendant is guilty, then I must return a verdict of 'GUILTY'.
- If I am not sure then my verdict must one of 'NOT GUILTY'.

Circumstantial Evidence

Sometimes a judge and / or a jury- are asked to, find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw a defendant commit a crime; or if there is a video recording of the incident which plainly demonstrates his guilt; or, if there is reliable evidence of the defendant himself having admitted the offence, these would all be good examples of direct evidence against him-her.

On the other hand, it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime, and of the defendant; which they say when taken together will lead you to the sure conclusion that it was the defendant or defendants who committed the crime.

It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a judge or a jury can say 'We now know everything there is to know about this case'. But the evidence must lead to the sure conclusion that the charge which the defendants face is proved against him.

Circumstantial evidence can be powerful evidence, but it is important that it is examined with care, and I have to consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does in fact prove guilt. Furthermore, and before convicting on circumstantial evidence I should consider also whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or to destroy the prosecution case.

I should also be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, neither the prosecution the defence nor I, should do that.

The Elements of the Offence of GBH s 106 Cap 18

To find the Accused Guilty of an offence alleging Grievous Bodily Harm under section 106 of the Criminal Offences Act-the prosecution must prove each of the essential elements of the offence. In layman's terms and in a nutshell the essential elements are-

Every person who

- Wilfully and without lawful justification
- Causes grievous harm to any person
- In any manner or by any means whatsoever- commits an offence

Grievous harm means-

In layman's terms it means - really serious bodily harm

a) Its any harm endangering life
b) The destruction or permanent disabling of any external or internal organ, member, or sense-or
c) Any severe wound-or
d) Any grave permanent disfigurement

Does GBH also means there was an assault

The term assault is frequently used to include both an assault-and-a battery; Strictly speaking an assault is an independent offence and a court should always treat it as such *Fagan v the Metropolitan Police Commissioner* [1968] 1 QB 439.

So an assault is an act- [and not a mere omission to act]

By which a person

- intentionally or
- recklessly
- causes another person to apprehend-[that is to say to fear]
- immediate unlawful violence

So an assault involves a hostile intent.

It is settled law the use of a weapon in order to carry out an assault- is an aggravating feature to any offence. For example the use of a person's feet and or a head butt, have been defined by Higher Appellant Courts - as the use of a weapon. A knife can become an offensive weapon, whenever it has been used unlawfully, but that is dependent upon the actual-circumstances of the case.

SELF-DEFENCE

The defendant via his counsel and via his voluntary caution statement to the police says that he was acting in self-defence; if that statement is true- then the defendant is entitled to be acquitted.

1 Because the prosecution must prove the defendant's guilt
2 It is for the prosecution to prove that the defendant was not acting in lawful self-defence,
3 It is not for the defendant to establish that he was,
4 As a judge I must consider the matter of self-defence in the light of the situation which the defendant honestly believed he faced at the material time.

I must first ask myself whether the defendant honestly believed that it was necessary to use force to defend himself- at all. I must also ask myself could the defendant- have simply walked away.

Further it is settled law, the defendant cannot benefit from an acquittal for self defence, if he the defendant was the aggressor, or, if he acted in revenge, or, if he knew he did not need to resort to violence.

- If I am sure the defendant did not honestly believe that it was necessary to use force to defend himself, then he cannot have been acting in lawful self-defence, and I need consider the matter no further.
- But what if I thought that the defendant did in fact honestly believe, or may honestly have believed that it was necessary to use force to defend himself?
- Is he entitled to be acquitted? Or must he tell me it was necessary for him to use force, in his own words by direct evidence or, via his VCS as here?
- If he does tell me he had to use force to defend himself- then it is settled law that I must also decide whether the type and the amount of force the defendant used was reasonable.
- Obviously, a person who is under attack may react on the spur of the moment, and he cannot be expected to work out exactly how much force he needs to use to defend himself.
- On the other hand, if the defendant goes over the top, and he uses force out of all proportion to the anticipated attack on himself; or he uses more force than is really necessary to defend himself, then the force used- would not be reasonable.

So in this case I must take into account both the nature of the attack on the victim and what the defendant then did. Did he assist the victim? Did he call for help, or did he run?

The Medical Evidence

Dr Veronique LALOE testified that PITA TAVAKE was admitted as an emergency patient on the 3rd November 2007 at 6.30am after having been allegedly stabbed with a knife.

On examination there were two stab wounds on the upper abdomen, one 2cm-long a SUPRA UMBILICAL wound, and a 3cm-long SUBCOSTAL wound on the left side of the upper abdomen. The patient was pale, and shocked upon arrival with blood coming out of the NASTROGASIC tube.

He was taken to the operating theatre for an emergency LAPAROTOMY after resuscitation. The surgery revealed a 2 cm-long traumatic laceration of the greater curvature of the stomach with active and severe bleeding from the posterior gastric vessels into the lesser sac.

In excess of 3 litres of fresh blood and clots were sucked out from the abdominal cavity. The bleeding was arrested by sutures and ligatures, and the perforation sutured. The patient received six units of blood as a transfusion and the wounds were consistent with a history of STABBING.

The patient has made a good postoperative recovery and was discharged from the surgical ward on the 9th November 2007. He was treated as an outpatient on 14th November 2007. On the 15th November he returned to the outpatient clinic with abdominal pain, he was admitted overnight but discharged the next day.

The Oral Evidence

PW1 AILA KATA gave evidence that on the night in question the 3rd November 2007, she went out clubbing with the wife of the accused, who drove the car- and the victim PITA TAVAKE and another passenger.

PW1 testified the occupants of the car had all been drinking. In cross examination she admitted there came a point in time when they met up with the defendant who tried to stop the car to speak to his wife, twice, and the defendant's wife swerved out of the way- to avoid hitting or colliding with him.

Just after dawn- the vehicle arrived back home, PW1 testified they were met by the defendant, and there was some type of confrontation. PW1 says she did not see the stabbing, and she also said she did not hear the victim arguing with the defendant.

> She said- "No one was paying attention, we did not know what he (Vic) was being angry about"

PW1 said in evidence the victim Pita was going out with a niece of hers.

PW1 described how she was standing at the gate of the property with the gate closed talking to the two persons who were still inside the vehicle. She testified the defendant went to the back of the vehicle and she said,

> "I noticed he was fumbling with some rope. I saw him tying the rope, he came from the back of the car (boot) and then he came up to Pita and he was saying something. Pita was saying what is the Philipino saying- why is he angry. I was surprised to hear he (Pita) was dropping down to the ground, saying he was injured.

PW1 testified Pita did not fight with the defendant. She testified in examination in chief that Pita had stab wounds to his stomach so they took him to the hospital by car. She also testified the defendant ran from the scene, when asked where he ran- she said into the house.

PW1 was cross examined at length. She admitted her group were cruising around town, and that they had all been drinking alcohol but she was evasive about how much alcohol they had consumed or what type of alcohol they had consumed.

She consistently maintained under cross examination that there was no argument or words said between the defendant and the complainant. The defence questioned her intently about her view of the scene of the crime and what she was doing at the time of this alleged crime. She confirmed she was talking to the passengers in the car and she confirmed she was drunk.

The Defendant's VCS

The defendants VCS and charge statement were read into evidence and were admitted as evidence by consent.

THE LAW SAYS: - I am required to carefully consider the defendant's voluntary record of interview, and also his charge statement, to see if they voluntary; or not, in the true sense of the word.

In relation to that, it is my duty to decide two issues in relation to the statements and to any alleged confession.

- First I must decide if the defendant actually made them
- Second but only if I am sure that he did make them, I have to consider whether or not what he said was true.

In determining that I should take into consideration all the circumstances in which I find it was, or may have been made. If for whatever reason I am not sure whether the confession was made, or I am not sure whether it was true, then I must disregard it.

If on the other hand I am sure both that it was made and is true, I may rely upon it--- even if it was or may have been made by oppression or by other improper circumstances.

In this particular case the evidence reveals the defendant wrote in his own handwriting all the answers to the police questions which totaled some 16 questions in all, and he hand wrote his reply to the charge statement. Besides which, these documents were admitted by consent.

> In *Rex v Fa'aoso* [1996] TOSC 3; [1996] Tonga LR 36 it was held, "a confession alone can be sufficient to justify a conviction where the jury is satisfied that the confession-is reliable and it is cogent evidence.

Finding of Fact

Exhibits one and two admitted by consent were voluntary in the true sense of the word.

Analysis

The evidence adduced for the prosecution and the defendant reveals the following:-

- A number of people were cruising around the town of Nuku'alofa, during the early hours of 3rd November 2007 and were in the defendant's wife's car.
- At a point in time the defendant and the victim in this case met, and were standing together and in close proximity in Kotomotu'a on the morning of the 3rd November 2007.
- At that time the defendant did not know the identity of the victim- according to the defendant's VCS.
- At the time of this meeting the defendant was carrying a knife- the victim did not have a knife on him.

- PW1 says the victim did not argue with the defendant- though she said the victim had been drinking.
- The witness PW1 says the defendant came from the boot of his wife's car, with a rope on his hands, and he was standing in close proximity to the victim face to face.
- PW1 said she heard the victim says he was injured, and then he fell on the ground.
- PW1 saw blood and she formed the opinion the victim Pita had been stabbed.
- PW1 said the defendants ran away into the house.
- Via his charge statement the defendant admits, "*I just make sure defence, because he is aggressive to attack me for survival times, so that's how I stab, I used my knife*".
- The defendant says in his VCS he was punched- but the evidence of PW1 says she did not see- or hear that.
- The defendant in his VCS says the victim was drunk, he just wanted to talk to his wife about family matters; he said in his VCS the victim would not go away.
- PW1 on the other hand says the defendant was angry.
- The defendant says he went to the police about 8.00am and told the police he had stabbed "one Tongan".
- The hospital say the victim Pita, was admitted at 06.30 am — so why was there a time delay in reporting the crime by the defendant to the police?

Findings of Fact

- I find as a fact that on the 3rd November 2007 at Kolomotu'a the defendant stabbed the victim Pita TAVEKA- not once-- but twice.
- I find as a fact upon hearing the evidence that after stabbing the victim twice-the defendant ran away.-
- That running away- is also evidence of guilty knowledge; and is part of the res gestae? Authority - *DPP v Anderson* & *R v B* (infers guilty knowledge)
- I believe the evidence of PW1 who although she admitted she was drunk- (is and was capable of giving evidence) that there was no altercation on the part of Pita TAVEKA towards the defendant.
- I find the aggressor in this case to be the defendant a man who admitted he carried a knife, and he admitted he used it.
- There is no doubt in my mind, the defendant was angry at his wife ostensively for going out in her car, transporting others that night, and the defendant took out his frustrations on a man he did not know in the manner described to this court.
- I find as a fact the stabbing was in anger.

- This was an extremely serious offence, as the doctor indicated because- it was life threatening.
- I reject the defendants assertion of self defence, I am sure the force used by this defendant was unreasonable and UNLAWFUL.
- Accordingly I find as a fact the defendant cannot have been acting in lawful self-defence.

I find the defendant guilty of causing grievous bodily harm by unlawfully stabbing PITA TAVEKA on the 3rd November 2007.

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Azuelo v R

Court of Appeal, Nuku'alofa
Ford P, Burchett, Salmon, and Moore JJ
AC 09/2009

29 June 2009; 10 July 2009

Criminal law – grievous bodily harm – appeal against conviction – self-defence pleaded – appeal allowed and conviction quashed

For the facts and the Supreme Court judgment, see *R v Azuelo* [2009] Tonga LR 140

10 The appellant was tried and convicted of causing grievous bodily harm. He appealed in respect both of conviction and sentence.

Held:

1. The only account of what occurred in the moments before the injury was that of the appellant. The onus being on the prosecution to prove unlawful injury (injury not inflicted in self-defence), the Court failed to perceive the scanty evidence before it as leaving a reasonable doubt whether the appellant was acting reasonably in self-defence having regard to what he honestly believed to be his situation.
2. It was not reasonably open to the trial judge, on the case put forward by
20 the Crown, to find beyond all reasonable doubt that the appellant was not acting in self-defence. That being so, the proper order was simply that the conviction be quashed.
3. The Court recorded that the Crown felt unable to support the sentence imposed. There was an issue of very considerable provocation, and in the circumstances, the sentence of six years was manifestly excessive.

Cases considered:

Alan Abraham [1973] 57 Cr App R 799
Palmer v The Queen [1970] UKPC 2; [1971] AC 814
R v McInnes 55 Cr App R 551
30 R v Reeves (1992) 29 NSWLR 109
Shannon (1980) 71 Cr App R 192

Counsel for the appellant : Mr Pouono
Counsel for the respondent : Mr Kefu and Ms Finau

Judgment

[1] The Appellant was indicted upon one count that on or about 3 November 2007 he did wilfully and without lawful justification cause grievous bodily harm to Pita Tavake when he "stabbed him in the stomach with a hunting knife". He elected to be tried by a judge sitting without a jury, and he was tried and convicted by Shuster J. on 17 March 2009, and sentenced on 27 March 2009. His appeal is in respect both of conviction and sentence.

[2] Briefly stated, the circumstances out of which the indictment arose were the following. The Appellant is a Philippino resident in Tonga and married to a Tongan woman ("Vika"), by whom he has a son of perhaps four years in age as at the date of the alleged offence. That morning, at about 6:30am, Vika, a woman friend of hers, 'Aila Kata, another friend Palavi Pasi, one Pelenatita and the man Pita Tavake, who was not known to the Appellant, drove up to a house near the Appellant's house, stopped the car and got out. The car was the Appellant's and his wife had been driving the others through much of the night to various places where liquor was obtained and/or consumed. They were all said to be drunk ('Aila Kata said: "we drank all night"), though not so much so as to be incapable of driving the car, either then or a little later when Pita Tavake had to be taken to hospital. During the night, according to the Appellant's statement, which was not contradicted, he had gone out on a bicycle looking for them, as he had expected his wife to be home many hours earlier. He had seen her driving, and she had nearly run him down twice, a matter he had reported to the police - again there was no evidence contradictory of his claim to have made this report, while the fact that some such incident had occurred was admitted by 'Aila Kata, although she gave an account of it conflicting with the Appellant's account, and, indeed, with her own earlier statement to the police.

[3] The only oral evidence led by the Crown concerning what happened that morning was the evidence of 'Aila Kata and the evidence of a surgeon at the hospital. There were also in evidence a hospital report and the Appellant's voluntary statements upon interrogation and upon being charged. The hearing had been adjourned on several occasions due to the absence of witnesses including the injured man Pita Tavake himself and, presumably, also one or two other occupants of the car. But, at the time of the hearing, Mr Tavake was still unavailable, having gone to New Zealand, and (without explanation) two other members of the drinking party, who were present, were not called. The hunting knife referred to in the indictment, though it had allegedly been in police possession, was not produced, and counsel for the Crown conceded the description of the knife in question in the Tongan language indicated it was not actually a hunting knife, but a pocket knife.

[4] The only direct account of what occurred immediately before and at the precise time the injury to Pita Tavake was sustained is that of the Appellant in his voluntary statements. As will be explained, the witness 'Aila Kata does not give such an account in her evidence. In what is entitled his "Record of Interview" he refers to his wife going out drinking with people, leaving "the kids" [sic]; to the incident in the road of

which he said he had "complain[ed] already to the police"; and he says it was when he then got home that the drinking party arrived. He spoke to his wife complaining of her conduct. Asked specifically: "Did you talk with the man?" he replied: "I talking to my wife but he is the one answering and swore... and continue swear and say bad words."

Asked: "Did you have a problem with Pita Tavake when you talk with your wife, but he answer it?" he replied:

> *"First time (No) I say to him 'Zip your mouth I talking to my wife'. He is the one answering to me but not good words, and I tell him to 'go away because you are drunk and you are not our family'. He is continue say swear to me bad words, and kapikapi [sic-'kapekape' is a Tongan expression for swearing] so, up to the time that he asking me to fight so I tell him 'go away, go home, your (scil you're) drunk' and he tell me to fight, then he is starting to attack me and I block all his punches and I back ward then he attack and attack me again so I back ward but because the car is in my back I cannot back ward any more so I touch something in my back it's my knife so I stab him ones [scil once], but because he is drunk, he twist to the other side and punch me with he's [sic] right hand so he got another scripe [scil scrape] but not a stab."*

At another point in the interview, the appellant referred to "successive attack and attack to me", saying "I cannot back ward any more because the car is in my back so I don't have choice I stab him."

[5] Upon being charged, the Appellant said: "I just make self defence because he is aggressive to attack me for several times, so that's how I stab and used my knife." Unfortunately, a typed-up version of this is quite garbled, although the handwriting, while not perfect, is sufficiently legible. It is the typed-up version that appears, word for word, in the judgment below, and his Honour may not have appreciated the clarity of this claim to have acted "just" (ie. only) in self defence, after several attacks.

[6] The judge appeared to suggest the Appellant delayed in reporting the matter to the police, but it is not clear what (if any) significant delay there was. The Appellant may have had to make arrangements about the child whose mother was at the hospital. The mother had the family car. The distance to the police station was not in evidence, and the whole period from the incident to the report (if the times are accurate – it is not clear what was the source of the time of arrival at the police station) was about one and a half hours. Another question raised was the effect of the Appellant departing the scene. But his statement (not contradicted by the one witness at the scene who was called) was that his wife Vika threw a stone at him, and he told her and two of her friends to drive Pita Tavake to the hospital. It seems difficult to infer beyond a reasonable doubt that he left the scene for fear of prosecution, if his presence was only delaying the taking of the injured man to hospital by prolonging a conflict with Vika, and he may also have had to see to the child.

[7] When the Crown case inevitably, because of the absence of a number of eye witnesses, was so dependent on a record of interview which raised self defence, it is a case where any indications that the Appellant was frank and accurate in what he said must be specially important. No attention seems to have been given to this question at the trial. There is, as has been noted, no suggestion the Appellant was not entirely truthful when he said he had been to the police himself after his bicycle was twice side-swiped, and the investigator did not challenge that statement in questioning him. Indeed, it is clear from a passage in the cross-examination of 'Aila Kata that the police had obtained a statement from her about this incident. More important is his claim that he only stabbed once, the other wound being a scrape accidentally inflicted in the struggle. For, although the learned judge referred to the appellant as having "stabbed the victim...not once but twice", the fact is the medical evidence fully supports the Appellant's account. The surgeon's report, after referring to the admission at 6:30am, states:

> *"On examination, there were 2 stab wounds on the upper abdomen: one 2 cm-long, supra-umbilical wound, and a 3 cm-long subcostal wound on the left side of the upper abdomen. He was pale and shocked on arrival, with blood coming out of the nasogastric tube, and was taken to the operating theatre for emergency laparotomy after resuscitation.*
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> *Laparotomy revealed a 2 cm-long traumatic laceration of the greater curvature of the stomach with active, severe bleeding from posterior gastric vessels into the lesser sac. In excess of 3 litres of fresh blood and clots was sucked out from the abdominal cavity. The bleeding was arrested by sutures and ligatures and the perforation sutured. Six (6) units of blood were transfused. This is consistent with the history of stabbing.*
>
> *The patient made a good postoperative recovery and was discharged from the surgical ward on November 9th and reviewed in outpatient clinic on November 14th. He presented to the outpatient department at night on November 15th with some abdominal pain, was admitted overnight for observation, and he was discharged the next day."*

[8] It will be observed that this report, although it refers to two wounds, goes on to describe the repair of only one. In oral evidence, the surgeon, asked whether both wounds were "penetrations", after referring to the 2cm wound "just above his belly button", explained "the second one was more superficial as I recall it".

[9] It is important to realize this is the whole of the evidence on which Shuster J found, and emphasised five times in his reasons for conviction and sentence, that the Appellant "stabbed the victim...not once but twice"; "stabbing the victim twice"; "this was a particularly serious case because it involves stabbing someone not once but twice"; "this was a deliberate act of stabbing not once but twice"; and the appellant "used that knife not once but twice in anger". On the evidence, this emphasis on the

second stab (as presumably assisting the Crown to show the Appellant was not merely acting in self-defence) ignores the legal burden on the Crown and also the common sense consideration that such a consistency between the Appellant's account and the medical evidence strongly suggests the Appellant's statement was truthful.

[10] Before turning to the law on self defence, it is necessary to complete the picture of the evidence by looking further at what emerged from the examination of the witness 'Aila Kata. At the outset of his recital of this evidence, his Honour said she "testified the occupants of the car had all been drinking". Upon their return, the judge continues, "there was some type of confrontation, [the witness] says she did not see the stabbing and she also said she did not hear the victim arguing with [the appellant]. She said 'No one was paying attention, we did not know what [the Appellant] was being angry about'." The last statement seems at least disingenuous in the circumstances, but his Honour's next comment appears rather to be intended to suggest that Pita Tavake was not likely to have had an interest in the Appellant's wife (although he was the one sitting with her while they drove around) such as to lead him to be aggressive towards the Appellant; he notes 'Aila Kata "said in evidence the victim Pita was going out with a niece of hers." This is in fact incorrect; the evidence is he expressed a wish to do so, not that they were going out. 'Aila Kata in cross-examination added they neither were going out that night nor are going out. His Honour also stated the witness "testified Pita did not fight with the defendant". But this statement of the effect of her evidence needs to be seen in context. What she said, after the statement suggesting she did not know why the Appellant should be angry, was: "We then continue on with our conversation [aside from the Appellant and Pita Tavake, there were four persons in the drinking party present at this time, all in or near the car] and I was surprised when I heard him [ie Pita Tavake] shouting, swaying off the ground saying he's bleeding." She was then asked: "During your conversation, did Pita say something to [the Appellant]? and answered "No", the next question in chief being the leading one "Was there any *cause of fight* or something?" to which also she said "No". [Emphases added]

[11] Asked to describe what happened to Pita Tavake, 'Aila Kata said:

> *"At the time, I didn't saw him and I didn't see it with my eyes but I was just surprised Pita was falling on the ground, and he was telling me, 'it's the Philippino'. I didn't see what it was. I just turned around [emphasis added] he already stabbed him."*

In cross examination, she admitted that she did see Pita Tavake and the Appellant "facing each other" with the Appellant "turning his back on [the vehicle]". At that time, she said the Appellant "was the only one talking". But then she added, pressed about this answer, "I was talking to Palavi as we were talked [sic] ; no one pays attention as we don't know what he is talking about". The final questions and answers in her cross examination were the following:

> *"XXD: So you did not see the time Vic was alleged that he caused harm to Pita.*
> *Wit: Yes the truth is I did not seen the side or whether he stabbed him because I did not pay attention and I did not see anything.*

> *XXD: I put to you that your statement is not true because you talk to the place where Vic was talking to Pelenatita and Palavi and you were saying that you do not know how it occurred?*
> *Wit: I mean the time that Vic carried out the stab, as I was standing and talk to those two inside the vehicle.*
> *XXD: The reason why you did not notice of what's going on because you were drunk that morning.*
> *Wit: Yes the truth is, I was drunk."*

[12] Although the issue of self-defence was raised at the initial report of the incident by the Appellant to the police, there was no evidence at all comparing the physique of Pita Tavake with that of the Appellant. The Appellant, of course, was in Court and could be seen to be a man of no more than moderate size and apparent strength. It is certainly quite possible, having regard to the paucity of the evidence, that he was forced back and back against the car because he was completely out-matched physically by Pita Tavake. In this situation, the burden and standard of proof are vitally important. In *Alan Abraham* [1973] 57 Cr App R 799 at 803, Edmund Davies L.J. (as Lord Edmund Davies then was) said: "By his plea of self-defence the accused is raising in a special form the plea of Not Guilty. Since it is for the Crown to show that the plea of Not Guilty is unacceptable, so the Crown must convince [the jury] beyond reasonable doubt that self-defence has no basis in the present case."

[13] In *R v Reeves* (1992) 29 NSWLR 109, Hunt CJ at CL, with the agreement of Mahoney JA. (as Mahoney P. then was) and Badgery–Parker J, said (at 117), after emphasizing a trial judge's duty to direct a jury that the Crown must prove the case beyond reasonable doubt, that "in some cases (such as ... self-defence...) it will usually be necessary to repeat the direction and to point out that the Crown *must eliminate any reasonable possibility that the accused acted in self-defence* [emphasis added]". This way of putting the matter is peculiarly apposite to the present case where the evidence led by the Crown left a reasonable possibility that the Appellant, who said he had no choice, felt he was pinned to the car by a more powerful man from whom he could back away no further.

[14] So the Crown has to disprove self-defence, and do so beyond all reasonable doubt. The content of what must be disproved must, of course, be related to the facts proved. In *Halsbury* 4th ed. reissue vol. 11(1) at para. 456, the law is stated:

> *"The test to be applied in such cases is now established . . ., that is the force used in self-defence . . . must be reasonable in the circumstances. However, a genuine belief in facts which would justify the accused using force in self-defence may be relied upon even if there are no reasonable grounds for the belief and it results in the use of force which is in fact unreasonable . . .*
>
> *In deciding whether the force used was reasonable . . . it cannot be ruled that a person who is attacked must retreat before retaliating. A person's opportunity to retreat with safety is a factor to be taken into account in deciding whether*

> *his conduct was reasonable, as is his willingness to temporise or disengage himself before resorting to force."*

[15] Halsbury's brief statement is elaborated in Blackstone's Criminal Practice (2006) at 58-62. At 60, it is stated specifically: "There is no longer any duty to retreat", and also at 60, the judgment of Lord Morris in *Palmer v The Queen* [1970] UKPC 2; [1971] AC 814 at 832 is cited :

> *"[I]t will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."*

Lord Morris's judgment, followed in the Court of Appeal in *R v McInnes* 55 Cr App R 551, was described in Archbold (2009) sec. 19-41a as the "classic pronouncement upon the law relating to self-defence".

[16] It was suggested in argument that the use of a pocket knife by the Appellant against a man who did not have a deadly weapon must have been excessive. But fists may be lethal, depending on the weight and strength behind them, and the principles we have referred to do not admit any such hard-and-fast rule. In *Shannon* (1980) 71 Cr App R 192, the appellant, who weighed about 11 stone, was attacked by a man of 14 stone in an aggressive manner. Two other men tried to pull the attacker away, but had not yet succeeded when the appellant, who had a large pair of scissors in his hand at the time, used them to stab his assailant three times, one stab being hard enough to break a rib and penetrate the heart. Ormrod LJ, speaking for the Court of Appeal at 197, made it clear the trial judge erred by not directing the jury in terms of *Palmer v The Queen*; instead he had "effectively excluded the state of the accused's mind" by putting the question simply as whether "the appellant use[d] more force than was necessary in the circumstances". The conviction was quashed.

[17] After stating the law of self-defence in general terms (of which no complaint is made), the trial judge in the present case said :

> *"On the other hand, if the defendant . . . uses more force than is <u>really necessary</u> to defend himself then the force used would not be reasonable [emphasis added]."*

This statement overlooks Lord Morris's test of what a person under attack "honestly and instinctively thought was necessary" and substitutes the judge's assessment of what was "really necessary", offending against the very nub of the decision in *Shannon*. And when his Honour came to apply his test, he did so emphasizing that there were two stabs and the Appellant then ran away, without any reference to the evidence that cast grave doubt on whether the second wound was deliberately inflicted or was more than trivial, and without any examination of the question

whether the Appellant was driven from the scene by his wife, or in any case was justified in telling those who must have still had the key to his car to take Pita Tavake to hospital without further delay. The two stabbings, accepted without consideration of the absence of oral evidence as to how, particularly the second wound, was inflicted, and without consideration of the significant qualification put on the admission by the Appellant that was relied on, and the consistency of the medical evidence with it, must have played a large part in the conclusion that the Appellant was the aggressor and the force used "was unreasonable".

[18] There was, of course, no evidence from 'Aila Kata of any aggressive act on the part of either man that was seen by her prior to her becoming aware of the injury. She explained this by saying she was not paying attention, she was talking to others, and she was drunk. But the fact remains the only account of what occurred in the moments before the injury is that of the Appellant. The onus being on the prosecution to prove unlawful injury, that is injury not inflicted in self-defence, his Honour failed to perceive the scanty evidence before him as leaving a reasonable doubt whether the Appellant was acting reasonably in self-defence having regard to what he honestly believed to be his situation.

[19] The appeal should be allowed and the conviction quashed. We have considered the question whether there should be a new trial. However, it would not be in accordance with principle, the Crown having chosen to present the case on inadequate evidence, to order a new trial that would have the effect of allowing the Crown to take a different course. That would offend against a fundamental doctrine in criminal law which underpins the defence of autrefois acquit. We have reached the conclusion that it was not reasonably open to the trial judge, on the case put forward by the Crown, to find beyond all reasonable doubt that the Appellant was not acting in self-defence. That being so, the proper order is simply that the conviction be quashed.

[20] If we had taken a different view, it should be recorded that the Crown felt unable, in our view quite rightly, to support the sentence imposed in this case. Plainly, there was an issue of very considerable provocation, and in the circumstances, the sentence of six years was manifestly excessive.

Tongi v Kingdom of Tonga

Supreme Court, Nuku'alofa
Andrew J
CV 783/2007

19 March 2009

Tort – false imprisonment by police – strict liability – no aggravated damages - $1000 damages

On 26 November 2006 the plaintiff was invited to the central police station, then placed in custody without being informed as to why or what he was being arrested for. The plaintiff commenced proceedings against the defendants for false arrest and imprisonment at the Central Police Station from midday Friday the 24 November 2006 until midday Sunday the 26 November 2006 without proper cause or reason.

Held:

1. The plaintiff was arrested or imprisoned without being informed as to why he was being arrested and that constituted the false imprisonment. False imprisonment was a tort of strict liability.
2. In relation to damages the Court looked at all of the circumstances. Whilst there could be no excuse for unlawful arrest, the Court found there was some explanation in that the events were all taking place at the central police station in the time of the riots of 16 November. There was no conduct on the part of the police which would normally attract "aggravated damages".
3. In all of the circumstances the Court assessed damages at $1,000.

Case considered:

Edwards v Pohiva [2003] Tonga LR 231

Counsel for the plaintiff	:	Mr Edwards
Counsel for the defendant	:	Mr Little

Judgment

The plaintiff commenced proceedings against the defendants "for and in respect of the conduct, acts and omissions of the police for false arrest and imprisonment of the Plaintiff at Central Police from midday Friday the 24th November, 2006 until midday Sunday the 26th November 2006 without proper cause or reason."

In the course of the trial the defendants acknowledged liability to the extent that when on this day (the 26th November 2006) the plaintiff had been invited to the Police Station, he was then placed in custody without being informed as to why or what he was being arrested for.

The facts are not greatly in dispute. This was around the time of the riots in NUKU'ALOFA. I accept that Inspector Kaufusi had obtained some information that a refrigerator had been stolen and that the goods were on the plaintiff's allotment. I accept that police had received some information that they had been transported by the plaintiff's taxi. The police located the plaintiff in his taxi at the wharf area. I accept that the police told the plaintiff what they were enquiring about and they asked the plaintiff if he would come to the police station and talk about this. After he had been waiting at the police station for some time without apparently being spoken to, he was then placed in a cell without being told why he was being arrested. He was released 48 hours later without being charged, apparently when it was decided there was no evidence or insufficient evidence against him.

The plaintiff had said that he was never told why he was incarcerated nor did he know of the police making enquiries in relation to the refrigerator. I do not know that that is entirely accurate because the police took a statement from him on the Sunday, 26th November 2006, shortly before he was released without charge. But the plaintiff was arrested or imprisoned without being informed as to why he was being arrested and that constitutes the false imprisonment.

False imprisonment is a tort of strict liability: see *EDWARDS v POHIVA* [2003] Tonga LR 231. In relation to damages I look at all of the circumstances. Whilst there can be no excuse for unlawful arrest I think there is at least some explanation in this case in that these events were all taking place at the central police station in the time of the catastrophic events of the riots of 16/11. Neither do I see the type of conduct on the part of the police which would normally attract "aggravated damages".

In all of the circumstances I would assess damages in the sum of $1,000.

Costs are awarded to the plaintiff.

Uasi v 'Ahokava

Supreme Court, Nuku'alofa
Shuster J
AM 04/2009

27 March 2009

Appeal against Magistrate's decision – no reason to interfere with findings – appeal dismissed

Defamation – amount claimed should be substantiated – sum required strict proof

The appellant claimed that the respondent defamed her. The Magistrate ruled in favour of the respondent and found that there was no case to answer. The appellant appealed the decision and sought for the Magistrate's decision to be quashed and for the case to be returned to the Magistrate's Court for rehearing.

Held:

1. A Higher Court would only interfere with the factual findings of a lower court in the clearest of cases, for example if the appellant court was able to conclude the Magistrate's decision was unsound, or that the Magistrate clearly came to the wrong conclusion.
2. The Court found no reason to interfere with the Magistrate's Ruling. The appeal was dismissed and the decision of the lower court was affirmed. There was insufficient evidence of defamation adduced in the trial.
3. In future defamation cases, if the claim for defamation was in the sum of $10,000 then the claim for that particular monetary value would have to be substantiated by evidence. In other words the sum would have to be assessed by hearing evidence and the amount claimed would require strict proof.

Case considered:

Pa'ila v Ma'u (2002) TLP 114

Counsel for the appellant : Mr Piukala
Counsel for the respondents : Mr Fifita

Judgment

This Appeal concerns a ruling in the Magistrates Court concerning civil case no. 264/08 a civil dispute concerning an alleged allegation of defamation

The Claim

The plaintiff is claiming from you the amount of $10,000.00 because you created rumours about the plaintiff by telling Setaita 'Ahokava that the plaintiff (Makeleta) licked the ass and penis of the defendant. And Setaita told the plaintiff that Makeleta and Pula have been cohabiting for two years. This is a lie and a rumour and the plaintiff deny all of the contents of the rumour that was talked about in November or close to that at Fanga Market. This is one rumour that is very detrimental to the plaintiff's reputation particularly when it is false and that the plaintiff is a married woman, and operates a big business in Fanga. Wherefore I pray that the defendant pay the costs of these proceedings including legal fees of the Lawyer, $800.00 and other adjustments that deem just.

In which the presiding Magistrate at Lopaukamea made an order on 20-01-09 as follows.

> Magistrate Poto Mohenoe at Lopaukamea ruled in favour of the defendant because the onus of proof for criminal case must be proved beyond reasonable doubt, and even though the onus of proof for civil cases is on the balance of probabilities, there are some instances where civil cases use the measure of proof beyond reasonable doubt.

Magistrate's Decision

> The Magistrate concluded this trial by saying the following I have listened to both parties and their evidence. There is no evidence provided for me to conclude that PULU had defamed Makeleta as stated in the writ of summons, therefore I overrule this case.
>
> Legal Counsel Fees to are to be paid to Tesina Fifita $300.00 within 3 weeks if not a warrant of distress will be issued against the Plaintiff.

Notice of Appeal against the Magistrate's Ruling was issued on 20th January 2008-9 signed by MAKELETA UASI for the appellant. The Notice of appeal was duly served on the Supreme Court. The substantive hearing of this appeal took place in the Supreme Court on the l3-03-2009 with judgment reserved until the 27 March 2009.

There are Six Grounds of Appeal

1. This is a civil matter and the learned Magistrate has erred in law and made an unconstitutional decision as stated above.
2. The affidavit of the complainant (Makelete UASI) stated that rumours about her in the civil case CV26/08 was known to her when Setaita 'Ahokava told her, by her husband Pulu 'Ahokava (defendant).
3. If there are no disputed facts, disputed by the defendant either in open court, or during the course of the trial, those facts are deemed true if they weren't disputed.
4. It is surprising to the appellant when Magistrate Poto covered up for the defendant in the civil case when he said there wasn't any evidence, disregarding the fact that the appellant gave evidence through the affidavit.
5. This is an unfair decision made by the learned presiding Magistrate, No legal foundation in law, and an unconstitutional decision.
6. And any further grounds at the time of hearing this matter.

They Pray For

- The decision made by the learned Magistrate be quashed, and the case be returned to the lower court to proceed with another Magistrate.
- A strong direction to the Magistrate to avoid this kind of performance.
- Any further orders that this honourable Court deem just.

The Magistrate's Findings of Fact

According to the court record the Magistrate heard and considered oral evidence- as per the court record. Mr Fifita at the close of the Plaintiff's case made a submission that there was no case to answer.

After hearing the evidence and from Mr Fifita for the defendant- the Magistrate concluded as follows:-

- I have listened to both parties and their evidence. There is no evidence provided for me to conclude that PULU had defamed Makeleta as stated in the writ of summons, therefore I overrule this case.
- Legal Counsel Fees to be paid to Tesina Fifita $300.00 within 3 weeks if not a warrant of distress will be issued against the Plaintiff.

The Magistrate's Judgment

The Magistrate in this case did make a findings of fact and found that there was NO EVIDENCE PROVIDED FOR ME TO conclude that Pulu had defamed Makelete as stated.

Submission of No Case to Answer

After hearing and recording the plaintiff's case, counsel for the defendant made a submission of no case to answer. The submission of no case to answer- was upheld by the Magistrate: - in that the first limb of Galbraith had not been complied with. (i.e) there was insufficient evidence to prove the case. This the Magistrate is clearly entitled to do.

> **"SUBMISSION OF NO CASE**
>
> The defence submits that the prosecution has failed to prove an essential element of the offence alleged - and that there is no case to answer. The defence argue that no evidence has been adduced to prove [here specify the element(s)] as required for the prosecution to succeed.
>
> **THIS IS THE FIRST LIMB OF A SUBMISSION OF NO CASE TO ANSWER**
>
> [Counsel must then summarize the defence submissions]
>
> **OR**
>
> The defence asks the court to find that the prosecution case has been so undermined that no reasonable tribunal could convict upon the evidence as presented.
>
> They submit that the evidence [of key witness 'A'] is so manifestly unreliable that it cannot be relied upon. [Then refer to reasons provided in submissions, e.g. key witness discredited under cross-examination, witnesses providing differing versions of the event or events, contradictory evidence, and poor identification evidence].
>
> **THIS IS THE SECOND LIMB OF A SUBMISSION OF NO CASE TO ANSWER**
>
> The prosecution, in response, argue that [summarize prosecution submissions].
>
> If the court finds that no reasonable tribunal could convict upon the evidence- then the court must dismiss the case against the defendant(s)."

Whilst it is likely- that a 'submission of no case to answer' will usually be made by the defendant; the court may raise the issue of its own volition, and may also act of its own motion; and should always do so; **wherever a defendant is unrepresented**.

Having heard the plaintiff's case; and having considering Mr. Fifita and his "submission" the court found there was a NO CASE TO ANSWER then the case stopped.

In accordance with established tradition and case law- no written reasons are required, or are ever given by a court for its reasons to find there- is a case to answer; but the Magistrate did record and he is obliged to record his reasons for finding that there was insufficient evidence to proceed.

Supreme Court Ruling

I heard oral argument from both the appellant and the respondent in this matter on the l3 March 2009 and I reserved Judgment of this matter to today. I have considered carefully all that was said in the Supreme Court and considered the paperwork submitted from the lower court. I have also considered the case of *Pa'ila v Ma'u* (2002) TLP 114- which clearly says - that a Higher Court will only interfere with the factual findings of a lower court in the clearest of eases- For example - if the appellant court was able to conclude the Magistrate's decision was unsound- or that the Magistrate clearly came to the wrong conclusion.

Ruling

- In this case I can find no reason whatsoever to interfere with the Magistrate's Ruling.
- This Appeal is dismissed and I affirm the decision of the lower court.
- I find also find as a fact there was insufficient evidence of defamation adduced in this trial.
- For the sake of clarity I point out to all parties in future defamation cases, if the claim for defamation is in the sum of $10,000 (as here) then the claim for that particular monetary value of $10,000 will have to be substantiated by evidence.
- In other words the sum WILL have to be assessed by hearing evidence and the figure will require strict proof.
- In a nutshell- defamation cases are not cases with a licence to print or, to just hand over money, these types of case require strict proof; courts must rely upon admissible and reliable evidence- AND NOT JUST GOSSIP.
- Costs of today are awarded against the appellant to be taxed by the Chief Registrar if not agreed.

Uasi v 'Ahokava anor

Supreme Court, Nuku'alofa
Shuster J
AM 01/2009

27 March 2009

Appeal against Magistrate's decision – no findings of fact recorded – case remitted back to Magistrates' Court for rehearing

On 20 January 2009 the Magistrate made an order finding the second respondent guilty of defamation in the civil proceedings. The appellant appealed and requested that the case be returned to the Magistrates' Court to proceed with a different Magistrate.

Held:

1. A Higher Court would only interfere with the factual findings of a lower court in the clearest of cases, for example if the appellant court was able to conclude the Magistrate's decision was unsound, or that the Magistrate clearly came to the wrong conclusion.
2. The Court found the case confusing primarily because the lower court record lacked detail and there were no findings of fact recorded. In all future cases involving both civil and criminal cases the Magistrates should formally record their findings of fact and formally ask for written submissions from defence counsel appearing before them. The Magistrate was then to formulate and deliver in open court a written judgement because only if they adopt these principles would ordinary people obtain true justice.
3. The case was remitted back to the Magistrates Court for a rehearing before a different Magistrate, because the Court could find no findings of fact and concluded the Magistrate may have come to or reached the wrong conclusion.

Case considered:

Pa'ila v Ma'u (2002) TLP 114

Counsel for the appellant : Mr Piukala
Counsel for the respondents : Mr Fifita

Judgment and Ruling

This Appeal concerns a ruling in the Magistrates Court concerning civil case no. 245/08 - a civil dispute concerning an allegation of defamation.

On the 20 January 2009 the presiding Magistrate at LOPAUKAMEA made an order as follows.

1. UINA 'AHOKAVA you are guilty of the charge.
2. Pay $100.00 within 2 weeks if not a distress warrant will be issued against you.
3. Each party is to pay his own costs.

Notice of Appeal against the Magistrates Ruling was issued on 20th January 2008-9 and signed by MAKELETA UASI for the appellant. The Notice of appeal was duly served on the Supreme Court. The substantive hearing of this appeal took place on the 13-03-2009 with written judgment reserved until the 27th March 2009.

There are Eight Grounds of Appeal

1. This is a civil matter and the learned Magistrate has erred in law thus making an unconstitutional decision as stated above.
2. According to the Appellants (Makelete UASI) evidence given under oath, the defamatory statements shown in civil case CV261/08 were statements incited by both defendants, however the 2nd defendant has apologised to the appellant and asked the Appellant to forgive him because it was the lst defendant who started the slander.
3. The same explanation was given by Uilou SIALE who heard and saw UNIA apologise to Makeleta which is shown in the civil case number 261/08 instructed by Setaita 'Ahokava.
4. If there was any fact then the defendant wouldn't dispute in open court or during the course of the trial, if those facts are not disputed then it is held to be trite since it was not disputed.
5. But it was surprising to the Appellant when Magistrate Poto covered up for the defendant Sataita 'Ahokava since it was a civil case stating there was no evidence. But how about the statement given under oath by the appellant and Uilou SIALE?
6. This is an unfair decision, made by the learned presiding Magistrate, No legal foundation in law, thus made an unconstitutional decision.
7. And any further grounds at the time of hearing this matter.
8. The counsel for the Appellant has a feeling that the said Magistrate has a personal feeling with him. There are numerous appeal made by this Counsel against the decision of the said Magistrate.

They Pray For

- The decision made by the learned Magistrate be quashed, and the case returned to the lower court to proceed with another Magistrate.
- A strong direction to the Magistrate to avoid this kind of performance.
- Any further orders that this honourable Court deem just.

The Magistrates Findings of Fact

According to the court record the Magistrate heard and considered oral evidence as per the court record.

After hearing the evidence the Magistrate concluded as follows:-

- In section 13 of the Constitution, there shall be no other reason for proceeding with the case, but what is shown on the face of the indictment. Now regarding Setaita 'Ahokava, witness number 2, there is no evidence given by her. I therefore discharge her from this case.
- The charge of Uina, according to Makeleta, she went to apologize to her. And that you were telling the truth, which was revealed to you by Setaita, in which that truth or fact was not questioned.

Therefore there are three elements to defamation:-

1. Slander of defamation has taken place
2. The defamatory statements cause ridicule
3. It lowers the reputation of the plaintiff, since she is a married woman, and the defamatory statements have exposed her to hatred, contempt, causing her to be shunned.

Magistrate's Judgment

Of concern, the Magistrate in this case did not appear to make or record any FINDINGS OF FACT UNLESS one looks at the record. Using item 3 above, under the heading there are shown three elements to defamation, quote, "It lowers the reputation of the plaintiff, since she is a married woman, and the defamatory statement have exposed her to hatred, contempt causing her to be shunned.

Neither did the learned Magistrate ask either of two counsels who appeared before him, for written submissions before he pronounced verdict and sentence-as below.

1. UINA 'AHOKAVA you are guilty of the charge.
2. Pay $100.00 within 2 weeks if not a distress warrant will be issued against you.
3. Each party is to pay his own costs.

There was no means enquiry carried out.

Supreme Court Ruling

I heard oral argument from both the appellant and the respondent in this matter on the 13th March 2009 and I reserved judgment of this matter until today. I have considered carefully all that was said in the Supreme Court and considered the paperwork submitted from the lower Court.

I have also considered the ease of *Pa'ila v Ma'u* (2002) TLP 114- which clearly says - that a Higher Court will only interfere with the factual findings of a lower court in the clearest of cases- For example - if the appellant court was able to conc1ude the Magistrate's decision was unsound- or that the Magistrate clearly came to the wrong conclusion.

In this case I can find no factual findings.

Ruling

This case is a confusing case- that is primarily because the lower court record lacks detail and there are no Findings of Fact recorded for this case. In all future cases involving both civil and criminal cases then the Magistrates are to formally record their findings of fact and they are to formally ask for written submission from defence counsel appearing before them. The Magistrate is then to formulate and deliver in open court a written judgement because only if they adopt these principles will ordinary people obtain true justice.

Order

This case is remitted back to the Magistrates Court for a rehearing before a different Magistrate, because I can find no findings of fact and I conclude the Magistrate may have come to or reached the wrong conclusion.

Lolohea v Kingdom of Tonga

Supreme Court, Nuku'alofa
Shuster J
CV 625/04

23 January 2009; 16 April 2009

Damages – unlawful punishments in prison – quantum determined

While the plaintiff was serving a sentence of imprisonment in the Hu'atolitoli Prison he endured punishments that were both extreme and unlawful. The full facts of his incarceration and ill-treatment were set out in *Tapa'atoutai anor v Police* [2004] Tonga LR 108. Liability to pay damages had been admitted by the defendant in writing. The parties had been unable to reach agreement on the quantum of damages.

Held:

1. The Court considered the plaintiff's whole conduct during the time he was incarcerated and serving a lawful sentence for serious crimes, in particular his conduct towards other inmates and towards prison staff. The plaintiff had not helped himself and he brought a lot of trouble upon himself and he appeared to enjoy his own solitary confinement.
2. The Court also considered the defendant's reluctance to settle out of Court by way of mediation and the fact the Crown was vicariously liable for the torts of its servants and agents.
3. The Court ordered that the plaintiff receive by way of compensation for unlawful privation a payment at the rate of $200 per day for 284 days making a total payment for unlawful privation of $56,800; for inhumane punishment the Court ordered the plaintiff receive the sum of $17,500; for exemplary damages the Court ordered the plaintiff receive the sum of $7,000; and the Court awarded the plaintiff full costs, including an order for the payment of Consumption Tax. The awarding of full costs and the payment of consumption tax was ordered because "the but for test" applied.

Cases considered:

Cumber v Chief Constable of Hampshire Constabulary (1995) Times, 28 January
Edwards v Pohiva [2003] Tonga LR 231
Fainga'a v Lelea and ors [2005] TOSC 5

Hague v Deputy Governor of Parkhurst Prison [1991] 3 All ER 733 (HL)
Murray v Ministry of Defence [1988] 2 All ER 521
Nifai Tavake v Kingdom of Tonga (unreported, CV 296/07, 16 December 2006, Ward CJ)
Oscar v Chief Constable of the Royal Ulster Constabulary [1992] NI 290
R v Governor of Brockhill Prison ex parte Evans (No 2) [1998] 4 All ER 993 (CA) & [2001] 2 AC 19 (HL)
Tapa'atoutai anor v Police [2004] Tonga LR 108
Thompson v Commissioner of Police of the Metropolis [1997] 2 All ER 762 (CA)

Statutes considered:
Consumption Tax Act 2005
Prisons Act (Cap 36)
Supreme Court Act (Cap 10)

Rules considered:
Prison Rules (Cap 36)

Counsel for the plaintiff : Mr Niu
Counsel for the defendant : Mr Kefu

Judgment

The hearing of this matter was simply to determine the quantum of damages which the defendant is to pay to the plaintiff as a result of this suit. Liability to pay damages had previously been admitted by the defendant; and admitted in writing.

History

This claim stems from the treatment of the plaintiff whilst he was serving a sentence of imprisonment, and whilst detained in the Hu'atolitoli Prison. The full facts of his incarceration and ill-treatment; have previously been set out in the Judgment of my brother Judge Ford J as he was then in case number AM8-9-03 (*Tapa'atoutai anor v Police* [2004] Tonga LR 108). I do not intend to rehearse the facts in this my judgment. Suffice it to say FORD J indicated at the time of his judgment:-

> "Indeed it is difficult to take exception with Mr. Nui's description of the suffering the two men endured as "torture"

These words are a damming indictment, of the treatment this plaintiff (and another) received at the hands of the prison authorities into whose care and control, the plaintiff was entrusted whilst he was imprisoned serving his sentence.

Various attempts to mediate a settlement to this particular case have been proposed in the past by various members of the Judiciary- both past and present. A written agreement on damages was proposed by the parties; but for various reasons, settlement was never forthcoming. The case was listed for trial- and evidence adduced in relation to the quantum of damages (only) on the 23rd January 2009.

The Plaintiff's Original Statement of Claim

The plaintiff claimed damages on 7th September 2004 via his writ and his statement of claim against the Kingdom of Tonga-

The plaintiff claims:-

1. Damages in the sum of $66,000 for unlawful privation as per paragraph 10 of the statement of claim.
2. Damages in the sum of $20000 for inhumane punishment as stated in paragraph 13 of the statement of claim.
3. Damages in the sum of $15,250 for unlawful incarceration as stated in paragraph 16 of the statement of claim.
4. For costs of these proceedings.
5. Any other order or relief as may be just.

TOTAL CLAIMED IS $101,250.00

Defence to this Action

A statement of defence was filed (albeit out of time) with the leave of the court on October 2004. In this case the defence alludes to various letters and correspondence which has passed between the parties, concerning the possibility of settlement -but as stated before, to no avail.

In August 2008 the prospect of formal Mediation of this case was again raised by the judiciary; and Mediation was considered. Unfortunately Mediation failed because one of the parties held the view that both HM Cabinet and HM Privy Council's approval was required- and they state Mediation was therefore inappropriate- in all such cases brought against the Crown and a court order is required. I query this assertion, Court ordered Mediations is extensive used in the United Kingdom and other jurisdictions, in cases against the Crown (or the State) so why not here in Tonga?

The Hearing

Because Mediation failed, the matter was listed and the hearing of the matter- focusing on the issue of quantum took place on 23rd January 2009 - with the parties written submissions to be filed - as follows.

- The plaintiff by l6 February 2009
- The defendant by 9th March 2009
- Any reply by 23rd March 2009

Oral Evidence

The plaintiff gave evidence and confirmed the facts of his imprisonment from 21/3/2003 to 10/12/2003. The plaintiff also confirmed his inhumane punishment from 22/1/2003 to 23/1/2003 and his imprisonment from 10/12/2003 to 9/2/2004, as well as his incarceration on 12 separate occasions in the maximum security cell.

The plaintiff confirmed his claim for damages at $250 (which he made well before he became aware of the rate of $800) per day for the days of his unlawful imprisonment and the sum of $20,000 for his inhumane punishment. These were amounts previously awarded by the Court of Appeal in similar cases.

The Plaintiff's Written Submission

Via his written submission dated 16th February 2009, Mr. Niu said after he had an opportunity to spend time researching the applicable law, concerning the quantum of damages - awarded in this type of case; counsel — rethought the claim of behalf of his client. Counsel submitted his reasoning for a substantially amended damage claim and, sought leave to amend his original statement of claim the same date.

Mr. Nui's argument on the value of damages- which the plaintiff should receive on behalf of his client is now significantly different from the original statement of claim filed on 7th September 2004- The new figures are substantially higher than $101,250.00. Nevertheless in this courts view the amended figures justify this courts full consideration - in view of Ford J's judgment in case AM 8-9 of 2003- a judgment which at the time directly affected this plaintiff - and another inmate.

An Amended Statement of Claim

I have set out the plaintiff's amended claim for damages below for information. Mr. Niu enclosed with his submission a copy of Ford J's judgment dated 9th June 2003- under file reference AM 8-9-2003 which concerned this plaintiff.

Suffice it to say the amended claim- is opposed by the Defendant as excessive- via their written submission, filed and dated 9th March 2009.

Plaintiff's Submission

1. The plaintiff was unlawfully imprisoned and as a result of his unlawful imprisonment he served an extra 264 days (from 21/3/2003 to 10/12/2003) which he should not have served, NOW claimed at $800 per day- the total claimed is now $211,200.00.
2. The Plaintiff was unlawfully, cruelly and inhumanely punished by being handcuffed and leg-cuffed to a horizontal pipe in his shorts and singlet whilst lying on the concrete floor and exposed to the heat of the sun and cold of the rain, mosquitoes, and dew and cold of the night, from 8.00 am 22/1/2003 to 10.00 pm 23/1/2003- the total claimed is $20,000.00.
3. The plaintiff was unlawfully imprisoned for 2 months from 10/12/2003 to 9/2/2004 for escaping from his cruel punishment under (2) above, at $800 per day for 61 days — the total claimed is $48,800.00.

The cumulative total of damages now amounts to $280.000.00

Damages for Unlawful Imprisonment

1. The plaintiff's counsel suggested it might be appropriate to combine the first claim with the third claim of the plaintiff, as they both relate to imprisonment and which are now claimed at the same rate of $800 per day. The defence appears to treat it that way too. They say as

claimed, and proved by evidence, the number of days in the first claim is 265 days and the number of days in the second claim is 61 days, making a total of 326 days unlawful imprisonment.

2. When the plaintiff was asked in cross-examination on what basis he claimed $250 for each day of his imprisonment, the plaintiff replied that the amount he should claim and which should be payable was much higher than that, but he would accept the rate of $250 as being sufficient. Counsel argues that was before the plaintiff became aware that a rate of $800 had been awarded in an earlier case (refer below), which the plaintiff now claims - via his amended Statement of Claim.

3. The plaintiff argues when one considers the decision of the Court of Appeal in the case of *Edwards_v Pohiva* [2003] Tonga LR 231, it is clear that the plaintiff answered the question correctly (but for his ignorance that the rate in that case was $800 per day). In that case, the Court of Appeal stated in paragraph 60 (page 246 of the report)

> "We have considered all matters relevant to the assessment of general damages and the features that aggravate those damages. We have reached the conclusion that the judge, in assessing the damages that he did, equivalent to $800 and $680 per day, failed to make an adequate allowance for the aggravating factors to which we have referred."

4. The aggravating factors to which the Court of Appeal had referred were listed in paragraph 59 (a), (b), (c) and (d) (page 345 of the report). Those factors are as follows:

(a) the respondents were-
   (i) Law abiding citizens,
   (ii) They were imprisoned in clear breach of their constitutional rights,
   (iii) Breach of clause 14— liberty being taken away except according to law.

(b) The respondents were held in the maximum security section of the prison, treated like depraved and dangerous criminals, little short of solitary confinement, intention to impose the worst possible form of punishment — the person imposing the same behaving in a malicious and oppressive manner and that person and the Kingdom must be held responsible for the consequences;

(c) The humiliation, the pain, the shock, emotional suffering and deprivation;

(d) The failure of the respondents to make amends, apologize and pay compensation reasonably soon after the unlawfulness of the imprisonment was pronounced by the Court when the writ of habeas corpus was issued and instead they prolonging the proceedings for 6 and a half years.

Taking those aggravating factors into consideration, the plaintiff argues the Court of Appeal increased the rate of damages from $800 and $680 per day to $1,200 and $1,080 per day respectively.

The 3 persons to whom those damages were paid had been imprisoned for 25 days in the maximum security cell, which the plaintiff in the present case described in his evidence; and which this court has personally viewed. Those 3 persons were 'Akilisi Pohiva, member of Parliament, Kalafi Moala, editor of Taimi 'o Tonga newspaper and Filo 'Akau'ola, assistant editor of same newspaper. Pohiva and 'Akau'ola - were each awarded $30,000. Moala was awarded only $27,000 because he had not appeared and given evidence as to his personal feelings, etc.

The plaintiff argues it was significant to note that the Court (both the Supreme Court and the Court of Appeal) made no distinction in awards it made - that Pohiva was a Member of Parliament or that Moala was an editor and 'Akau'ola was his assistant. It treated them as equals. It is significant no account was taken of their income or salary- that each earned.

What is of greatest significant in that case was that the several aggravating factors which the Court of Appeal enumerated, as summarized above, increased the rate from $800 to $1200 per day. The plaintiff argues that before the aggravating factors were included in the assessment, and the rate of $800 per day was found to be reasonable, it is respectfully submitted that it would and should be applied to any person who has been unlawfully imprisoned, unless, one would think, there are exceptional circumstances which would warrant a lesser rate, let alone a much lesser rate. It is submitted that there are no exceptional circumstances in this case which would warrant the application of a lesser rate than a rate of $800 per day.

The plaintiff argues that the present case showed a blatant disregard by the Superintendent of Prisons to the laws with regard to any trial of prisoners for prison offences and to penalties and punishment to be imposed on them.

He, without lawful authority, purported to try the plaintiff and went on and punished him by imprisoning him in the maximum security cell- well in excess of the allowable 7 days- followed by only another 7 days. Instead the evidence reveals the Superintendent of Prisons ordered- and the plaintiff was imprisoned in the cell on 12 occasions which came to a total of 1,437 and one half days! That is to say a period of nearly 4 years!

The plaintiff argues that all of these punishments were unlawful and they were in clear breach of the constitution. Clause 10 provides:

"10. No one shall be punished because of any offence he may have committed until he has been sentenced according to law before a court having jurisdiction in the case."

In consequence of those punishments, the Superintendent of Prisons purported to remove the entitlement of the plaintiff to remission of his prison sentences by one quarter. The plaintiff therefore served a total of 265 days which he should not have served-. That was unlawful and also unconstitutional. The Superintendent punished the plaintiff for offences which the Superintendent himself had unfairly tried and he convicted the plaintiff and that is contrary to due process of law.

The plaintiff claims, in his amended statement of claim the rate of damages that should be properly be paid to him should now be a rate of $800 per day, making his claim for unlawful imprisonment for a total of 326 days and the amount of damages to be paid to him is now $260,800.00.

Damages for Inhumane Punishment

The plaintiff argues when the Court of Appeal gave its judgment in the *Edwards v Pohiva* the case referred to above, it was not aware that Hu'atolitoli prison had imposed a worse form of punishment at the prison than the punishment it had imposed on the 3 men in that case. It never dreamed that a form of punishment imposed on the plaintiff was being imposed on other prisoners at the prison. The plaintiff gave evidence, evidence which was not rebutted, that four other prisoners had been similarly hand and leg cuffed to the "punishment pipe", they were, Saulala Lolohea from Saturday to Monday (3 days), Sione Palanite for 2 days, Tevita Lei for 2 days and Viliami Tapa'atoutai for one week.

On the occasion when the plaintiff was both hand and leg cuffed to the punishment pipe, Viliami Tapa'atoutai was hand cuffed to the maximum security cell door- so that he was standing throughout the 38 hours they were both being punished. Whereas Viliami was under the roof of the verandah, the plaintiff was cuffed by both the hands and legs to the punishment pipe — in the sun and rain and night dew and cold and left to the mercy of the mosquitoes, because he was ordered to wear only shorts and singlet.

Counsel asked how the plaintiff could swat mosquitoes that might bite him; and how would he scratch the itch which would be caused by mosquito bites chained up? Well he could not.

Counsel asked, what was the plaintiff to do about the numbness of his back, his sides, his head and other parts of his body from lying on the concrete floor especially his wrists and ankles from the cuffs being on them? Turn on the other side? Hold his hands up above the pipe to relieve the pressure of the cuffs? For how long? And then start again? What about the heat of the sun on the concrete floor? Did it heat up the concrete floor? No wonder the plaintiff said that he would try and lie on top of the pipe. But for how long? Till he's numbed on his chest? Would he then choose to endure, the numbness on his chest; or the heat of the concrete floor? All were relevant questions and answered.

The plaintiff's counsel emphasized the Prison Superintendent knew all the circumstances and that he intended the plaintiff would suffer harm. That is and was malicious and oppressive. It was torture and it was inhumane. Counsel says the plaintiff's punishment was painful and, not knowing when it would end, both prisoners decided to put an end it and to bring it to the attention of the authorities- by escaping from prison. They did escape and the authorities have since put an end to that form of punishment of prisoners.

Counsel says it must be pointed out that the "punishment pipe" had been acquired and had been imbedded into the concrete block walls at such height from the concrete floor across the sunny cell for the only purpose of cuffing the prisoners to it by the wrists and ankles. What else was the punishment pipe intended for? And the pipe was installed by the Kingdom or its servants and or its agents. Counsel says the punishment pipe had been there for some time. Surely, some other authority, other than the Prison Superintendent, was aware of its purpose. Yet, the pipe was allowed to be there and to be used for its specific purpose- of as counsel say torturing prisoners.

The court asks what about supervision by the prison Visitors as required under s 17 of the Prisons Act (Cap 36). There was no supervision. Accordingly, the plaintiff argues the defendant, the Kingdom of Tonga; vicariously approved and condoned the use of the punishment pipe and the Kingdom must therefore be held responsible. The court is aware three Prison Visitors were appointed by His Majesty's Council on the 6th October 2006 well after this event.

Counsel says this surely must sound in damages not merely to repay in some sufficient way the suffering which the plaintiff had been subjected to, but also to punish the defendant for it. Counsel says- as there has been no case like this before the Court until now. They say the Court must set an amount that loudly proclaims the despicable nature of the punishment and torture perpetrated in this case, and the abhorrence with which the Supreme Court regards that treatment.

It was submitted the sum of $20,000, consisting of both of general and exemplary damages, that is to say, a global figure of $20,000, be awarded to the plaintiff in respect of this claim, In support, of counsel's arguments counsel produced a copy of the judgment of His Honour, Justice Ford (as he then was) of 9 June 2004 in Appeals AM 8-9 of 2003. This was the judgment in respect of the appeal of the plaintiff and Viliami Tapa'atoutai against their conviction and sentence in the Magistrates' Court for escaping from the inhumane punishment described above which appeal against conviction and sentence was allowed.

In the Appeal Ford J said and I quote.

> "The punishments the appellants were subjected to were both extreme and unlawful. Indeed, it is difficult to take exception with Mr. Niu's description of the suffering the two men endured as "torture." "

The Defendant's Written Closing Submissions

The defendant says the main issue in this case is what damages the plaintiff is entitled to for:

- Unlawful privation?
- Inhumane punishment?
- Unlawful incarceration?
- In this case the plaintiff claims the following: unlawful privation (by being placed in a security cell for 264 days) - $66,000.00

- Inhumane punishment (by being restrained in an unnatural position and exposed to sun, rain, dew and mosquitoes) - $20,000.00
- Unlawful imprisonment from 10/12/03 to 9/2/04 - $15,250.00

TOTAL $101,250.00 - PLUS COSTS

The plaintiff sought to amend the amount he is claiming based upon a daily rate of $800 per day. The defendant opposes that application and relies on the original amount claimed. In their response to the plaintiff's claim the defendant agrees the defendant is vicariously liable for the unlawful privation, inhuman punishment and unlawful imprisonment of the plaintiff; however, the defendant says the amounts of damages claimed for unlawful privation, inhuman punishment and unlawful imprisonment is excessive as against this particular plaintiff;

The defendant opposes the application by the plaintiff to amend his claim at a late stage to claim to $800 per day for unlawful incarceration. The defendant also says the plaintiff is not entitled to aggravated or exemplary damages as he has not claimed any of those and the plaintiff is not entitled to his full costs.

The Defendants Case

The defendant says the undisputed facts are - the plaintiff is a career criminal having a number of what they call serious convictions amongst which are offences of grievous bodily harm, dishonesty and the growing and possession of Indian hemp

- 27/03/97, 5 years imprisonment), housebreaking and theft
- 15/08/98, 3 years imprisonment, and bodily harm
- 01/06/01, 3 months imprisonment, concurrent with substantial sentence

During his incarceration the defendant says the plaintiff was also a violent prisoner. They gave examples the plaintiff assaulted a prisoner 'Isi Kali with the iron rod which was used to ring the prison bell and as a result of the assault he was put in the punishment cells on 29/01/01. Another example they cite is that Plaintiff attacked a prisoner with a sharp object and as a result he was put in the punishment cells on 20/10/99.

The defendant says during his incarceration the plaintiff was an unruly prisoner. For example,

- He was put in the punishment cells on 10/09/97 for breaking into the exhibit room and stealing marijuana and other goods.
- On 13/02/09 he was put in the punishment cells for swearing and disobeying a prison officer.
- During the various times the plaintiff was kept in the punishment cells he often requested to stay on in the punishment cells, because he was reading the Bible and was trying to change his ways and he admitted that in court.

- They say the plaintiff was put in the punishment cells, and not into solitary confinement; the defendant admits the plaintiff was put in the punishment cells without the authority of the Visiting Officers (If any existed).
- Between the 23/01/03 and 24/01/03, due to ill-discipline, the plaintiffs wrists and ankles were handcuffed to a pipe and was exposed to the sun, mosquitoes and put in an unnatural position for around 38 hours (8am, 23/01/03 to 10pm, 24/01/03).
- The Plaintiff was released only to go to the toilet and eat during the 38 hours. The defendant accepts; the plaintiff escaped from prison, at 10pm on 24/01/03 and they accept the Plaintiff returned to prison 11 days later.
- The defendants accept the plaintiff was subsequently prosecuted and sentenced by a Magistrate to 2 months imprisonment for escaping from prison. The Plaintiff appealed his conviction for escape, court records indicate he was successful and on 9 June 2004 before Ford J, (as he then was) the conviction was set aside and sentence was quashed.

A Prison Offences

Under rule 158 of the Prison Rules - made under the Prisons Act no punishment or privation of any kind shall be awarded against a prisoner except as provided for under section 241, 28,2 293 and 30 of the Prisons Act, and the Prison Rules.

Section 30 is the most relevant section.

Section 30 establishes the Prison Visiting Officers, who have the power to sit as a court to consider any allegations against a prisoner for committing a prison offence under the Prison Rules. If a prisoner is convicted of an offence under prison rules the Visiting Officers may punish the prisoner with one or any of the following punishments:

- Solitary confinement with or without reduced diet for a period not exceeding 14 days, but shall only serve 7 days at a time, and a interval of 7 days shall elapse before continuation;
- Forfeiture of marks;
- Corporal punishment;
- If a prisoner is ordered into solitary confinement, rule 160 allows a medical officer to intervene and cause any confinement to punishment cells to cease, and that the Officers will then direct to cease the confinement.

B Use of Irons

Rule 171 provides that "irons shall be used only as a means of restraint or prevention to escape, not as a punishment". Moreover, "no prisoner shall be kept in irons without having been previously examined by the medical officer". The use of irons as punishment is therefore unlawful.

C False Imprisonment

In *Fainga'a v Lelea and ors* [2005] TOSC 5; C 38/2003 (6 January 2005), the former CJ Webster outlined the law of false imprisonment in Tonga as follows:

- The law on false imprisonment was recently reviewed (in particular damages for it) comprehensively by the Court of Appeal in *Edwards v Pohiva* (Cross Appeal) [2003] TOCA 8; CA 01 & 102003.
- The Court of Appeal accepted that the law relating to the tort of false imprisonment is well-established, being a form of trespass to the person. As stated by Lord Bridge in *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733,743 (HL):
- "The tort of false imprisonment has two ingredients: (a) the fact of imprisonment and (b) the absence of lawful authority to justify it."
- It is a tort of strict liability there is no onus on a Plaintiff to prove that the imprisonment was unlawful or malicious. Once the Plaintiff establishes the fact of imprisonment, that is sufficient to make out a prima facie case and the onus then falls on the defendant to prove that the detention was lawful. It may be so, for example, if it is pursuant to an order of the court or the exercise of statutory powers.

NB. An action for false imprisonment will succeed or fail depending on whether the defendant can, as a matter of law, justify the detention or imprisonment. In *Fainga'a*, Webster CJ also set out the principles to be used when awarding damages as follows:

> The law attaches supreme importance to the liberty of the individual and if he or she suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage: *Murray v Ministry of Defence* [1988] 2 All ER 521,529 (HL).

In *Edwards v Pohiva* the Court of Appeal accepted that for the assessment of general and aggravated damages the relevant basic principles are now well established, having been comprehensively analyzed in 2 recent English cases. First in *Thompson v Commissioner of Police of the Metropolis* [1997] 2 All ER 762 (CA), and then more recently, by both the Court of Appeal, (Lord Woolf MR) and the House of Lords in *R v Governor of Brockhill Prison ex parte Evans (No 2)* [1998] 4 All ER 993 (CA) &

[2001] 2 AC 19 (HL). The House of Lords upheld the approach outlined by Lord Woolf in the Court of Appeal, which Lord Hope (at 40) described as a guideline 'in an area where guidance was almost entirely lacking'

> In calculating the proper compensation for loss of liberty the analogy with personal injury cases is closer than cases of defamation and the compensation is for "something which is akin to pain and suffering". In relation to aggravated damages a penal element can properly be involved, however "aggravated damages ... are primarily to be awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequences of being humiliated": Thompson (at 771-2 per Lord Woolf MR).

The principles are then summarized in the form of the guidance to be given to a jury (p 774-7):

> "(1) Save in exceptional situations ... damages are only awarded as compensation, and are intended to compensate the plaintiff for any injury or damage which he has suffered. They are not intended to punish the defendant.
>
> (2) As the law stands at present compensatory damages are of two types.
>
> (a) Ordinary damages which we would suggest should be described as basic, and
> (b) Aggravated damages.
>
> Aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award of aggravated damages. (... in the rare case where special damages are claimed in respect of some specific pecuniary loss this claim should be explained separately.)
>
> (3) ... the basic damages will depend on the circumstances and the degree of harm suffered by the plaintiff ...

The defendant argues, in a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000.

For subsequent days the daily rate will be on a progressively reducing scale. (These figures are lower than those mentioned by the Court of Appeal of Northern Ireland in *Oscar v Chief Constable of the Royal Ulster Constabulary* [1992] NI 290 where a figure of about £600 per hour was thought to be appropriate, for the first 12 hours. That case, however, only involved unlawful detention for two periods of 30 minutes in respect of which the Court of Appeal of Northern Ireland awarded £300 for the first period and £200 for the second period. On the other hand the approach is substantially more generous than that adopted by this court in the unusual case of *Cumber v Chief Constable of Hampshire Constabulary* (1995) Times, 28 January in which this court awarded £350 global damages where the jury had awarded no compensatory damages and £50 exemplary damages.)

The figures which the court has identified so far are provided to assist the judge in determining the bracket within which the jury should be invited to place their award. We appreciate, however, that circumstances can vary dramatically from case to case and that these and the subsequent figures which we provide are not intended to be applied in a mechanistic manner. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high-handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted.

The jury should then be told that if they consider the case is one for the award of damages other than basic damages then they should usually make a separate award for each category of damages. We consider that where it is appropriate to award aggravated damages the figure is unlikely to be less than £1,000. We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest. It should be strongly emphasized to the jury that the total figure for basic and aggravated damages should not exceed what they consider is fair compensation for the injury which the plaintiff has suffered. It should also be explained that if aggravated damages are awarded such damages, though compensatory and not intended as a punishment, will in fact contain a penal element as far as the defendant is concerned. Finally the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such a claim, that though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages.

It should be explained to the jury: (a) that if the jury are awarding aggravated damages these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendants point of view; (b) that exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants; (c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be

payable out of police finds, the sum awarded may not be available to be expended by the police in a way which would benefit the public (this guidance would not be appropriate if the claim were to be met by insurers); and (d) that the sum awarded by way of exemplary damages should be sufficient to mark the jury's disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose. In an appropriate case the jury should also be told that even though the plaintiff succeeds on liability any improper conduct of which they find him guilty can reduce or even eliminate any award of aggravated or exemplary damages if the jury considers that this conduct caused or contributed to the behaviour complained of.

The figures given will of course require adjusting in the future for inflation ... In giving guidance for aggravated damages we have attached importance to the fact that they are intended to be compensatory and not punitive although the same circumstances may justify punishment. In deciding upon what should be treated as the upper limits for exemplary damages we have selected a figure which is sufficiently substantial to make it clear that there has been conduct of a nature which warrants serious civil punishment and indicates the jury's vigorous disapproval of what has occurred but at the same time recognizes that the plaintiff is the recipient of a windfall in relation to exemplary damages.

As punishment is the primary objective in this class of case it is more difficult to tie the amount of exemplary damages to the award of compensatory damages, including aggravated. However, in many cases it could prove a useful check subject to the upper limits we have identified if it is accepted that it will be unusual for the exemplary damages to produce a result of more than three times the basic damages being awarded (as the total of the basic aggravated and exemplary damages) except again where the basic damages are modest."

The Tonga Court of Appeal accepted those principles in *Edwards v Pohiva*. Expanding on this in the Court of Appeal in London in *Brockhill Prison*, Lord Woolf (at 1005) noted:

- "...there can be two elements to an award of damages for false imprisonment; the first is compensation for loss of liberty and the second being the damage to reputation, humiliation, shock, injury to feelings and so on which can result from loss of liberty."
- and he went on to give more guidance that it was right to use a global approach in this type of case (at 1005):
- "We recognize that it is possible to work out a daily, weekly, or monthly figure from this amount for the approximately 2 months extra imprisonment of this case but we discourage such an exercise. No 2 cases are the same. The shorter the period, the larger can be the pro rata rate. The longer the period, the lower the pro rata rate should be.

Submissions

The defence says the claim for unlawful privation is excessive based on the following grounds:

(1) The plaintiff was a violent prisoner, and thus he was a threat to other prisoners and prison staff;

(2) The plaintiff was an unruly prisoner in deciding not to obey prison rules, the only reasonable option available to the staff was to isolate the threat from the plaintiff- to separate him from the prisoners and to put him in the punishment cells where he could be isolated and not pose any further threat;

(3) These types of situations required immediate and strict action in order to avoid a further life-threatening situation;

(4) The Prison Visiting Officers system was not functioning. (The court asks was it operational)

(5) The plaintiff was in the punishment cells on 12 occasions as listed by the Plaintiff, but there are some mistakes as accepted by the Plaintiff in cross-examination:

Incident No. 1 - should be 410 days, rather than 440 days
Incident No. 2 - should be 147 days, rather than 153 days
Incident No. 5 - should be 494 days, rather than 474 days
Incident No. 9 - The escape was on 24/1/03, not 24/1/04

The total number of days should be 1,422 days, and not 1,437 days.

- On various occasions the Plaintiff admitted he requested himself to be kept in the punishment cells so he could change his behaviour to enter Sia'atoutai Theological College, which he did attend for some time.
- The Plaintiff was put in the punishment cells and not into solitary confinement.

The claim for inhumane punishment is excessive and this is based on the following grounds:

- This form of restraint was used to restrain the Plaintiff who was a very violent and uncontrollable prisoner at the time, because he had shaken the iron bar door of the cell to the point it was going to come off.
- At that time the Plaintiff was in the punishment cells because he was part of a group of prisoners assigned to work at the Royal Palace in Nuku'alofa and he escaped, and he was later found at Vaiola Hospital. He was thus put in the punishment cells as a form of restraint from further escapes. (Incident- 7 and 8).
- The Plaintiff was not restrained at all times, but was released to have meals and also when he wanted to go to the toilet.
- There was no evidence to indicate, nor was there any cause to believe that the Plaintiff would incur any medical problems if he was to be restrained with the irons in the form that he was restrained, and the Plaintiff did not suffer

such and has not claimed that he suffered any medical problems as a result of the form of restraint.

- The restraint was ordered because it seems the only form of restraint available to stop the Plaintiff from the prolonged shaking of the iron bar door.
- The circumstances and the behaviour of the Plaintiff justified the restraint at the time.
- There is no evidence that there was an intention to leave the Plaintiff in that form of restraint for an indefinite time period.

This case is comparable to the case of *Nifai Tavake v Kingdom of Tonga* CV 296/07 (Unreported, 16 December 2006, Ward CJ) where the plaintiff in that case was handcuffed in the cells of the Central Police Station with his hands to his back for six days without ever being released. He was however assisted by fellow prisoners for comfort and also taken to the toilet, and not exposed to the sun. He was awarded $1,500 for the assault. The plaintiff in that case has not appealed.

The claim for unlawful incarceration is excessive

This is based on the following:

- The Plaintiff is claiming unlawful incarceration after he was sentenced to imprisonment for escaping from prison.
- The Plaintiff served the extra two months as a result of the Magistrate's Court sentence on the Plaintiff for escaping.
- Although the Supreme Court later quashed the conviction and sentence, before then, the Plaintiff was serving a lawful sentence.
- It should not be the fault of the Defendant that the Plaintiff did not appeal earlier before his extra sentence was served.

The Plaintiff is not entitled to damages of $800 per day.

This is based on the following:

- The assessment of the damages a person is entitled to for unlawful imprisonment depends on each case and its circumstances.
- The decision in Edwards v Pohiva and ors, [Tonga LR] 231 regarding the amount of damages awarded for the plaintiffs in that case for unlawful imprisonment was particular to the persons unlawfully incarcerated in that case. That case dealt with public figures, with employment and who suffered different unlawful incarceration.
- With respect, it would be an absurd application of the law if the decision in *Edwards* is interpreted and taken to be applied to each case of unlawful imprisonment, and as a 'one size fit all' precedent.

- The defendant argues there have been other unlawful imprisonment cases since *Edwards* where the Supreme Court has not applied the $800 per day rate for unlawful imprisonment.
- *Nifai Tavake v Kingdom of Tonga*, CV 296/07 (Unreported, 16 December 2008 Ward CJ): the Chief Justice awarded $2,950 for six days imprisonment after the 16/11 riots;
- *Faite Fainga'a v Lelea and ors*, CV 38/03 (Unreported, 6 January 2005, Webster CJ): the former Chief Justice Webster awarded $200 for 10-15 minutes unlawful imprisonment by PC Lelea, and $400 for one hour of unlawful imprisonment by PC Paasi.

The defendants submits it was never the intention of the Court of Appeal that the rate used in Edwards be applied as a 'one size fit all' precedent, because it never said so in the judgment. The defendant argues the plaintiff was unemployed, with no constant source of income, only earning his living from working his plantation, and not to mention was a serious criminal offender. They say the plaintiff is not even entitled to damages of $250 per day due to his personal circumstances. They say the plaintiff is entitled to around $100 per day- or even less than that.

E. Damages in this case is sought on the basis of vicarious liability

The defendant is sued as the employer of those who were responsible for the unlawful treatment of the plaintiff. The prison officers responsible for the treatment of the plaintiff are not being sued separately. The defendant says they should not be fully responsible for the actions of the prison officers who were responsible for this unlawful behaviour.

F. The Plaintiff is not entitled to aggravated or exemplary damages

This is based on the following: The Plaintiff has not claimed aggravated damages. The Plaintiff has not entitled exemplary damages. There are no grounds to award aggravated or exemplary damages against the Defendant on a vicarious liability basis.

G. The Plaintiff is not entitled to his full costs

This is based on the following: The Defendant has always accepted liability from the start and was willing to settle the case at the start. The Plaintiff however sought judgment by consent before Counsel could seek final confirmation and approval of the settlement from His Majesty's Cabinet, and thus delayed the resolution of this matter. Counsel was then directed to pursue an assessment by the Court of the appropriate damages to be awarded, as a matter of transparency. They say the delays in resolution of this case are not entirely the fault of the Defendant.

H. The issue of Consumption Tax

The defendant argues it is inappropriate and not in accordance with the Consumption Tax Act 2005 for the defendant in a civil case, if ordered to pay costs,

to also pay consumption tax because the defendant is not receiving a taxable service from the plaintiff or his counsel. Moreover, they say consumption tax should be paid by the Plaintiff to his Counsel. It is not the Defendant's problem if the Plaintiff cannot pay consumption tax to the Plaintiffs Counsel. The Plaintiff is the proper person to pay consumption tax because he is receiving a taxable service from his Counsel.

The Defendant seeks the following orders from the Court:

- That an appropriate amount of compensatory damages be awarded for the unlawful privation, inhumane punishment and unlawful incarceration;
- That no aggravated damages be awarded against the Defendant;
- That no exemplary damages be awarded against the Defendant;
- That the Plaintiff be awarded only partial costs, without consumption tax;

Analysis

The court has had the benefit of receiving very comprehensive written submissions from both parties to this suit; for which I am grateful.

Because of the importance of this particular case, most of counsel's submissions have been incorporated into this my Judgment. I have also had the benefit of reading the judgment of my brother Judge FORD J (as he then was) in case number AM8-9 of 2003 (*Tapa'atoutai anor v Police* [2004] Tonga LR 108):- which judgment directly affected this particular plaintiff- and that judgment was delivered on June 2004 nearly five years ago.

I wish to place on record- I consider the treatment of this particular plaintiff by the defendant's servant and agents on the date in question- as barbaric to say the very least.

The plaintiff's treatment reminds me of the type of treatment, metered out to men and women - who were detained in the various prisoner of war camps during the last world war. It also reminds one of reports on the conditions and treatment of people in Stalin's Gulags' and of the inhumane treatment of POWS in North Vietnam.

I find it quite reprehensible to have heard evidence that the defendant's servants and agents- sought fit to chain this inmate by his hands and his feet to an iron pipe at the prison - so the victim was forced to lay in the sun- frilly exposed to mosquitoes, rain and the like: - for hours on end- and this was done illegally.

That is and was inhumane and it is totally unacceptable in any civilized - christian society

There can be little wonder the plaintiff (together with another inmate) decided to escape from prison. To the plaintiff's credit, whilst the prisoners were on the run, they decided they would write to the then Chief Justice and inform him of their plight. When they wrote and delivered their letter to the then Chief Justice the plaintiff surrendered- AND THAT IS TO THEIR CREDIT (Ford J's judgment)

Upon surrendering to custody the plaintiff was charged with escaping from prison. He was subsequently convicted by a Magistrate and given an additional

sentence of two months imprisonment. The plaintiff appealed against his conviction for escape- arguing duress. He subsequently won his appeal against both conviction and sentence.

That said however- it must also be said on behalf of the defendant - their servants and agents- the plaintiff has not helped himself by his behaviour and his conduct whilst he (the plaintiff) was lawfully detained in prison. The plaintiff can hardly be described as a model / or even as a cooperative prisoner- who was well deserving of remission. The evidence revealed whilst detained in prison- and detained under a lawful sentence; imposed by a duly established and constituted court of law- the plaintiff appeared to be a constant source of trouble to the authorities.

More importantly- and of great concern to the Authorities in maintaining any semblance of order inside the prison, - the plaintiff is said to have caused trouble for and, towards fellow inmates. Undisputed evidence revealed he assaulted other prisoners on occasions using weapons. He was also abusive to the prison staff. The defendant argues- strongly how would prison staff be able to deal effectively with an unruly and violent prisoner in this type of scenario, and of necessity at the same time maintain proper order?

Prison Visitors- Under our system of justice here in Tonga, Prison Visitors (P.V's) are responsible for punishing prisoners who offend against the Prison Rules and Regulations, during their sentence. PV's are provided for under the Prison Act and the Prison Rules and Regulations. When appointed Prison Visitors have a duty to visit prisons on a regular basis, and look into all complaints concerning inmates. Prison Visitors are empowered to award punishment where necessary but always working under the law.

I have been told the Prison Visitors system was not functioning at the time of this suit; the court asks; why was the Prison Visitor system not in place? The court of its own volition obtained from the Ministry, a copy of a record indicating three named prison visitors were appointed by HM Cabinet on the 8th October 2006. This means the three current PV's were appointed on a date after this particular incident. So it is also fair to say the plaintiff cannot have been dealt with by duly appointed PV's under the Prison Act for any unlawful acts he is alleged to have committed whilst he was detained in prison serving his sentence.

Thus I must find as a fact any punishments / and or confinements awarded against the plaintiff, ---were in fact unlawful.

False Imprisonment, The tort of false imprisonment has two ingredients:

(a) The fact of imprisonment and
(b) The absence of lawful authority to justify it

There can be no dispute the plaintiff was lawfully imprisoned in the first place and that finding must also extends to the sentence of the Magistrate for his escape- the sentence was subsequently overturned on Appeal by Ford J.

In a case such as this there is no onus on a Plaintiff to prove that the imprisonment was unlawful or malicious. Once the Plaintiff establishes the fact of imprisonment, that is sufficient to make out a prima facie case and the onus then falls on the defendant to prove that the detention was lawful. Upon hearing all the evidence adduced in this case, I find as a fact the defendant was lawfully imprisoned

and whilst imprisoned for good behavior he is entitled to remission in accordance with Prison Rules in Force at the Time:-

- BUT REMISSION IS - AND ALWAYS WILL BE DEPENDANT UPON AN INMATES GOOD BEHAVIOUR. IT WOULD BE ABSURD TO THINK OR HOLD OTHERWISE.
- THE EVIDENCE REVEALS THERE WAS NO PRISON VISITOR(S) INVOLVED IN DISCIPLNG THIS PLAINTIFF.
- THE SUPERINTENDENT OF PRISONS TOOK IT UPON HIMSELF TO DO SAME AND THAT IS AND WAS UNLAWFUL.

Damages

"(1) Save in exceptional situations

Damages are awarded as compensation, and are intended to compensate the plaintiff for any injury or damage which he has suffered.

They are not intended to punish the defendant who in this case is vicariously liable for his servants and agents.

(2) As the law stands at present compensatory damages are of two types.

(a) Ordinary damages which we would suggest should be described as basic.

(b) Aggravated damages.

In this particular case there can be no claim for Aggravated damages- because Aggravated Damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award of aggravated damages.

(3) Basic damages will depend on the circumstances and the degree of harm suffered by the plaintiff ... Which in this case I find was significant.

Conclusion

I have considered all that has been said in this case. I have had sight of the correspondence between the parties and in particular a letter dated 6th April 2006 from the Solicitor General and an application for judgment dated 28th November 2006, which was considered well over three years ago.

By his Application for Judgment dated 28th November 2006 Mr. Niu set out certain terms which had been discussed at length between the parties- that is to say between the Crown and the Plaintiffs counsel - and a Minister of the Crown.

- Mr Niu asked Judgment be given in this action in favor of the plaintiff against the defendant in the sum of $53,770.00 inclusive of costs and consumption tax payable on the costs
- Counsel for the plaintiff wrote to the Hon Attorney General on 28th September 2006 to seek agreement to the settlement on behalf of the Government.
- The Solicitor General wrote on the 23rd October 2006 and advised the matter had not been lawfully settled because

Mr. Kefu had advised the plaintiff's solicitor that offer of settlement would be subject to both Ministerial and Cabinet approval.

- That Governments practice is that Cabinet gives the final approval for settlement, subject to the Hon Attorney Generals approval and that Government would like to pursue the matter to court for quantum only, and for the court to decide what amount should be awarded
- They say the Government is not liable for payment of consumption Tax on costs.
- They say Government accepted if there was to be a trial then there will be further costs, which they will have to pay to the plaintiff.

Possible Mediation Orders Pursuant to Order 45 RSC

- Rules for the practice and procedure of the Supreme Court made pursuant to the Supreme Court Act (Cap 10) came into effect 01 November 2006.
- In our view perhaps this matter should have been mediated and not have had to come to court. It is a classic case for mediation.

Accordingly

I have also looked at the plaintiffs whole conduct during the time he was incarcerated and serving a lawful sentence for serious crimes. I have in particular considered his conduct towards other inmates, and towards prison staff.

As I said before: - the plaintiff has not helped himself and there is no doubt in my mind he brought a lot of trouble upon himself- and the evidence also revealed he appears to enjoy his own solitary confinement.

I have also looked at the Defendants reluctance to settle this case out of court by way of mediation and the fact the Crown are vicariously liable for the torts of its servants and agents, and that the main protagonist the relevant Superintendent of Prisons was not included in this suit.

I have also considered Mr. Niu's request to use a much higher rate of damages awarded recently than that initially claimed, and I have taken these higher rates into account when considering quantum.

Accordingly

- I make the following orders in the interest of justice.

Order

- The Plaintiff will receive by way of compensation for Unlawful Privation a payment at the rate of $200 per day for 284 days- making a total payment for Unlawful Privation of $56,800.00.

- For Inhumane Punishment the plaintiff will receive the sum of $17,500.00 as payment
- For Exemplary Damages the plaintiff will receive the sum of $7,000.00 as payment
- The Plaintiff is awarded his full costs- including an order for the payment of Consumption Tax - by the Defendant
- THE AWARDING OF FULL COSTS AND THE PAYMENT OF CONSUMPTION TAX IS ORDERED BECAUSE IN THIS CASE "THE BUT FOR TEST" APPLIES TO THE FACTS OF THIS CASE.

In closing I would like to say; the Judiciary hopes never to see a case like this again. I also stress - Independent Prison Visitors are an essential part of any protection mechanism for inmates detained in prison. However any such system can operate **only** if Prison Visitors are properly funded, resourced and trained.

Finally, I wish to thank counsel for their attendance and I thank them both for their very comprehensive written submissions tendered on behalf of their respective clients.

Kingdom of Tonga v Lolohea

Court of Appeal, Nuku'alofa
Ford P, Burchett, Salmon, and Moore JJ
AC 20/2009

1 July 2009; 10 July 2009

Damages – appeal against quantum awarded – unlawful punishments in prison – award varied

For the facts and the Supreme Court decision, see *Lolohea v Kingdom of Tonga* [2009] Tonga LR 168

The Respondent claimed damages against the Crown for wrongful imprisonment for a total of 326 days and for inhumane punishment while a prisoner at Hu'atolitoli prison. The Crown admitted liability and the trial in the Supreme Court related just to quantum. The court awarded compensation of $200 per day for 284 days – a total of $56,800. The court also awarded the plaintiff $17,500 for inhumane imprisonment and $7,000 for exemplary damages; and that the defendant should pay the plaintiff full costs and Consumption Tax on those costs. The Crown appeal challenged the awards for unlawful imprisonment, inhumane punishment and exemplary damages and claimed that the judge had no power to order the payment of consumption tax.

Held:

1. In respect to the award for damages for unlawful imprisonment, the Court considered that $46,000 was an appropriate award. When one took into account that that included the damages for inhumane punishment separately allowed in the Court below it was significantly less than the amount awarded there. The Court concluded that it was justified in interfering with that award. The Court took into account the following facts: on occasions the respondent asked to remain for a longer period in the punishment cell to read his Bible and study; the real value of money in the Kingdom and the fact that many people were unemployed; prior to his imprisonment, the respondent was paid $45 per night as a security guard which would be $270 per week for a 6 day week and up to $800 per week when delivering containers; he lost almost a year of his life and was treated in a degrading way; he was in prison for a little over 46 weeks longer than he should have been.

2. In respect to damages for inhumane punishment, the respondent claimed $10,000 and the lower court awarded $17,500. The Court of Appeal did not consider that the inhumane punishment which existed should be treated as a separate head of damages. It was a part of the total circumstances which should be taken into account in the general damages.
3. Consideration of exemplary damages was appropriate. It was clear that the decision to manacle prisoners to the bar described in evidence must have been made at a high level. In addition to that there was a failure by the executive to put in place the procedures which would have prevented the abuses which occurred. The respondent claimed $10,000 under this head. The Court considered that to be an appropriate award. The total damages awarded was $56,000.
4. The judgment in the court below was varied in the manner outlined. The award for costs in the lower court remained. The order for payment of consumption tax was vacated.

Cases considered:

Edwards v Pohiva [2003] TLR 231
Flint v Lovell [1935] 1 KB 354
Gamser v the Nominal Defendant [1977] HCA 7; [1976] 136 CLR 145
Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29; [2002] 2 AC 122; [2001] 3 All ER 193
Rookes v Barnard [1964] UKHL 1; [1964] AC 1129 at 1228; [1964] 1 All ER 367
Rowlands v Chief Constable of Merseyside Police [2006] ENCAC v 1773
State of New South Wales v Ibbett [2006] HCA 57
Tapa'atoutai and Lolohea v Police [2004] Tonga LR 108
Tavake v Kingdom of Tonga [2008] Tonga LR 304

Statutes considered:

Crown Proceedings Act (Cap 13)
Prisons Act (Cap 36)

Rules considered:

Prison Rules (Cap 36)

Counsel for the appellant : Mr Kefu
Counsel for the respondent : Mr Niu

Judgment

[1] This is an appeal and cross appeal from a judgment of Shuster J.

[2] The Respondent claimed damages against the Crown for wrongful imprisonment for a total of 326 days and for inhumane punishment while a prisoner at Hu'atolitoli prison. The Crown admitted liability and the trial in the Supreme Court related just to quantum.

[3] The amended statement of claim which was filed after the hearing, but before final written submissions were lodged, claimed a total of $260,000.00 for wrongful imprisonment and $20,000 for inhumane punishment. The latter sum was made up of $10,000 for compensation and $10,000 for exemplary damages. No specific sum was claimed for aggravated damages.

[4] The Crown maintained that the daily rate should be $100 as a maximum. It said that the sentence of 61 days served for escaping from prison should not be included, that the amount claimed for inhumane punishment was excessive and that the plaintiff was not entitled to exemplary damages and had not claimed aggravated damages.

[5] A word of explanation is needed in relation to the 61 days period referred to above. It is correct that this was a sentence imposed by a magistrate for escaping from prison. However, on appeal Ford J held that the Plaintiff and another prisoner were entitled to an acquittal on that charge based on the concept of duress of circumstances. He held that the punishment to which they were being subjected at the time, which counsel described as torture, justified the escape. During the escape the prisoners wrote to the Chief Justice complaining of their treatment and then surrendered back to the prison – see *Tapa'atoutai and Lolohea v Police* [2004] Tonga LR 108. The question as to whether the 61 days period should be taken into account will be addressed later in this judgment.

The Respondent's Treatment in Prison

[6] The following description of the Respondents treatment is taken from the judgment of Ford J referred to in the preceding paragraph.

> "I set out below the summary of material facts taken from Mr Kefu's submissions:
>
> "I. The first appellant, Lolohea, is currently serving a sentence of 6 years imprisonment for housebreaking, theft and possession of Indian hemp.
>
> II. The second appellant, Tapa'atoutai, is currently serving a sentence of 15 years imprisonment for manslaughter.
>
> III. During the appellants incarceration, they were both repeatedly put into maximum security for various prison offences under rule 159 of the Prison Rules.
>
> IV. On 9 February 2002 the second appellant was put in the punishment cells for swearing and attempting to attack a prison officer.
>
> V. On 21 December 2003 the first appellant was put in the punishment cells for running away on 20 December 2003 when he was part of a group of prisoners assigned to work at

the Royal Palace in Nuku'alofa, and he was found at Vaiola Hospital in a drunken state.

VI. On 23 January 2003 the first appellant was put in handcuffs in the sunning cell because he was disobedient by shaking the doors of the punishment cells, and he was required to make a statement as to why he was shaking the doors but he refused.

VII. On 23 January 2003 the second appellant was put in handcuffs in the sunning cell because he was disrespectful, fieme'a by shouting he wanted to "suck a brain", and he was handcuffed to maintain the peace of the prison.

VIII. The first appellant's hands and legs were handcuffed around a pipe while he was lying on the floor, and he was wearing shorts and a singlet.

IX. The second appellant's hands were each handcuffed to the iron bars of the door to the punishment cells.

X. The appellants were handcuffed in this manner throughout 23 January 2003, and 24 January 2003, and were only released when they requested to got to the toilet or when they were fed.

XI. Around 10pm on 24 January 2003 the appellants escaped from Hu'atolitoli Prison.

XII. The appellants returned to Hu'atolitoli Prison voluntarily on 4 February 2003."

In his grounds of appeal, Mr Niu provided additional details of the punishment imposed. His description of these events was unchallenged:

"1. About 9am on Thursday 23/1/03, Lolohea was ordered to wear only a pair of shorts and a singlet and to lie back on the concrete floor of the sunning cell underneath and along where a 2 inch galvanised pipe was running from one concrete wall of the cell to the opposite concrete wall about 18 inches above the floor. His hands were then handcuffed above and hanging from the pipe, and his ankles were similarly cuffed above and hanging from the pipe with leg cuffs. He was thereby left exposed to the sun (the cell has no roof except for diamond wire mesh cover at the top) during the day and the cold and dew of the night.

2. At about 9:30am of the same morning, Tapa'atoutai was similarly ordered to wear only a pair of shorts and a singlet and to stand with his back against the outside of the steel bars of the closed door of his punishment cell (which has a roof). His right-hand was then cuffed above his right shoulder to the steel bar back behind him and his left hand was similarly cuffed above his left shoulder to the steel bar behind him with another pair of handcuffs. He would have to hang by his wrist if he was tired of standing or wanted to sleep.

3. They were both left at the mercy of the mosquitoes, which were always plentiful there.

4. Neither was told how long they were to be so cuffed. The only relief they had was when they were uncuffed to go to the toilet or have their meals, which was only for about 5 to 10 minutes.

5. They suffered and were tortured by the pain of the hand and leg cuffs, the bite and sting of the mosquitoes, the absence of sleep, the heat of the sun and the cold and dew of the night, and of the wet of the rain. The Chief Gaoler, Moleni Taufa (the Superintendant of Prisons) had ordered and had intended that these two prisoners be so punished and tortured in order that they would learn to obey and comply with the prison rules.

6. No such punishment and no torture is allowed under the Prison Act or Prison Rules. The punishment was unlawful.

7. Lolohea repeatedly asked the prison officers to allow them to consult a lawyer. Tapa'atoutai heard the requests. Other prisoners heard the requests. The request was not granted at all.

8. At about 10pm. on Friday night 24/1/03, with no hope of having a lawyer to see them and no knowledge when the torture would be over, they broke the cuffs off and broke out of Hu'atolitoli Prison and went into hiding.

9. At first they tried to see the Minster of Police and then the Chief Justice (but the Minister had shifted from his residence at Fasi to the fenced and guarded compound of Longolongo and the Chief Justice was away in Tuvalu until 3/2/03) to complain about their treatment in the prison. They decided to wait for the Chief Justice to return.

> 10. On 4/2/03 they wrote a letter to the Chief Justice about what had happened to them and gave it to a friend to take for them. They then went and gave themselves up to prison authorities on the same day."

The Judgment in the Supreme Court

[7] Shuster J outlined the facts and the arguments of counsel. He strongly criticised the prison service for its treatment of the Plaintiff. He described it as inhumane and totally unacceptable. In determining the amount of damages he took into account the plaintiff's conduct during the time he was in prison including his sometimes aggressive attitude towards other inmates and prison staff. He awarded compensation of $200 per day for 284 days – a total of $56,800. He also awarded the plaintiff $17,500 for inhumane imprisonment and $7,000 for exemplary damages. He ordered that the defendant should pay the plaintiff full costs and Consumption Tax on those costs.

The Appeal and Cross Appeal

[8] The Crown appeal challenged the awards for unlawful imprisonment, inhumane punishment and exemplary damages and claimed that the judge had no power to order the payment of consumption tax. Mr Niu for the respondent acknowledged before us that there was no justification for that order.

[9] The cross appeal essentially seeks the relief claimed in the amended statement of claim.

The Issues

[10] The issues to be determined on this appeal are:-

(i) The appropriate award of damages for unlawful imprisonment.
(ii) Should aggravated damages be included in that award
(iii) Should the 61 days period be included
(iv) What award should be made for inhumane punishment.
(v) Is the Crown liable for exemplary damages and if so what award should be made.

General Principles

[11] In *Edwards v Pohiva* [2003] TLR 231 this Court at p.244 adopted the classic statement of the grounds upon which a Court of Appeal will interfere in the assessment of damages by a judge set out in the judgment of Greer LJ in *Flint v Lovell* [1935] 1 KB 354 at 360:

> *"This court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial*

> *judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."*

[12] At page 241 of *Edwards v Pohiva* this Court adopted the following statement by the Judge appealed from of basic principles relating to the assessment of general and aggravated damages:

> *"Turning to the claim for general and aggravated damages, the relevant principles seem now to be well established. They were rather comprehensively analysed in two recent cases. First, by the English Court of Appeal in Thompson v Commissioner of Police of the Metropolis [1998] QB 498, and more recently, by both the Court of Appeal, (Lord Woolf MR) and the House of Lords in the Brockhill Prison case [R v Governor of Brockhill Prison ex parte Evans (No 2) [2000] UKHL 48; [2001] 2 AC 19. The House of Lords upheld the approach outlined by Lord Woolf, which Lord Hope (at 40) described as a guideline "in an area where guidance was almost entirely lacking."*

Lord Woolf (at 116) had noted:

> *"...there can be two elements to an award of damages for false imprisonment; the first is compensation for loss of liberty and the second being the damage to reputation, humiliation, shock, injury to feelings and so on which can result from loss of liberty."*

In the Thomson case, Lord Woolf expressed the view that in calculating the proper compensation for loss of liberty the analogy with personal injury cases was closer than cases of defamation and the compensation was for "something which is akin to pain and suffering". In relation to aggravated damages his Lordship noted that a penal element can properly be involved, however, as he put it, "aggravated damages... are primarily to be awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequences of being humiliated."

[13] As to whether ordinary and aggravated damages should be separately itemised the Court in *Edwards v Pohiva* approved (at page 243) the approach of the High Court of Australia in *Gamser v the Nominal Defendant* [1977] HCA 7; [1976] 136 CLR 145, 155. Aickin J said:

> *"[The judge] did not indicate that he had arrived at that figure by a process of attributing particular sums to individual ingredients and in this respect he followed the indication which this court had given in Arthur Robinson (Grafton) Pty. Ltd. v Carter [1968] HCA 9; (1968) 122 CLR*

> *649 that it is preferable not to attempt to assess a figure under each possible individual heading and then to add up the total... There can certainly be no error in refraining from attributing separate amounts to various headings or topics regarded as matters to be adverted to in assessing general damages."*

[14] As to exemplary damages the Court said at pp246-247:

> *"It is preferable, when the case requires consideration of basic, aggravated and exemplary damages to deal with basic and aggravated damages before exemplary damages. This is because, as Lord Woolf observed in Thompson at page 517, "exemplary damages should be awarded if, but only if, [the jury] consider that the compensation awarded by way of basic and aggravated damages was in the circumstances an inadequate punishment for the defendants." This approach was also adopted by this court in Kaufusi v Lasa & ors (above), Manu & Kingdom of Tonga v Muller (above), and Health Practitioners Registration Council & Kingdom of Tonga v Schafer-Macdonald [1997] Tonga LR 101.*

[15] The issues to be determined will be considered in the light of the above principles.

The Award for Damages for Unlawful Imprisonment

[16] Issues (i) (ii) and (iii) will be dealt with together. Shuster J appears to have accepted the Crown submission that the 61 days spent in prison as a result of the sentence imposed for the escape was a lawful imprisonment and therefore should not be included in the period for which compensation was paid. The Crown made a similar argument in this Court. We take a different view. The result of the judgment of Ford J was to declare that the escape was justified by the inhumane treatment to which Mr Lolohea was subjected. Thus the term of imprisonment imposed for escaping was a consequence of the wrongful acts of the prison authorities. The period of 61 days should therefore be included in the time being considered in the calculation of general damages. The Crown's argument that s 4(2) of the Crown Proceedings Act applies therefore fails.

[17] It is unclear whether the Judge included aggravated damages in his assessment. At p.24 of his judgment in an italicised passage commencing with quotation marks it records in para 2(b) limitations on the award of aggravated damages – they can only be awarded where claimed and where there are aggravating features. He makes no clear finding on the first issue although his comments about the treatment meted out by the prison suggest that he accepted the existence of aggravating features.

[18] In the Supreme Court the Crown argued that aggravated damages should not be allowed because they had not been pleaded. In this Court Mr Kefu noted correctly that Mr Niu had conceded that was so. Mr Niu did not resile from that position in this Court but maintained that *Edwards v Pohiva* had set a benchmark of $800 per day for

general damages. General damages will inevitably be affected by any aggravating features in the case. All the circumstances of each case must be considered. Aggravated damages when claimed separately are to compensate the plaintiff for injury to his proper pride and dignity – see the extract from Thomson referred to above. We accept Mr Kefu's submission that each case must be looked at on its own facts and that *Edwards v Pohiva* does not set a rate which should be applied in every case.

[19] The judge in the court below seems to have taken account of the respondent's behaviour in prison in assessing damages. In this court Mr Kefu argued that the fact Mr Lolohea was in prison for a serious offence and that he was an unruly prisoner should be taken into account. We do not accept this submission. Mr Lolohea's lawful term in prison paid his debt to society for his wrongful behaviour. However, we do take into account his evidence in the Court below that on occasions he asked to remain for a longer period in the punishment cell to read his Bible and study. We are also entitled to take into account as Ford CJ did in *Tavake v Kingdom of Tonga* [2008] Tonga LR 304 the real value of money in the Kingdom and the fact that many people are unemployed. We also take into account Mr Lolohea's evidence in the Court below that prior to his imprisonment he was paid $45 per night as a security guard which would be $270 per week for a 6 day week and up to $800 per week when delivering containers. He lost almost a year of his life and was treated in a degrading way. He was in prison for a little over 46 weeks longer than he should have been. In *Tavake* the plaintiff received $2,950 for unlawful imprisonment for 4 weeks. We consider that in this case $46,000 is an appropriate award. When one takes into account that this includes the damages for inhumane punishment separately allowed in the Court below it is significantly less than the amount awarded by Shuster J so we conclude we are justified in interfering with his award.

Inhumane Punishment

[20] Mr Lolohea claimed $10,000 under this head and the Judge awarded $17,500. We do not consider that the inhumane punishment which undoubtedly existed in this case should be treated as a separate head of damages. It is a part of the total circumstances which should be taken into account in the general damages and we have done so.

Exemplary Damages

[21] Counsel referred us to a number of judgments in Court in England, Australia and New Zealand. Mr Kefu relied in particular on the judgment of Lord Scott in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29; [2002] 2 AC 122; [2001] 3 All ER 193. Lord Scott expressed the view that the entitlement to an award of exemplary damages was contrary to principle and should be rejected. However that case dealt with the issue of whether exemplary damages may be awarded for the tort of misfeasance in public office. The question of whether such damages are available generally was not argued and Lord Scott acknowledged that his views were provisional. It should be noted in that case that Lord Hutton appears to support the view of Lord Devlin in *Rookes v Barnard* [1964] UKHL 1; [1964] AC 1129 at 1228;

[1964] 1 All ER 367 at 411 that exemplary damages are appropriate to punish conduct which is outrageous as being oppressive or arbitrary or unconstitutional.

[22] In the more recent decision of *Rowlands v Chief Constable of Merseyside Police* [2006] ENCAC v 1773 the issue of vicarious liability for exemplary damages was directly addressed by the English Court of Appeal. At para. 47 the Court had this to say:-

> *"47. The arguments generally for and against the retention of a power to award exemplary damages in limited classes of cases, as well as the arguments for and against awards being made [against] persons whose liability is solely vicarious, are canvassed in the Report of the Law Commission on Aggravated, Exemplary and Restitutionary Damages (1997) (Law. Com. No.247): see in particular paragraphs 1.210-229 in which vicarious liability is discussed. There undoubtedly are strong arguments of principle in favour of limiting the application of an avowedly punitive award to those who are personally at fault, who, in all but a tiny minority of cases brought against the police, could confidently be expected not to include the chief constable. However, since the power to award exemplary damages rests on policy rather than principle, it seems to me that the question whether awards can be made against persons whose liability is vicarious only must also be answered by resort to considerations of policy rather than strict principle. While the common law continues to recognise a power to award exemplary damages in respect of wrongdoing by servants of the government of a kind that has a direct effect on civil liberties, which for my own part I think it should, I think that it is desirable as a matter of policy that the courts should be able to make punitive awards against those who are vicariously liable for the conduct of their subordinates without being constrained by the financial means of those who committed the wrongful acts in question. Only by this means can awards of an adequate amount be made against those who bear public responsibility for the conduct of the officers concerned."*

Earlier the Court indicated that such damages would be available for oppressive arbitrary and unconstitutional action. The Court also said at para 50 that the award of exemplary damages must be considered in the light of the award of compensatory damages in order to ensure that the total award is not excessive. An important question is whether the total award provides adequate punishment (para 51). A similar approach has been taken by the High Court of Australia in *State of New South Wales v Ibbett* [2006] HCA 57 where the Court approved the award of exemplary damages where liability was vicarious and there had been a misuse of coercive powers entrusted to public officials.

[23] In our opinion these principles should be adopted in Tonga. We consider that this is a case where, as a matter of policy, consideration of exemplary damages is appropriate. It seems clear from the evidence in this case and the earlier one before Ford J that the decision to manacle prisoners to the bar described in evidence must have been made at a high level. In addition to that there was a failure by the executive to put in place the procedures which would have prevented the abuses which occurred in this case. The Plaintiff claimed $10,000 under this head. We consider that to be an appropriate award. That will mean that the total damages award is $56,000.

410 **Conclusion**

[24] The judgment in the court below is varied in the manner outlined above. The award for costs in the lower court remains. The order for payment of consumption tax is vacated.

[25] In this Court each party has had some success. Costs should lie where they fall.

Vainikolo v Kaihea anor

Land Court, Nuku'alofa
Shuster J
LA 11/08

24 April 2009

Land law – dispute over purported grant of land – defendants were in lawful occupation of land – grant cancelled

The plaintiff claimed that he was the registered holder of an allotment. The registration of the allotment occurred on 11 July 2007. Registration occurred after several approaches were made by the plaintiff to the Fakafanua (the estate holder (tof'ia) now identified as "the present Fakafanua). The defendants claimed that in 1990 permission was lawfully granted to the first and second defendants to live on the land. They claim that they had undisturbed occupation of the land for more than 19 years and were in lawful occupation on 11 July 2007 when the Minister of Lands purported to register the land in the plaintiff's name.

Held:

1. The Minister for Land, and his deputy or agents of necessity had the duty to physically inspect each and every parcel of land prior to the granting and or registration of a parcel of land; this was particularly so, whenever a Minister / Deputy or Public Servant was asked to use his or her wide discretionary powers.
2. A Court would upset a grant only if a person challenging its validity established that the Minister acted on wrong principles which meant that the Minister acted contrary to statute or in breach of the rules of natural justice, or in breach of a clear promise by the Minister, and, or the tof'ia holder".
3. The Land Court found that on the 11th July 2007 there was a clear impediment to the grant of the land to the plaintiff, because the land was lawfully occupied by the defendants and they were lawful tenants of long standing tenure of more than 19 years ensconced at the behest and the acquiescence of previous estate holders. Therefore the grant of land to the plaintiff was unlawful.
4. The Court ordered the grant of the registration of the land to the plaintiff, made on the 11th July 2007 by the Hon Minister of Land, to be cancelled.

Cases considered:

Havea v Tu'i'afitu, Kava and Minister of Lands [1974 — 1980] Tonga LR 55

Kaufusi v Taunaholo [1981-88] Tonga LR 70 (PC)

Levene v Inland Revenue Commissioners [1928] All ER 746 (HL)

Moa v Faka'osita and Ors [1991] Tonga LR 32 (CA)

Tafa v Siope Viau, Sinitalela Viau and Minister of Lands (unreported, Appeal case no. 3/2006)

Veikune v Tu'iha'atehio LA 10/2005

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff : Mr Garrett

Counsel for the first and second defendants : Mr Niu

Judgment

Background

The plaintiff's claim is that he is currently registered as the holder of an allotment which is the central issue in this case. The registration of the allotment (hereinafter called the land) with the Nuku'alofa Land Office, occurred in July 2007. Registration occurred after several approaches were made by the plaintiff to the Fakafanua; (the estate holder (tof'ia) now identified as "the present Fakafanua"

The plaintiff accepts he has no claim to the land by line of descent, but he also argues neither does anyone else. The plaintiff claims he has family, and also blood ties to the land; because his grandmother was the sister of the last legal holder of the land - a grandmother - who left no male heirs when she died.

The second defendant is an illegitimate child - again with no direct blood connection to the land. Her claim to the parcel of land arises from the fact she was fostered by the daughter of the last legal holder of the land, and her claim is also based upon her families long term — that is to say 19 plus years of she says lawful residence - on the land.

The first defendant is an adult male, and a resident of Ma'ufanga, and as a male he was lawfully entitled to apply to the Noble (tof'ia) for an allotment - he never did. The only connection the first defendant has to the land is by his marriage to the second defendant. The defendants have a son who recently turned 18. The defendant's son has also taken no formal steps to apply for registration of this parcel of land, despite having becoming entitled to, upon turning 16.

Via her evidence, the second defendant (a police officer) said she was aware the land could never be registered in her name; as the law now stands. The second defendant constantly averred the land could, and it should be registered in her son's name. The defendant's 18 year old son did not give evidence in this case.

The plaintiff's claim

The plaintiff's claim is set out under - three grounds.

[a] The first ground is the plaintiff is the legal holder of the allotment, having obtained registration of the land - without fraud, or, any other improper conduct.

[b] The second ground is that the plaintiff has blood ties to the land - ties derived through his grandmother.

[c] The third ground is that the defendants are at best occupiers, and - occupiers under a bare licence which is terminable at any time by the landholder, and, at the very worst - they are squatters.

The Law and the Burden of Proof

The plaintiff's submission is — this is an unusual case. It is unusual in that although the case is brought by the plaintiff; by its very nature; it is also a challenge by the second defendant - to the plaintiff's right to become the registered holder of the land. The case was brought by the plaintiff; because the defendants refused to move from the land, despite the land, being registered in the plaintiff's name at the Land Office, since July 2007.

The plaintiff's case is also that - by virtue of his formal registration of the land, the plaintiff is *prima facie entitled to be assumed to have obtained a valid grant of the land.*

The plaintiff says the burden of proving the grant is invalid and that the registration is accordingly invalid therefore falls on the defendants. The plaintiffs says the defendants must show in law that their equitable claim - whatever its basis — is superior to the plaintiff's legal claim, by virtue of the plaintiff applying for; and, by the plaintiff registering the land.

The plaintiffs say the applicable law - whenever a person seeks to overturn a grant of land because of a claimed equitable interest - has been set out, both at the Privy Council and, at the Court of Appeal level and they cite the case of: *Havea v Tu'i'afitu, Kava and Minister of Lands* [1974 — 1980] Tonga LR 55 at 56 where their Lordships stated the law to be as follows:-

> *"The court will upset a grant only if a person challenging its validity establishes that the Minister has acted on wrong principles which means that the Minister has acted contrary to statute or in breach of the rules of natural justice, or in breach of a clear promise by the Minister and the tof'ia holder"*

In *Moa v Faka'osita and Ors* [1991] Tonga LR 32 (CA) at 33 the Court of Appeal endorsed a very similar language - stating:

> *"The Minister or Deputy Minister has a wide discretion in deciding who should be granted allotments and this Court [the Land Court] should only interfere if it is clearly shown to have been exercised - on wrong principles."*

The plaintiff says it is proper to acknowledge the important role in such cases, of the tof'ia holder, who they say in this case, is the present Fakafanua. The plaintiff says that in Tonga, land allotments are properly made by the Noble in whose estate the

allotment lies: provided there is no material irregularity, such as a fraud or breach of the law: — which may be discovered by either the Ministry of Lands - or by the Minister or his Deputy Minister.

Given the wide discretion referred to in *Moa,* the plaintiff says it is proper to note the remarks in the judgment of the Privy Council in *Havea* (supra) regarding the role of the tof'ia holder:

> *"On the question of family connections, the judge said there was no evidence on the point, but stated as he was entitled to do, that the tof'ia [holder] is considered to be an expert on Land Law"*

The plaintiffs say it was extremely unlikely that in the present case, the tof'ia has failed to consider family custom. In the present case the plaintiff says - the following was well established by the evidence: The plaintiff, when he approached the present Fakafanua seeking to have his application for his land registration signed, says the plaintiff fully disclosed the land was presently occupied by others, and he fully explained who the occupiers were.

The plaintiff says before granting the allotment, the present Fakafanua made enquiries of the plaintiff, as to the basis of *his* claim, and also his family connections to the land, and, after satisfying himself of the legitimacy of the claim, the present Fakafanua then signed the plaintiff's application for the grant. The plaintiff says the Minister of Lands — if not prior to the registration of the land— then immediately afterwards— the Minister was made fully aware of *all the facts.*

That assertion is hotly disputed by the defendants.

The Plaintiff is lawfully registered - as the allotment (land) holder

The plaintiff via his statement of claim says - the starting point must be that the plaintiff is lawfully registered as the holder of the allotment; and the first question to be answered before any consideration takes place of any competing interest is- whether the registration of the piece land - was lawful?

The plaintiff says the evidence revealed the plaintiff is - and at all material times was a male Tongan, over 18 years of age, with ancestral ties to the Ma'ufanga estate, the landholder of which - is the present Fakafanua. They say the present Fakafanua has on the evidence accepted the plaintiff's claim that the plaintiff- is entitled to be registered as the allotment holder - because of his ancestral ties to the land, albeit those ties are derived through the plaintiff's grandmother - **not** his grandfather.

The plaintiff says it must be accepted by the parties; that the promise of the late Fakafanua to the plaintiff cannot in itself provide the plaintiff with a cause of action. The plaintiff says the uncontradicted evidence, of the various meetings between the plaintiff and all three holders of the Fakafanua title, goes a long way to support the proposition that the plaintiff, as a male Tongan; with long standing ties to the Ma'ufanga estate, and in particular to this piece of land- entitled him to be registered as the holder of that piece of land on the estate.

The plaintiff says that while the plaintiff is not entitled to the land by descent, that does not mean his blood connections via his Grandmother are irrelevant — although, lie accepts they would be irrelevant- if the last landholder had left male descendants, arid the plaintiff had no connection with the male heirs.

The present Fakafanua — the plaintiff argues is an intelligent and well educated man - as such he is - and he would be very much aware of his specific role in Tongan society. The plaintiff argued the present Fakafanua was left in no doubt (and said so in his evidence) - that the plaintiff had the right to be the registered holder of that land.

The plaintiff says - the present Fakafanua confirmed in evidence, the plaintiff prior to asking the present Fakafanua to sign his application, had informed the present Fakafanun of the fact that the second defendant was occupying the land, and the plaintiff had fully explained the nature of the defendants' claim to this piece of land. In possession of all the facts, the plaintiff says the present Fakafanua went and signed the plaintiffs application document- they argue by signing the document and by assenting, the present Fakafanua fully endorsed the plaintiffs application for the land.

The defendants disagree: - they question - did the present Fakafanua with all that knowledge then approach the defendants. Did lie take any time to visit - to see if the piece of land *was available*? The evidence given by the present Fakafanua - in court on oath reveals - the Fakafanua admitted he had never met the defendants in this case. He did not visit them, and he did not visit the land the locus in quo.

The issue of — the Plaintiff's residence in the USA

It was suggested the plaintiff was not entitled to be registered as the allotment holder of the land in question - because the plaintiff was not currently resident either in; or on the Ma'ufanga estate. In his evidence in chief, the plaintiff says he made it clear his primary residence was in the United States, although he also told the court he returned to Tonga often. He also made it clear he was careful to have customary obligations performed for his Noble by immediate relatives during his absence abroad.

Section 50 (a) of the Land Act provides that:

> (a) An applicant for an allotment, lawfully resident in a hereditary estate, shall have his allotment out of land *available* for allotments in that estate.

It has been argued on a number of occasions; that unless an applicant is resident in / on the particular estate at the time the allotment is registered to him, then that registration is invalid. It was submitted by the plaintiff, that it is now well established this argument alone is insufficient - to invalidate the grant of a piece of land.

In *Havea v T'i'afitu, Kava and Minister of Lands* [1974-1980] Tonga LR (PC) the question of "*residence*" was addressed. The appellant in that case claimed that because the respondent was resident in Ha'apai, he was not entitled to be registered as the holder of an allotment elsewhere in Tonga.

In rejecting that argument, their lordships made two important points:

1.1.1. That the courts will upset a grant only if the person challenging its validity establishes that the Minister acted on wrong principles — which means that the Minister has acted contrary to statute, or in breach of natural justice, or

in breach of a clear promise by the Minister and the tof'ia holder, and secondly

1.1.2. Even if the person to whom the land had been granted was not shown to be resident in the tof'ia before the grant, this did not cause the grant to be invalid under s50 of the Land Act.

The plaintiff argues the first finding in Havea is relevant to the wider issues in the present ease, but for the moment they submit that the case is authority for the proposition that establishing that a person is not primarily resident in a tof'ia - is not a sufficient ground for disturbing a grant. The plaintiff says the residence issue came before the Privy Council- again in *Kaufusi v Taunaholo* [1981-88] Tonga LR 70 (PC).

The facts of this case are not dissimilar to those in the present case, in that following the surrender of land in favour of Taunaholo, an application was made for registration of the allotment, which application was opposed by two persons; who had been living on the land for quite some period of time. *Note that land was surrendered - this land was not.*

In *Kaufusi*, the Supreme Court upheld Taunaholo's claim, and ordered that the surrendered portion be registered in his name. The occupiers appealed to the Privy Council. One of the grounds of appeal was that Taunaholo had never been a resident of Haveluloto, and that s.50 of the Land Act debarred him from a grant of land. The appellant's arguments failed, and Taunholo's grant was upheld. The issue of residence arose again before the Court of Appeal in *Moa v Faka'osita, H'alaufnli & Minister of Lands* [1991] Tonga LR 32. At first sight the plaintiff's counsel says, this case appears unhelpful to the plaintiff, but it was submitted that there are important differences between the facts in *Moa* and in the present case.

In *Moa*, the appellant — a resident of the United States - had been successful in the Land Court to the extent of having obtained cancellation of a grant made to the first respondent. He was unsuccessful in the Land Court in having the disputed land instead registered to himself. He appealed the Land Court's refusal to register him, to the Court of Appeal. One of the arguments made in the appeal was that the appellant was resident in the United States, and was therefore not entitled to be registered.

It was submitted that for a number of reasons, *Moa* can be distinguished from the facts in the present case.

Firstly, the plaintiff in the present case is already registered as the allotment holder. Although the case has been brought by the plaintiff that is only because the defendants have refused to recognize the registration in his name, and they refuse to leave the land. Therefore it was submitted, it was appropriate to return to the principles set out above.

Secondly, and arguably more importantly, it was submitted that whereas in Moa the appellant had effectively abandoned Tonga for the United States, the plaintiff in the instant case has retained close ties to Tonga because he returns to the Kingdom often.

The plaintiff had also been careful to have his customary obligations to his Noble complied with by his relatives whenever he is not in Tonga. Evidence was also adduced in this case that when the present Fakafanua visited the United States with his father, the late Tuotasi Fakafanua, the plaintiff picked them up from the airport he

drove them around and he took care of them. Evidence was also led whenever the plaintiff is in Tonga; he has personally discharged his customary obligations. The present Fakafanua also confirmed in his evidence the plaintiff's claims with regard to his visit to the United States, when he accompanied his late father he also confirmed the plaintiff had discharged his cultural obligations following the death. It was submitted by counsel that as a result the plaintiff is in a very different position from the appellant in *Moa* of whom the Court observed:

> *"... there is no evidence in the Appeal Book which would establish that whilst in the United States the appellant maintained any connection with Tonga, other than recognition of it as his place of birth and as the place to which he hopes ultimately to return."*

It was also submitted by the plaintiff it was clear from the evidence that in stark contrast to the plaintiff in this case, the second defendant, despite her living on the estate, has not discharged any of her obligations to the present Fakafanua; indeed the evidence of both the second defendant and the present Fakafanua was that they had never even met prior to this case. However this was denied by the defendant.

Thirdly, it is clear from *Moa* that Tongan law does not differ from English law on the issue of residence, and in English law it is quite clearly established that a man can have more than one residence. In *Moa* the Court accepted that submissions made by counsel for the Minister of Lands correctly stated the law as to residence and the Judgment of Morling J adopts the submissions and it refers to cases presumably cited in them. His Honour cited with approval: *Levene v Inland Revenue Commissioners* [1928] All ER 746 (HL) at 749.

> *"...But a man may reside in more than one place. Just as a man may have two homes — one in London and one in the country — so he may have a home abroad and a home in the United Kingdom, and in that case he is held to be a resident of both places."*

It was submitted that the plaintiff in the present case is a person such as referred to in *Levene* — he is a resident of both the United States and Tonga. The plaintiff has never renounced his Tongan citizenship, and he returns to his homeland regularly. There was nothing in the evidence to contradict his claims to have made approaches to three successive holders of the Fakafanua title for registration of certain land within the estate in which he was born; land to which he has strong blood ties, albeit they are not ties recognized by the law of succession.

It was accepted that the late Fakafanua's alleged promise to the plaintiff cannot in itself create a cause of action, but it was also submitted that equally there is no evidence to contradict the plaintiff's claim to his ongoing efforts; or to have the land registered in his name based on that promise made to him.

It was said by the plaintiff that the precise nature of the defendants' claim remained somewhat unclear by the time the evidence was concluded. The first defendant gave no evidence because it was said he was abroad. In her evidence the second defendant conceded that she could never be registered as the holder of the allotment because she was a female. In that regard, it was submitted that even if the

Court was minded to consider whether the laws of succession excluding women remain valid, this is not a case where any discussion of that issue is appropriate.

The plaintiff says the second defendant— regardless of her sex — could **never** succeed to the land because she had no blood connection to the land. She is no more than the foster child of a woman- who once held an unmarried daughter's life interest. The second defendant said at various points in her evidence that while she could not become the registered holder of the allotment, her son could and lie should be entitled to be registered as the allotment holder.

In her evidence in chief the second defendant was asked why she went to see the late Fakafanua sometime after her marriage — the exact or even approximate date of that meeting was entirely unclear on the evidence, although the pleadings say the meeting was in 1990.

> "Her answer was-- "*to apply for the allotment, and to register it*".

Her counsel pointed out that because she was a woman she could not have an allotment. In reply the witness said that she wanted to register the Land in her son's name. In reply to a question from the bench, the witness stated that her son was only one year old at that time. The second defendant admitted in cross examination that she was aware that her son could not be registered as the holder of an allotment until he was 16. When asked why she did not encourage or have her son make an application on the day he turned 16, the plaintiff says the witness was evasive.

Although the second defendant admitted she knew where the Ministry of Lands was, and also that she knew application forms for allotments were to be obtained from them, neither she nor her son had, at any time prior to the court hearing, taken any steps to make an application for registration of any land.

The plaintiff says the witness repeatedly made reference to her supposed rights to the land in question "*through my son not through me*." Although she claimed to have been granted the right to live on the land by the late Fakafanua at a meeting she attended after her marriage, she nevertheless felt the need to approach the late Tuotasi Fakafanua — the father of the Present Fakafanua — "*to be certain of this allotment because her son was almost of legal age*."

It was submitted by the plaintiff that this evidence was quite inconsistent with a claim based on an alleged promise by the late Fakafanua. If the witness the second defendant had been given a promise that she could "*go and live on the land — no-one will disturb you*", why did she have a need to approach Tuotasi Fakafanua, because her son was almost of legal age? If the second defendant thought she had a valid claim through her son — as she claims — why did she not ensure that her son beat a path to the Ministry of Lands the day he turned 16? Why, two years after her son's sixteenth birthday, has **he** not made a claim?

It was also said while the defendants' son may well have a claim to **an** allotment in Ma'ufanga, he has no claim to the allotment in question, and the second defendant knew it. Because the second defendant admitted that she had no legal claim. It was submitted that her only possible claim is an equitable claim, based on her long residence on the land amounting to prescription.

The true nature of the defendants' claim

It was submitted by the plaintiff that the best that can be said about the defendants' claim to the land is that they were granted a licence to occupy the land by the late Fakafanua at some uncertain date in the past. At the worst, the defendants are mere squatters with no right to be on the land at all.

Given that the second defendant cannot make any claim for registration herself, and that given that neither her son nor the first defendant have made a claim to be registered holders, the defendants' only possible claim must be in the nature of an estoppel - created by an alleged promise made by the present Fakafanua's grandfather, which promise created some sort of licence to occupy the land. If the court accepted that such a promise was made, and that a licence was created, it was submitted that the only thing which can be said about it is that its terms were entirely unclear. There was no evidence adduced — and to be fair no claim — that there is or ever was, anything in writing which went and supported the existence of the alleged promise.

In her evidence, the second defendant said with regard to the meeting she had with Fakafanua's Grandfather that:

> "His answer was go and live on the allotment and no-one will come and remove you ... I am the owner of the estate."

Under cross examination the following exchange occurred:

> Q: Old Fakafanua said "go and live there, no-one will disturb you"?
> A: Yes
> Q: Did he say 'go and build a house on the land?
> A: No, he didn't say that

It is common ground that when the second defendant went to live on the land as a child, and the only building on the land was the old wooden residence built very close to the road boundary which building remains there today. It is also common ground that some time after their marriage, the defendants built the larger residence at the rear of the property.

The first question therefore should be "Under what authority if any did the defendants build that dwelling?" The next question arising from the first is "did building that dwelling give the defendants any greater right to the land?" It was submitted that the evidence of the meeting between Fakafanua's Grandfather and the defendants — if in fact that meeting took place at all — is very unsatisfactory.

This Court has, in the recent case of *Veikune v Tu'iha'atehio* LA 10/2005 (unreported) noted that while the court has adopted a rather generous approach to the exceptions to the hearsay rule, the plaintiff says double hearsay is an example of "the worse kind of hearsay evidence."

They say the only persons available to give evidence as to what transpired at the alleged meeting are the defendants themselves, and Kamilo, who appears to have known a Matapule called Makaui — who is now deceased - and who allegedly attended a meeting and later told Kamilo about the meeting. With respect to him, the plaintiffs say that Kamilo's evidence was — at best — double hearsay from 20 or

more years ago. It is evidence of what Makaui and the second defendant told him of what was said at the meeting. While the witness claimed at one point that his memory was clear, it was suggested it was obvious the witness did not have any clear idea of when the alleged meeting took place also his evidence completely contradicted that of the second defendant.

The first defendant did not give evidence. He is apparently an overstayer in New Zealand, and the second defendant claimed that neither she, nor any of her children had had any contact with him for quite some time.

The second defendant conceded that the first defendant's evidence as to what took place at the meeting with the Fakafanua's grandfather would have been very helpful, but she also claimed to have no knowledge of his whereabouts. The witness Kamilo however told a different story. He said that he had been told by one of the defendants' children that he — the child - had been in contact with his father "about one week ago." It was suggested that this is but one, of many areas in which the second defendant's evidence was less than credible.

It was suggested by the plaintiff that putting the best possible construction on what was granted to the defendants by the current Fakafanua's Grandfather — was a bare licence to occupy the land, and to occupy the land until such time as the Fakafanua should see fit to grant the allotment to some properly entitled person. It was further strongly suggested by the plaintiff that any licence to occupy the land, has now been terminated by the present Fakafanua- by the grant of the land to the plaintiff.

The Rights of a Licence Holder as against the Registered Holder

The defendants' claim to be lawful occupiers of the land is based solely on their occupation of the land for a period of 18 + years. The second defendant says their occupation is based upon a promise by the present Fakafanua's Grandfather, but the only evidence of that alleged promise is the oral evidence of the second defendant, and also the double hearsay- oral evidence of the witness Kamilo.

It was suggested by the plaintiff that it was significant that both in the pleadings (paragraph. 19 of the counterclaim) and in her evidence the second defendant only claims that the promise was to allow her and her husband to occupy the allotment. At the time the alleged promise was made, there was an old house on the allotment, a house which had been there since the last lawful landholder built it, which was sometime prior to his death in 1942.

It was suggested that allowing someone to occupy land on a licence — whatever its terms might be — is a very different thing from allowing someone to build on the land and build a new and much larger dwelling. Although in paragraph 20 of the counterclaim the defendants say they built this house "in pursuance of what the Fakafanua had told them it was submitted that the second defendant's own evidence on this point does not support the claim that the licence — if there was one — ever allowed the defendants to build a house.

It was suggested by the plaintiff that the court may take judicial notice of two things:

1.1.3. The original house — now apparently unoccupied — is built on the road boundary;

1.1.4. The new house built by the defendants is at the rear and is hard up against the rear of the allotment.

The plaintiff argued; that if the defendants truly believed they had the right: not only to occupy the land, but also to build on the land, why not demolish the derelict old house and build the new house somewhere in the middle of the allotment — or even partially over the site of the old house?

The plaintiff says the evidence of the current Fakafanua was that he had never met the defendants, and this was confirmed by Malia, who agreed that prior to the case she had never met the Fakafanua. More importantly, the Fakafanua said that to the best of his knowledge, neither of the defendants had performed their customary obligations after his, the Fakafanua's, father passed away but the defendants dispute this.

It was also suggested by the plaintiff that it is open to the court to find on the evidence that while a licence to occupy the allotment and the dwelling already on it - may have been given by the Present Fakafanua's Grandfather, the defendants conduct since building their house suggests that they were well aware that they had no right to build their new house: and they were effectively, "keeping their heads down" in the hope that they would be overlooked. It was also suggested by the plaintiff that it is significant that at no time did either the first defendant or his son ever apply to register the allotment formally. They ask why not?

Although it appears he had no ancestral ties to the area, the first defendant was certainly resident in and on the property — and therefore within the estate of Ma'ufanga — since at least 1990. As a male Tongan the first defendant would have been perfectly entitled to apply for a grant. The plaintiff also asks why the defendant's son had not applied to register the land the day he turned 16. They argue the son was presumably born within the estate, so arguably, the son had a better claim than his father.

In her evidence the second defendant repeatedly said that while she understood, she herself had no legal claim to the land, her son did. The second defendant referred to a meeting she allegedly had with the present Fakafanua's late father prior to this death. When asked by her counsel why she went to see the then Fakafanua, she said "because I have a son and I wanted to register the land in his name".

The plaintiff questioned why nothing happened after that meeting, which must have occurred more than five years ago, since the then Fakafanua died in 2004. It was suggested by the plaintiffs, that the lack of action by either of the qualified males in the defendant's family suggested that the defendants knew that whatever rights they had were temporary only, and sooner or later they would be required to leave when some other person- with blood ties made a claim on the allotment.

Issue made by mistake or incorrect principles?

In paragraph.24 of their defence the defendants suggest two alternative grounds - for the cancellation of the registration:

1.1.5. That either the Fakafanua or the Minister of Lands (or both) were unaware that the land was occupied by the defendants; or

1.1.6. The Minister was aware of the defendants' occupation, but notwithstanding that knowledge he granted the registration on a wrong principle, namely that is was not "available" due to being occupied.

It was said by the plaintiff that the evidence suggests that neither of these scenarios is supported by the evidence. The plaintiff says — and the present Fakafanua confirmed — that the plaintiff informed both the Fakafanua and the Minister of Land the defendants were occupying the land, and he further explained who they were, and the basis of their claim. What the plaintiff says is correct —other than the repeated assertion that the second defendant's son was entitled to be registered; no alternative basis of claim other than occupation was pursued.

The plaintiff says it is clear from the meetings arranged with the Minister of Lands on 22 and 23 October 2007 — which the defendant admits occurred but she did not attend — that the Minister of Lands was well aware of the competing claims to the allotment. At that time both the Minister of Lands and the Fakafanua were prepared to grant an alternative allotment to the defendants, but they refused the grant.

The plaintiff says there is no evidence to support any assertion that the plaintiff acted in any way underhandedly, or he concealed any information. He made his case to his Noble — disclosing the defendants' occupation of the land — and the Fakafanua was persuaded that the plaintiff ought to be granted the allotment. The Fakafanua was clear in his evidence that being in possession of all of the facts; he remained of the view that the plaintiff had the better claim in Tongan custom to the Land than the defendants.

The plaintiff says it is clear that the Minister of Lands also knew all the facts at the meetings on 22 and 23 October 2007 — the defendants admit both that the meetings took place, and that the plaintiff's then counsel wrote to both the Minister of Lands and the defendants' counsel shortly after the meetings occurred recording the outcome of them. The plaintiff says it is beyond argument that despite knowing the full facts, and the basis of the defendants' claim, the Minister of Lands declined to cancel the registration. He is apparently said to have said "he would let the Land court sort it out."

In responding to a general remark from the bench, the court asked why the Minister of Lands was not joined to the action by either of the parties. From the plaintiff's side, the answer is he did not need to; he maintains that he is lawfully registered as the holder of the land, and that he fully disclosed all facts when he applied for this allotment.

It was submitted by the plaintiff that perhaps the reason the defendants did not join the Minister — (who would have been their best source of compensation if the case went against them) — is simply that they and their counsel were aware of the weakness of their claim, and that the Hon Minister has a wide discretion in such matters — *Moa* (supra At page 33).

THERE IS NO REASON TO OVERTURN the presumption in favour of registration.

It was submitted by the plaintiff that there was nothing in the evidence before the court which justifies interfering with the principle stated by the Court of Appeal and

Privy Council in *Moa*, and *Havea* (supra) namely that the Court should only interfere where it is clear that the Minister has acted contrary to statute or in breach of natural justice.

With regard to the statutory argument, they say the only possible ground for challenge is that because the plaintiff is primarily resident in the United States, he may be disbarred by s 50(a) of the Land Act. That argument was answered comprehensively by the Court of Appeal affirmation in *Moa* (supra at page 34) and it was affirmed that a person may be resident in two different countries.

As to the natural justice argument, it was submitted that this has even less weight. The Minister had not one but two meetings with the parties. Although the second defendant did not attend one of them, she was represented by her then counsel. The plaintiff says there can be no argument that the defendants did not receive a fair hearing. The Court asks and queries: "Were the parties on an equal footing, per Minister, Noble, and Commoner?

The plaintiff argues having heard the defendants' grounds for seeking to cancel the registration, the Minister declined, but he offered the defendants an alternative allotment.

The plaintiff says the old saying goes "you can't be fairer than that". However the plaintiff says the defendants declined the offer. It was strongly submitted by the plaintiff that there was no reason for the land court to intervene and or overturn the decision of the Minister, and the plaintiff is entitled to the necessary orders to give effect to his prayer for relief set out in his Statement of Claim.

DEFENCE COUNSEL - made the following submissions on behalf of the defendants:

The lawful residence of the defendant's on the land in question.

The evidence revealed Kelemete had lawfully resided on this allotment the land with his wife, Asi, and his daughter, Tuva'itai. That was because —

(a) The previous estate holder, the late Fakafanua, had agreed that they could reside on the allotment, quite independently
(b) There was a lawful grant of the allotment to him - by the Minister of Lands.

An estate holder has the right to allow persons, to whom the Minister of Lands has not granted an allotment, to reside lawfully on lands of his estate. That right the defendants say is implied in the following provisions of the Land Act:

> *Section- 8 LA. Subject to the provisions of this Act relating to surrender, the grant, if the applicant be lawfully residing on an hereditary estate shall be made front the lands in such hereditary estate*
> (Underline added)

> *Section 35(1)*
> *Nothing contained hereof shall be deemed or construed as prohibiting any holder of an hereditary estate from refusing permission to take up residence on his hereditary estate to any person who belongs to another*

> *locality or holds a tax allotment elsewhere- even though the wife of such person belongs to a village- upon such holder's estate.*
>
> *(2) Any such person coming to reside on an estate may be ordered in writing by the holder to leave, and if that person refuses or fails to obey such order within 7 days ..."*

(Underline added)

Section 50.

Land for allotments shall be taken from the hereditary estates in accordance with the following rules —

> *(a) an applicant for an allotment lawfully resident in an hereditary estate shall have his allotments out of land available for allotments in that estate;"*

(Underline added)

By customary adoption, Tuva'itai fostered the second defendant as her daughter in 1966 when the second defendant was only 2 months old. She raised and brought up the second defendant on the allotment of her parents, Kelemete and Asi. When her mother remarried after her father died, she became the lawful holder of the allotment as an unmarried daughter (there being no heir to the allotment). It is clear by the evidence the second defendant was raised and she grew up and lived all her life on this particular allotment - the land.

When Tuva'itai died in 1977, the allotment lawfully reverted to the Fakafanua, but the second defendant continued to live on the allotment with her father who looked after her. When her father died in 1907, her uncle, Kamilo Pain, looked after her. In 1989, the second defendant lawfully married the first defendant they then continued to live on the allotment. Their first born child was a boy.

The court was told in 1990, the first defendant, the second defendant and a Matapule, Makaui, at the request of Kamilo, went to the Fakafanua in the customary Tongan way with cooked pig and food and they asked for the allotment the land.

> *The Fakafanua agreed and told them to go and live on the allotment in peace and that no one would take it from them, or would disturb them on the land.*

The defendants argue that was the first time the Fakafanua, the estate holder, personally allowed the second defendant to reside on the allotment and that right was also extended to her husband, the first defendant at the same time.

The defendants argue that permission was lawfully granted by the then Fakafanua- in accordance with his right to give such permission —as shown in the relevant sections of the Land Act —so from then on, the defendants lived on the allotment lawfully, even though the allotment had not been granted or registered by the Minister of Lands to either defendant. Importantly that permission was granted in 1990- some nineteen years ago.

The defendants argue that evidence of lawful permission and lawful occupation of the land is the fact that no one, not even the Fakafanua, attempted to disturb the defendants on this allotment the land for 19 years.

Accordingly, the defendants argue they were lawfully residing in and on the land and they were in lawful occupation of the allotment on the 11th July 2007, which was the day when the Minister of Lands purported to grant and to register the allotment- the land into the plaintiff's name.

The defendants therefore argue the grant and the registration of the allotment in the plaintiff's name — was unlawful

The defendants argue the occupation of the allotment by the defendants was substantial- because they not only fenced the land they kept, but they also maintained the allotment and they had brought up their nine children on the land. They argue they built a fairly substantial dwelling house, and a carport on it, according to their means. They spent approximately $30,000, on the house in 2002. They argue that during their occupation of the land they never abandoned the land - or left the land unattended at any time.

The defendants also argue that any person who visited the land or who had a duty to make enquiries at the quo, would have known the defendants were the occupiers and that they were still in occupation of the land on the 11 July 2007, which was the date of the registration of the land to the plaintiff, by the Minister of Land.

The defendants say there was no evidence that when the Minister granted and registered the land in the plaintiff's name, that he, the Minister, was personally aware of the defendants' occupation of the land. The defendants argue - NEITHER the plaintiff nor the Fakafanua said in their evidence that the Minister was aware, or that they informed the Minister of that fact.

The defendants say it would seem that the parties did not inform the Minister because had they had done so; the Minister might not have granted and or registered the land to the plaintiff using his wide discretion.

The defendants argue it does not matter whether or not the Minister was aware, because the fact is they say the Minister went and made a grant of the land to the plaintiff - whilst the land was lawfully occupied - and thus the land was therefore NOT AVAILABLE AS A GRANT.

As quoted- S.50 of the Land Act provides:

> *"50. Land for allotments shall be taken front the hereditary estates in accordance with the following rules —*
> *(d) An applicant for an allotment lawfully resident in a hereditary estate shall have his allotments out of land available for allotments in that estate,"*

(Underline added)

The defendants argue per the case of *Inoke Tafa v Siope Viau, Sinitalela Viau and Minister of Lands* (unreported) Appeal case no. 3/2006 - the facts were similar to the present case although the allotment in question was on Crown land. In their decision, the Court of Appeal quoted s.7 of the Land Act- which provides:

> *"7. Every male Tonga subject by birth upon making application on the prescribed form to the Minister of Lands shall be entitled to receive subject to the provisions of this Act a grant of land not exceeding 3.3387 hectares as a tax allotment and where any such grant is less than 3.3387*

hectares the Minister may from time to time as land becomes available ... make further grants until the area granted ... has a total area of 3.3387 hectares. He shall also be entitled to receive on making application as aforesaid and subject to the provisions of this Act a grant ... in a town as a town allotment."

(Underlining were the emphasis of the Court of Appeal)

After also quoting s.43 and s.50 of the Land Act, the Court of Appeal stated at page 8 of the judgment

"Repeatedly, in the provisions we have cited, reference is made to the question whether a piece of land is "available" to be granted. The scheme, as a whole, seems to us to make availability as an essential requirement before a grant can be made. Therefore the discretion conferred on the Minister, in the case of Crown Land, under s.50(e) must take account of availability, as is indeed clearly implied by the words "where possible".

This view will be reinforced if regard is had: - to the "prescribed form" referred to in ss. 7 and 43. That form appears as Form 9 at S-3 and 4 of the Land Act and subsidiary legislation related to it in the "Red Statutes". Immediately under the place for the signature of the applicant, there appears on the form the following:
"I hereby agree to the grant of the allotment as described above and declare that there is no impediment to this grant.

Signature of Tofi'a Holder

If the land were not available that would clearly be an "impediment". The Tofi'a Holder, of course, as is made clear by s.5 is the estate holder, and in the case of Crown land, the appropriate signature is that of the Minister ... "

In that case- the Court of Appeal held that

- for the registration of the land in July 2007, that the Minister of Land had proper knowledge the parcel of land was already occupied by long time residents of the estate- residents of 19+ years standing
- Because the testimony given on oath in court revealed at the time of registration on the l July 2007, the land was lawfully occupied: - this is and it must be an impediment to the grant of the land to another person.
- More importantly in the Land Courts view applying rules of natural justice — the land was occupied by a family who were lawfully resident on the land — and who had occupied that land for over NINETEEN YEARS - without let or hindrance.

- On the evidence before it, the Land Court must conclude either the present Fakafanua, or the Minister of Lands (or both) were unaware the land was lawfully occupied by the defendants and their family, or more likely than not that the Land Minister, was unaware of the defendants' long standing occupation of the parcel of land for 19+ years.
- Notwithstanding that, knowledge (or not) - the Land Minister went on and granted registration of the land to the plaintiff on 11th July 2007 on a wrong principle, namely that the land was available" when clearly it was not - due to the land being lawfully occupied by the defendants.
- Evidence adduced in the Land Court reveals the defendant occupiers were hard working persons, with long standing tenure rights ie: 19 + years. They were people who had never left or abandoned the land. They had properly maintained and improved the land. The court accepts their evidence, as being long term occupants.
- The evidence revealed the defendants were from day one living on the land as lawful residents residing in peace under what they genuinely believed to be a firm promise, from a previous estate holders - QUOTE "that they would not or never be disturbed." In today's society much can be said, and much can be inferred by the adage that "a man's word should be his bond." (my emphasis ALWAYS be his bond)
- Having observed the witnesses who gave evidence in court the court must conclude that had the Hon Land Minister known all the facts; and had the Land Minister (or his servants or agents) taken time to visit the locus in quo, then the court might reasonably conclude the Land Minister might well have used or he might well have exercised his wide discretion on whether to grant the land — in another way — perhaps applying the rules of natural justice in a different manner.
- The court concludes, if that were to be the case, and in possession of all the facts- then the Land Minister might well have used his wide discretion, and have refused to register the land in the plaintiff's name.
- The court concludes if the Minister had refused the grant to the plaintiff at that time then the plaintiff might well have been allocated another allotment by the Noble when he decided he wished to return to Tonga from living in the USA.
- The court concludes if the Land Minister had become aware of the first and second defendants' long term occupation of the land, or been informed of same, then the Land Minister (or in his absence his Deputy or a Senior

Member of staff) OUGHT to have arranged to visit the land in question; and, on finding evidence of any persons in occupation; then the Hon Land Minister should have arranged to interview the occupants and make all necessary enquiries of them before he REGISTERED the land.

- The court concludes if the Land Minister had made the necessary enquires, and if he had interviewed any of the present occupiers then the Court takes into account, the Land Minister might well have taken into account the defendant's claim / or / promise on the part of the past Tof'ia holders - that the defendants could lawfully occupy the land - and that no one would disturb them." Per rules of natural justice and the Minister might well have come to a different conclusion regarding registration, rather than say we will leave it to the land Court.
- Because both the Land Minister and the Land Court MUST be satisfied with the answer to this question as per the Act. "Was the actual piece of land available for grant" from the testimony this court is obliged to find as a fact - the parcel of land was clearly not available for grant to another. That was and that clearly is - and will always remain - an impediment to the grant of this piece of land - to any other person.
- The Land Court remains concerned to hear evidence that neither the Hon Minister of Land nor the Tof'ia holder visited the piece of land (at any time) before granting and registering the land to the plaintiff. The court asks does this tend to shows a partial disregard for the rights of these long standing occupiers of the land? It is certain the occupation of the land by the defendants at the time of registration is as the Act says, and the Court quotes is "A MOST MATERIAL FACT".
- On the evidence before it the Land Court cannot be satisfied the Hon Land Minister took into account, and, or applied the rules of natural justice to the facts of this case when on the 11th July 2007 the Land Minister went and registered the land in the plaintiff favour.
- The Land Court agrees with the defendants' submission and it has considered and applied in particular the case of *Inoke Tafa v Siope Viau, Sinitalela Viau and Minister of Lands* (unreported) Appeal case no. 3/2006- where the Court of Appeal held that "... In the circumstances of this case, reasonable steps were **not** taken by or on behalf of the Minister - to acquaint himself with the relevant information, so that a most material factor, the occupation of the land by the respondents together with the erection of a house on it, was not taken into account.

The Land Court accepts the defendant's argument, the estate holder (the Tof'ia) - signed the prescribed forms to the effect that there was no impediment to the grant of land to the plaintiff - and that assertion was clearly very wrong:

That assertion was very clearly wrong, because the land was occupied by the first and second defendants and their family, Per Inoke Tafa, also the defendant family, had spent a considerable amount of money and had erected a fairly substantial dwelling house on the property, moreover most importantly they were very long term residents of the estate. That said, it was and always will be a most material factor, which the Hon Minister of Lands ought to have been aware from making his own enquiries AND HE MUST have been made aware of by (1) the estate holder and (2) the plaintiff.

The defendants rightly say there was a material impediment to the grant, and the registration of the land on the 11th July 2007 to the plaintiff and the Land Court fully agrees with that assertion.

To Avoid Future Problems

To avoid future problems such as in this case, it should be the duty of officials in the Land Department to physically check upon the following:-

(1) the truthfulness and
(2) the accuracy of
(3) each and
(4) every single application
(5) for the registration and or
(6) the grant of land;
(7) to ensure
(8) land is available land for grant-
(9) As per the Act.

In the Land Court's view the Minister for Land, and his deputy or agents of necessity has the duty to physically inspect each and every parcel of land prior to the granting and or registration of a parcel of land, this is particularly so, whenever a Minister / Deputy or Public Servant is asked to use his or her- WIDE DISCRETIONARY POWERS- because whenever.

- A discretion which if used or is applied incorrectly or,
- As a result of an incorrect or untrue statement,
- Might well act to another person's detriment,
- Might cause another party unnecessary expense or,
- Cause embarrassment financial loss or adduce allegations of corruption or
- Result in unnecessary and expensive, and protracted court proceedings
- It denies people justice

BECAUSE

A court will upset a grant only if a person challenging its validity establishes that the Minister has acted on wrong principles which means that the Minister has

acted contrary to statute or in breach of the rules of natural justice, or in breach of a clear promise by the Minister, and, or the tof'ia holder".

ACCORDINGLY

- The Land Court cannot be fully satisfied the Land Minister when he acted on information he received in July 2007, that the Minister was fully briefed, or, that he was made fully aware of all the facts of this case (that is to say he was fully briefed by the plaintiff, the estate holder AND the defendants).
- The Land Court cannot be satisfied the Land Minister was at the material time provided with all, or, sufficient material to properly enable him to take into account, all the information for him to properly consider and apply the rules of natural justice to this case.
- The Land Court cannot be fully satisfied the Minister of Land considered the case both for the plaintiff, the estate holder and the defendants, who were all long term occupiers of the land, when the Minister came to decide on the Registration and grant of this parcel of land to the plaintiff, on or around the 11th July 2007.
- The Land Court says the evidence clearly reveals, that on the 11th July 2007 there was a clear impediment to the grant of the land to the plaintiff, because the land was lawfully occupied by the defendants and they were lawful tenants of long standing tenure of 19+ years — ensconced at the behest and the acquiescence of previous estate holders.
- The Land Court can come to no other conclusion - it finds as a fact that there was an impediment to the grant of the land to the plaintiff and as such the Court finds as a fact that the grant of land to the plaintiff by the Minister of Land, on 11th July 2007 was UNLAWFUL.
- The Court orders the grant of the registration of the land to the plaintiff, made on the 11th July 2007 by the Hon Minister of Land TO BE CANCELLED.
- The defendants are awarded their costs to be taxed by the Chief Registrar if not agreed.

Australia and New Zealand Banking Group Ltd v 'Aukafolau anor

Supreme Court, Nuku'alofa
Andrew J
CV 141/2008

26 and 27 March 2009; 1 May 2009

Debt – claim to recover loan money – no economic duress found – judgment given to plaintiff

The plaintiff bank claimed to recover monies loaned to the defendants through a housing loan to both defendants. The amount claimed was $93,736.75 plus interest. Additionally there was a claim to recover an amount of $8,806.96 plus interest which concerned a personal loan to the second defendant. The two defences raised were economic duress, and the first defendant only claimed that became his name was removed under the agreement of the 28th April 2008 in terms of the housing loan, the agreement was only with the second defendant. The first defendant did not appear in the proceedings and elected not to attend and defend the claim.

Held:

1. There was no viable evidence of economic duress. Economic duress usually would only be available in relation to a variation of an existing contract brought about by an unlawful threat not to perform it. The defence of economic duress could not succeed.
2. The first defendant's name was omitted from the subsequent housing loan agreement (the initial agreement was executed in 2005). This was a mistake. The first defendant could not escape liability due to a genuine oversight of not putting his name on the agreement of 28th April 2008.
3. Judgment was given to the plaintiff against the defendants jointly and severally in respect of the housing loan in the sum of $93,736.75 plus interest at 15% per annum from 2nd October2008.
4. Judgment was given to the plaintiff against the second defendant in respect of the personal loan in the amount of $8,806.96 plus interest at 15% per annum from 2nd October 2008.

Counsel for the plaintiff : Mrs Tupou
Counsel for the defendants : Mr Taufaeteau

Judgment

This is a claim by the Plaintiff Bank to recover monies loaned to the Defendants through a housing loan to both Defendants. The amount claimed is $93,736.75 plus interest. Additionally there is a claim to recover an amount of $8,806.96 plus interest which concerns a personal loan to the second defendant.

I accept, as submitted, that both loans and terms of such are recorded in five written agreements. The Plaintiff produced three and the Defendant produced two in 2005 which was not in the possession of the Plaintiff due to the fires resulting from the events of 11th November 2006. The Plaintiff agrees that these two earlier agreements are not that relevant to these proceedings as the proceeds from these two loans were settled following an insurance payment as a consequence of a house fire.

Again I accept as submitted and which is not in dispute, that all loan agreements except for the agreement of the 28th April 2008 were relevant to a housing loan in the joint names of both defendants. The latter loan agreement was for a personal loan in the sole name of the Second Defendant which went on to record also the housing loan but where the Bank Officer who had prepared this document by oversight omitted to record the First Defendants name. This Officer gave evidence that she had failed to record the first defendants name which was an oversight but that it should have been recorded.

The Defendants raise *two* defences. The first defence is one of economic duress and the second, which is raised by the first defendant only, that became his name was removed under the agreement of the 28th April 2008 in terms of the housing loan, therefore the agreement was only with the second defendant.

Duress

The first defendant did not appear in the proceedings and elected not to attend and defend the claim.

On all of the evidence this case is nothing other than an everyday commercial transaction of lending and borrowing. There is no viable evidence of economic duress. Economic duress usually will only be available in relation to a variation of an existing contract brought about by an unlawful threat not to perform it. As stated there is just no evidence of any economic duress on the plaintiff's part. I accept the submissions of the plaintiff that

> The second defendant in her evidence told the Court that the loan with the Plaintiff was to refinance a loan with the Westpac Bank of Tonga. She told the Court that she went to the Plaintiff Bank and made an application for the loan. There was no evidence to show that the Plaintiff induced the Defendants in any way to enter into the loan agreements. In fact, the Second Defendant told the Court that at the time she applied for the loan it was difficult because at this time there was a restriction on housing loans and she had to wait a while before her application for the loan was approved. Equally, there was no evidence to substantiate the existence of a threat in any form from the Plaintiff to induce the Defendants to enter into the loan agreements."

The defence of economic duress cannot succeed.

Whether the First Defendant is a Party to the Housing Loan

As stated, the first defendant's name was omitted from the subsequent housing loan agreement. The initial agreement was executed back in 2005 and that agreement was varied from time to time by the parties to include the first defendant's name. It was only when the personal loan which was to be in the sole name of the second defendant that the first defendants name was missed from the varied agreement which included the housing loan. Quite clearly this was an oversight on the part of the bank officer. It was a mistake. The first defendant was always a party to the housing loan.

The Plaintiff produced evidence to show that at no time had it intended for the housing loan to be taken over by the second defendant only. As stated, this was shown by bank statements on the housing loan account exhibit "F", diary notes "J" and demand letters "J", "K" and "L" and diary note "M". All documents record the joint names of the defendants. All of these documents were produced after the loan agreement of 28th April 2008. All the loan agreements were in relation to the same loan which named both defendants as the borrowers.

In these circumstances the first defendant cannot escape liability due to a genuine oversight of not putting his name on the agreement of 28th April 2008.

The loan agreements in respect of the housing loan was between the Bank and both defendants and the agreements of 15th January 2008 and 28th April 2008 were in fact variations of the agreement of 7th May 2007. The Defendants have breached the agreement by defaulting in their repayment.

The personal agreement was between the plaintiff and the second defendant and she has breached that agreement by defaulting in her repayments on the personal loan.

I give judgment to the Plaintiff against the Defendants jointly and severally in respect of the housing loan in the sum of $93,736.75 plus interest at 15% per annum from 2nd October2008.

I give judgment to the Plaintiff against the second defendant in respect of the personal loan in the amount of $8,806.96 plus interest at 15% per annum from 2nd October 2008.

Costs are awarded to the Plaintiff.

Allison anors v Tu'ipulotu

Supreme Court, Nuku'alofa
Andrew J
AM 08/2009

5 May 2009; 7 May 2009

Civil claim – damage to water tank – found plaintiff had no property in tank – could not bring claim
Magistrates' Court – appeal against decision – Magistrate erred in law – decision quashed

The plaintiff (respondent) made a claim of $8,820 for compensation for alleged damage to a water tank. The Magistrate heard the matter and found that the water tank was damaged and smashed by the defendants on or about 18th September 2007. He found that the plaintiff built the tank for another person, Mr Mortimer. The Magistrate then held that because the plaintiff looked after the water tank, he was in actual possession of the tank which entitled him to bring the claim as the plaintiff. He found that the plaintiff had not been paid in full for constructing the tank as contractor and was still owed $2,800 for work done. The Magistrate found that the smashing of the tank meant that the plaintiff had lost his interest and title in the property. The Magistrate found that part of the claim should succeed and ordered that the defendants were to pay compensation to the plaintiff, Mr Manu Tu'ipulotu, in the sum of $2,800 together with the 10% which is $280 amounting to a total of $3,080 plus costs. The defendants appealed the Magistrate's decision.

Held:

1. It could not be said that the plaintiff had any property in the water tank. He was only a contractor who built it for another person. The plaintiff had no property in the water tank therefore he could not bring a claim against the defendants for any damage they may have carried out. If the plaintiff was not paid the full amount for its construction by the owner then the claim should be against the owner.
2. The Court found that neither the owner of the water tank nor the plaintiff had any right to the land and therefore they had no right to build the tank there.
3. The appeal was allowed and the decision of the Magistrates Court was quashed.

Counsel for the appellants : Mr Vaipulu
Counsel for the respondent : Mr Piukala

Judgment

The background of this matter is that there was a civil claim in the sum of $8,820.00 for compensation for alleged damage to a water tank. The matter came before the Magistrates Court and a ruling followed that the matter should preferably be determined by the Land Court.

That decision was appealed to the Supreme Court and the appeal was upheld, it being found that this was a civil claim and had nothing to do with the Land Court. There was an order that the matter proceed in the Magistrates Court, Civil Jurisdiction, Before another Magistrate.

The matter duly came before the Magistrate Court on the 11th of February, 2009. There was an additional defendant that is Mr. Gordon Allison. The Court found that part of the claim should succeed and ordered that the defendants were to pay compensation to the plaintiff, Mr. Manu Tu'ipulotu, in the sum of $2,800 together with the 10% which is $280 amounting to a total of $3,080.00 plus costs.

That decision is now under appeal. The civil case was CV2/09.

The learned Magistrate found that the water tank was damaged and smashed by the defendants on or about 18th September 2007. He found that the tank was the property of one RICHARD MORTIMER and was not the property of the plaintiff. He apparently maintained the water tank and was also apparently a contractor who built the tank for one Peau Halahingano. The Magistrate also found that this person had initiated the building of the tank for Mr. Mortimer. They ultimately found that the plaintiff built the tank for Mr. Mortimer. He found:

> "True ownership of the water tank was Richard Mortimer (if there was such a person)."

The Magistrate then held that because the plaintiff looked after the water tank meant that he was in actual possession of the tank which entitled him to bring this claim as the plaintiff. He found that the plaintiff had not been paid in full for constructing the tank as contractor and was still owed $2,800 for work done. The Magistrate found that the smashing of the tank meant that the plaintiff had lost his interest and title in the property.

I cannot accept these findings as correct in law. It cannot be said that the (so called) plaintiff had any property in the water tank. He was only a contractor who built it for another person. The Magistrate had already found that the true ownership of the tank was Richard Mortimer. The fact that MANU had built the tank as a contractor and later maintained it did not give him any property in the tank, He clearly found that it was not the water tank of the plaintiff.

In my view the Magistrate was clearly in error. If the plaintiff had no property in the water tank, if he is not the owner he cannot have a claim against the defendants for any damage they may have carried out. If he has not been paid the full amount for its construction by the owner, Mr. Mortimer (and there is some dispute about this) his claim should be against Mr. Mortimer.

For that reason alone the appeal should be allowed and the decision of the Magistrate must be quashed.

There are further reasons for quashing the decision. The defence had claimed that the land on which the tank had been built was not the land of Richard Mortimer nor of Manu Tu'ipulotu (the plaintiff) and there was no right to erect a water tank on the land.

The learned Magistrate found that he could not rule on the question of who had the right to the land and he could not rule if the defendants had rights to the land or if the plaintiffs had any rights. I think that that needed to be resolved. As a consequence the defendants lost their right to bring a legitimate defence to the claim. I think it emerges from the evidence that clearly Mr. Mortimer and Manu Tu'ipulotu had no
90 right to the land and had no right to build the tank there.

The land is leased to ESCAPE TONGA LIMITED (Mr. Gordon Allison) until 2028. That is Deed of Lease 7659 and they have the rights over this land. For all of these reasons I make the following order:

> The appeal is allowed and the decision of the Magistrates Court dated the 25th February 2009 is quashed in all respects.
>
> Costs are awarded to the appellants.

Tonga Water Board v Fua anor

Supreme Court, Nuku'alofa
Shuster J
AM 26/08

22 May 2009; 22 May 2009

Appeal against Magistrate's decision – no reason to disturb Magistrate's findings – appeal dismissed
Motor vehicle accident – appeal against Magistrate's findings – dismissed

On 24 January 2008 a two vehicle motor vehicle accident occurred. The Magistrate found that the van belonging to the Tongan Water Board caused the accident by not giving way at the intersection and that the cost of the damage was $8,000. The appellant appealed the decision on the grounds that the decision was lawfully erred and was not in accordance with the witnesses.

Held:

1. A Higher Court would only interfere with the factual findings of a lower court in the clearest of cases. For example where the appellant court was able to conclude the Magistrate's decision was unsound, or that the Magistrate clearly came to the wrong conclusion.
2. It was impossible for the Court to say the learned Magistrate erred in any way shape or form when he considered the facts of the case. There was no basis to overturn the Magistrate's findings.
3. The appeal was dismissed.

Case considered:
Pa'ila vMa'u (2002) TLP 114

Counsel for the appellant : Mr Fakahua
Counsel for the respondents : Ms Vaihu

Judgment and Ruling

This Appeal concerns a ruling in the Magistrates Court at Fasi, concerning civil case no. 86/08. The case is a civil dispute, concerning a motor vehicle accident which occurred on 24-01-08, and the subsequent assessment of the quantum of damages by the Magistrate sitting at Fasi.

It is not disputed that a two vehicle motor vehicle accident occurred on the 24-01-08 (as per the police report) dated the same day. What was in dispute is - who caused the said accident?

Court records indicate the substantive hearing took place on the 17-07-08 at Fasi Magistrates Court. The plaintiff claimed a global sum of $10,000.00 plus court fees and legal fees in the amount of $800.00 - as damages.

At the conclusion of the hearing of the case at Fasi, and after considering all the evidence which has been clearly documented; the Magistrate justified his reasons for his findings of facts- to be as follows:-

I Quote

1. I believe that the vehicle C 10927 was on his right side of Taufa'ahau road, and it was right that the Vaha'akolo road must give way to the main road.
2. The C 10927's indicator's light was not on.
3. That the Water Board's truck did not stop.
4. That the vehicle crashed the left front part of the car and the right front part of the van on the left side of Taufa'ahau Road.
5. That the pre-accident value of the car is $8,000.00.
6. That the van was not insured and when the accident took place then they made it up.

The Magistrate stated:-

- I do not believe the witnesses — (of the appellants)
- It was hard to make the witness speak out.
- Their evidence was the same - as if they were working on their evidence – to be the same.
- There was no evidence from the Water Board that the vehicle was insured, before, and after the accident even during the trial - unless I asked Pesalili if the van was insured and he answered me that the van was not insured.
- I believe that when the incident took place they realized the van was not insured, and that's when they tried to make up something to hide the truth.
- Other expenses brought before the Court such a paying taxis and renting cars etc — the Magistrate said was not proved.

The Magistrate further stated and I quote:-

The law and the witnesses, although it was Katoni who drove the car C10927 - he used it under the care (custody and control) of the plaintiffs.

- The plaintiffs are road users and the first respondent had a legal duty - with vicarious liability of the Water Board to

perform a reasonable (*high duty of care*) duty of care to them. (and to all other road users)

- It was proven that the first respondent had failed — in his duty by not giving way at the intersection.
- By not giving way at the intersection, he thus caused this accident - thus causing damage (*to the motor vehicle*) C10927
- The cost of the damage are $8,000.00 as Sione Kaho, gave evidence on.

The Magistrate's Order Was-

- I grant the $8,000.00 claim
- I do not grant the other claim for the taxis and the rental cars.
- Cost of the plaintiff $600.00

The Appeal

Notice of Appeal against the learned Magistrate's ruling was issued on behalf of the appellant and the Notice of appeal was duly served upon the Supreme Court.

The file was received in the Supreme Court Office on 01-12-08. The file record indicates it was forwarded to the Chief Justice 14-04-09 and to me the same date.

I set a date for hearing on 14-04-09 — as the 22-05-09 - had I noticed the delay then, I would have heard the appeal much earlier.

I wish to place on record, I do not know why this appeal has been delayed so long, or who delayed it and I will bring the question of the delay in this case to the attention of the Chief Registrar - as soon as is practicable.

There are Seven Grounds of Appeal

1. The decision was lawfully erred and was not in accordance with the witnesses.
2. That the Respondent's Counsel had submitted that Paelata Fua had no lawful relevance to file this claim as of the defence of the second respondent.
3. It was clear from Kelepi Paea, he Lotu Tau's evidence that he saw the indicator's light of the car that Katoni Johansson was driving on, was on, but he did not turn on the intersection, thus causing the crash in the respondents truck. In support Viliami Tu'a Puaka also gave evidence and said that the indicator's light was on but he did not turn thus causing the crash in the respondents truck and also the car's driver smelled liquor.
4. Katoni Johansson had confirmed that his driver's licence here in Tonga was not yet renewed.
5. The $8,000.00 is the value from the Asco Motors, there was no foundation, the model of the C10927 is 1988 and if it will be depreciated it will be cheaper than $8,000.00.

6. Pesalili Kailahi, the Public Relations Officer but the former head of Traffic for 4 years gave evidence for the respondent saying that according to Katoni Johansson's drivers licence number 39910 it was expired and was not renewed at the time of the accident. Based on that he is entitled to be charged for driving without a licence.
7. Katoni gave evidence saying that he was not drunk and he did not turn on his indicator's light, but Kelepi Tau and Viliami Tua Puaka assured that his indicator's light was on and that he drank liquor from his behaviour at the time.

Supreme Court Ruling

I heard oral argument from both the appellant and the respondent in this matter on the 22-05-09 and reserved Judgment to 14.00.

I have considered carefully all that was said in the Supreme Court and considered the paperwork submitted from the lower Court.

I have also considered the case of *Pa'ila v Ma'u* (2002) TLP 114 - which clearly says - that a Higher Court will only interfere with the factual findings of a lower court in the clearest of cases - For example - if the appellant court was able to conclude the Magistrate's decision was unsound- or that the Magistrate clearly came to the wrong conclusion.

- In this case I can find no reason whatsoever, to disturb the findings of the lower court.
- The Magistrate has very clearly set out his findings of fact.
- The Magistrate observed the witnesses as they gave evidence and,
- Importantly, the Magistrate stated he did not believe certain of the witnesses who gave evidence before him on behalf of the appellants.
- The Magistrate said that - in open court and he made his decision on the facts of the case - based upon the evidence which he accepted.
- I accept - as the Magistrate accepted the plaintiff - did have proper standing to bring this case.
- It is impossible for this Court to say the learned Magistrate erred in any way shape or form - when he considered the facts of this case conducting the trial.
- There is clear documentary evidence the value of the motor vehicle C10927 was pre accident $8,000.00 - and post accident $100.00 as per the Asco repair assessment quote num her 364 dated 24—10—08. There is also a photograph of the vehicle on file depicting accident damage.
- The issue of the non renewal of a driving licence — lies with the police to prosecute or not, non renewal of a DL —does not prove guilt via a MVA.

- The Magistrate must have considered the allegation of drunkenness and dismissed the allegation as must the police.
- The Magistrate chose to believe the witnesses for the defendants, and he did so at the same time recording in the court record the words — he did not believe the appellants witnesses.
- In my view there is no basis for this Court to overturn the Magistrates findings in this case.

Accordingly

1. This appeal is dismissed.
2. I reaffirm the decision of the Magistrates Court.
3. Costs of today's hearing will be paid by the Appellant within 14 days.

Moengangongo v Leiola Group Ltd

Supreme Court, Nuku'alofa
Shuster J
CV 38/2008

16 April 2009; 5 June 2009

Employment law – dismissed before police report received – wrongful dismissal claim – unreasonable conduct of employer – claim upheld

The plaintiff was employed by the defendant company, as an assistant sales supervisor and the person in charge of its duty free shop situated inside the departure lounge of Fua'amotu International Airport. At the time of her dismissal, the plaintiff was paid an annual salary of $8,516. There were stocktake shortages in November and December 2006 for which the plaintiff was punished. She paid the shortfall, was suspended for two weeks, was demoted, and her base salary was reduced. The General Manager conducted an internal investigation into the loss of money and reported the loss to the police. Before the police report was received the General Manager dismissed the plaintiff. The plaintiff claimed she was wrongfully dismissed. She claimed damages, re-payment of retirement benefits, holiday pay and costs from the defendant.

Held:

1. The Court ruled that any deduction made by the defendant company covering the loss was unlawfully deducted by the defendant company especially because the money was deducted prior to the conclusion of the ongoing police investigation.
2. The conduct of the defendant company fell within the category of unreasonableness under the *Wednesbury* test.
3. The Court found for the plaintiff and reserved the issue of damages to allow both parties to attempt to come to an agreement as regards to future reemployment of this plaintiff in another post within the company.

Cases considered:

'Aisea v FIMCO CV 678/2007

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Kasimili v Vava'u Press [2002] TLR 168

Koloa v Helu [1999] TLR 227

Counsel for the plaintiff : Mr Edwards
Counsel for the defendant : Mrs Stephenson

Judgment

Introduction

The plaintiff claims she was wrongfully dismissed from her employment as an Accounts Clerk by the Leiola Group of Companies on 22nd June 2007.

As a consequence of her wrongful dismissal, the plaintiff claims damages, re-payment of retirement benefits, holiday pay and costs from the defendant as per her Statement of Claim filed on the 16th May 2008.

The plaintiff claims the defendant is a Public Enterprise — as defined under section 2 of the Public Enterprise Act 2002 as follows: The Public Enterprise assertion the defendant states was not specifically pleaded in the Statement of Claim.

Brief Facts

The plaintiff was employed by the defendant company, as an assistant sales supervisor and the person in charge of its duty free shop situated inside the departure lounge of Fua'amotu International Airport. At the time of her dismissal, the plaintiff was paid an annual salary of $8,516.00

On 30 December 2006, the Duty Free Shop at the departure lounge of the Fua'amotu International Airport was open for business. At the same time the duty free shop conducted its monthly stock taking for December 2006.

One Mr. Kivalu Tu'iono — had been sent from the defendant's head office - to assist in the monthly stock take at the Airport shop.

At the close of business on 30th December 2006 the total receipts for the day's cash sales (the takings) $7,112.00-were counted by the plaintiff, and another member of staff - Emalita Ngungutau - in the presence of Mr. Kivalu Tu'iono.

The daily takings of $7,112.00 were then sealed in a plastic bag and handed to Kivalu Tu'iono - to transport and lodge at the companies Head Office.

The plaintiff claims she heard nothing further concerning the 30th December 2006 takings, until the 3rd February 2007, when Falakiko Taimani advised the plaintiff verbally that there was a problem with the takings for the 30 December 2006. The plaintiff says this information was relayed to her after thirty-four days.

The plaintiff claims on or about the 6th February 2007 she met Falakiko Taimani and asked him, "*Why was the money missing*?" — Because the staff work records must have been received at Head Office — as staff had been paid for time worked in December 2006 the time sheets had been forwarded in the plastic bag together with the December 2006 takings of $7,112.00.

Falakiko Taimani told the plaintiff he would make enquiries. The plaintiff did not hear from Falakiko Taimani — so she said she went to see him again and that meeting took place, on or about 12 February 2007.

The plaintiff also saw the defendant's witness DW1 - Paula Taumoepeau the same date. The plaintiff told the court she saw DW1 twice - she told the court she was suspended on full pay on 17 February 2007 "*While an investigation took place*." A formal notice of suspension- contained in a letter dated 17 February 2007 was handed to the plaintiff that same date.

Evidence

There were two witnesses who testified in this case. The plaintiff PW1 gave evidence in support of her claim — and DW1 Paula Taumoepeau gave evidence for the defendant company.

The plaintiff says the evidence of the plaintiff was not contradicted or rebutted - and to a large extent the evidence was confirmed by the witness DW1 - Paula Taumoepeau.

> Paragraph 6 of the statement of claim which alleged the money was counted **and was handed** to Kivalu Tu'iono - to deliver to Head Office - and the plaintiff says this paragraph in the Statement of Claim, was admitted by the defendant company.

Paragraph 6 of the Statement of Claim - provided as follows:

> *"On or about the 30th day of December 2006 at the conclusion of work and closing of the shop the takings and receipts were counted and the cash of $7,112.00 and report was given to the company courier Kivalu Tu'iono who is responsible for the taking of the money to Head Office."*

Paragraph 6 of the Statement of Defence admitted the plaintiff's allegation as follows:

> *"It admits the allegations contained in paragraph 6 of the statement of claim."*

Quote- "While an investigation takes place". The plaintiff was asked to prepare a statement and deliver it to DW1 no later than the 19 February 2007.

The Decision to Dismiss

The plaintiff says - DW1 said in evidence he had enough evidence to dismiss the plaintiff on February 2007 - but he told the court he wanted to be fair and give the plaintiff a chance, so the matter was referred to the Police for investigation.

The plaintiff argued it would be difficult to reconcile this statement - with DW1's request on 17 February 2007 for a written explanation to explain the packing of the missing pay and its transfer to another member of staff - to be delivered no later than 19 February 2007. The plaintiff says DW1 said he was still enquiring into the missing money - yet DW1 said in his evidence that on 17 February 2007 - he was ready to dismiss the plaintiff.

The plaintiff says DW1 was not exercising proper judgment and care because he did not have all the facts before him; and DW1 had admitted in evidence that the money was counted and given to Kivalu Tuiono to deliver to Head Office.

The plaintiff says this demonstrates the witness DW1 was relying on what he called "*wrong grounds*" to dismiss the plaintiff. Importantly, in his evidence given in open court — DW1 also admitted that if he had received the Police report before dismissing the plaintiff, - he would NOT have dismissed her.

DW1 was asked in cross examination -what was the determining factor for his decision to dismiss the plaintiff from her employment? DW1 referred to the shortages

in November 2006 of $393.80, and the December 2006 shortage of $1919 on the two stock takes. DW1 was asked by plaintiff's counsel about punishing the plaintiff— twice because on those occasions the plaintiff repaid the shortages in full before 16 January 2007.

Further the plaintiff claims she was punished as follows:

i) The plaintiff was suspended for 2 weeks - without pay.
ii) Further the plaintiff was demoted.
iii) The plaintiff was demoted by the loss of seven pay increments- in other words $3,028.00 was deducted from her salary.

Finally the plaintiff was receiving $11,544.00 per annum - but her base salary was reduced to $8,516.00. Loss of $3028 [$252.33 per month].

The plaintiff claims she was severely punished for the shortage on the stock take.

The plaintiff says the company did not suffer any loss because the company was fully reimbursed for their loss and they refer to the letters dated 12 January 2007 (Production "C" in the defendants list of productions) and the letter dated 22/2/2007 from the plaintiff to the company secretary P5 in the plaintiff's list of production.

The plaintiff says she complained bitterly about her unfair treatment. It was submitted by the plaintiff the decision to dismiss her was flawed both in fact and in law. DW1 had erred in making that decision and they say DW1 admitted so during cross examination.

The plaintiff says there was no evidence the plaintiff had taken [or stolen] the money or that she was responsible for its loss - yet the plaintiff was blamed and she was dismissed from her employment as a result.

Retirement Benefits

The plaintiff argues there was no proper reason for the plaintiff's dismissal. They claim the defendant is a Public Enterprise and it was not open to it to dismiss an employer summarily - for the wrong reason. They say should the court uphold the plaintiff's claim - it follows that the defendant was wrong in withdrawing/withholding the defendant's contribution of $5,229.34 from her benefits and- also wrong in applying her contribution of $2,666.96 and the plaintiff's holiday pay in part payment of the missing money — arising from the incident on 30 December 2007.

The full benefit of $7,844.01 as stated in production "F" in the defendants list of production together with interest of 12% thereon from the 31/12/2006 to the date of payment should he repaid to the plaintiff. Two and a half years interest - at 12% and that would yield a figure of $10,428.45.

In production "F" the contribution from the plaintiff was applied in payment of the missing money on the 30/12/2006 (not the date of dismissal). Interest of 2% should be added to the plaintiff's contributions but the period for that percentage is not stated. The plaintiff claims 10% on her benefits from the 31/12/2006 until payment -plus the 2% making a total of 12%.

In production "F" by the defendant it shows - that holiday pay of $1,822.18 was due to the plaintiff and this amount was applied in part payment of the missing money. This amount was calculated as at 31/12/2006 as shown in production "F". If

calculated as at 22/6/2007 the date of dismissal it would be more. The plaintiff is entitled to 10% interest on the unpaid money from 31/12/2006 until payment. Two and a half years interest at 10% would yield a figure $2,216.94.

Damages for Wrongful Dismissal

The plaintiff claims - damages payable for wrongful dismissal - is normally calculated on a basis of loss of 6 months' salary for a Senior Officer in a public company. In Tonga the situation is somewhat different as it is more difficult to obtain employment, particularly if one is a woman let alone a widow with three dependent children.

The plaintiff - says in developed countries the situation is different. It is easier to obtain employment if you lost your employment. This situation was recognized by Ford CJ in calculating the damage awarded in the unreported case of *Vulaono 'Aisea v FIMCO* CV 678/2007. Vulaono 'Aisea was on a salary of $17,000.00 per annum - the plaintiff was awarded damages of $10,000.00.

The plaintiff says she is from the village of Lapaha. Her dismissal has been associated with theft of money from her employers. The plaintiff says this case is causing her considerable embarrassment and ridicule. The plaintiff has suffered as a result of her dismissal and she asks for compensation for the wrong done.

It was strongly submitted - the plaintiff has established her case against the defendant and is entitled to damages, repayment of retirement benefits, holiday pay and costs.

Defendant's Case

The defendant argues that the plaintiff's claim for $50,000 is excessive. They say the plaintiff claimed $50,000.00 even though she was being paid at just one sixth of that amount at the time she was dismissed.

The defendant says that the plaintiff's inflexibility has precluded any proper negotiated settlement or, resolution of the matter - between the parties to this suit.

The defendant argues there was a contract of employment between the parties and that the claim is based upon contract. The terms of the contract were contained in the Conditions of Service Manuel dated 10 September 2002 Defence Exhibit A.

The plaintiff disputed this in her admitted facts and testified she had never seen nor signed the Conditions of Service Manuel. In the courts view it is more than likely the plaintiff in her position as an OIC- would have had sight and knowledge of the Conditions of Service Manuel. Thus it would be reasonable for the court - to assume that the Conditions of Service Manuel contained the terms of the contract of employment - between the parties - to this suit.

The defendant argues clause 13.2 of the Manuel clearly sets out the procedures which were to be followed in relation to disciplinary procedures to be followed in respect of the plaintiff. DW1 testified he was familiar with the disciplinary provisions contained in the Manuel and he testified he had also sought the advice of the defendants Company Solicitor when he dealt with the incidents of stock shortage at the airport shop where the plaintiff worked and this suit.

DW1 testified that he acted in accordance with the provisions of the Manuel and told the court he personally conducted an internal investigation and had interviewed

staff members obtaining written statements from the staff members who worked at the airport shop.

DW1 testified he referred the matter to the police for a police investigation as allowed under the rules section 13.2.3 of the Manuel. DW1 confirmed he wrote the letters dated 9th January 2007 and 17th February 2007 to the plaintiff setting out what action he took and offering the plaintiff the opportunity to present her account of the incidents.

DW1 told the court how the plaintiff had over time worked her way up the ladder at the defendants company and had been promoted to the position of officer in charge of the defendant's duty- free shop at the airport. He testified as to the responsibilities and the obligations which the position brings.

DW1 was asked why he had decided to dismiss the plaintiff- DW1 said although the stock shortages were of minor amounts and are expected in the normal course of business - there had been stock shortages in November and December 2006 followed by a larger shortage at the end of December 2006.

After conducting an investigation - and taking into account all the circumstances, and additionally by consulting his companies solicitors DW1 testified —

> *"DW1 felt the plaintiff could no longer be relied upon to effectively manage and control stock shortages at the airport and as a result he concluded she was incapable of carrying out the duties of officer in charge.*

In cross examination the defendant says the plaintiff admitted it was her responsibility to make sure that stock shortages did not occur at the store, and that she had failed to do so on two separate occasions and when asked if she was doing her job properly, she replied, NO.

DW1 testified that as the General Manager of the defendant company - he was responsible for the hiring and the firing of employees and that section 13 of the Conditions of Service Manuel gave him the discretion to determine appropriate penalties- including the dismissal of employees for serious breaches of discipline.

When he was asked if the Conditions of Employment Manuel required him to await the results of a police enquiry or investigation BEFORE deciding to dismiss an employee —he said NO.

The defendant says interestingly the letter from Detective of Police Helepiko in the plaintiffs bundle states the evidence is not sufficient to "Issue any charges before the court." The defendant says- the letter does not say that the plaintiff was completely innocent of any wrongdoing.

The defendant argues that the plaintiff's submissions that there are two fundamental issues in this case which require consideration are-

[1] Whether the plaintiff embezzled the cash
[2] Whether the plaintiff's negligence was the cause the money went missing

The defendant says neither of these issues have any relevance to the defendants decision to dismiss the plaintiff- and they say these are red herrings. They say this is a claim based upon contract law and the only relevant factor for determination is:-

Whether the defendant acted within the terms of the employment contract in dismissing the plaintiff.

If not, then the dismissal is wrong, and the plaintiff is entitled to recover the damages allowable at law. The defendant says- the plaintiff believes she was treated unfairly but the fairness or otherwise of the dismissal is not relevant to whether the dismissal is wrong in the present case, because section 13.3 of the Conditions of Service Manuel expressly provided the GM— DW1 with a discretion to dismiss the plaintiff after having taken into account all of the circumstances of the case.

The defendant says that DW1 followed the guideline in the Conditions of Service Manuel and he acted within the scope of his authority in deciding to dismiss her. The defendant says the court should not interfere with their right under the contract to make the decision to dismiss the plaintiff, no matter how erroneous or unfair the plaintiff may consider that decision to be.

The defendant raises in their closing submissions the facts the plaintiffs allege they are a Public Enterprise pursuant to the Public Enterprise Act 2002 and that it was not open to dismiss the employee, for the wrong reason. The defendant points out this point was not specifically pleaded in the Statement of Claim and that it was not now open to the plaintiff at this late stage to try to assert that the defendant is a public enterprise and therefore subject to the principles of natural justice.

They say in any event it is clear from the correspondence produced at trial, the reasons for the plaintiffs dismissal was clearly stated, and that the plaintiff had been given the opportunity to present her arguments — before the decision to dismiss her was made and therefore the elements of natural justice- although not required of the defendant at law were applied and satisfied.

The Defendants Arguments on Damages

The defendant says the plaintiff has failed to prove that the defendant was wrong in law, when DW1 dismissed the plaintiff and they argue that the claim should be dismissed in its entirety.

The defendant says the claim for $50,000 is outrageous and the sum- gave them little chance to settle. The defendant claims the full cost of the action.

The defendant says even if it were found that the Conditions of Service was not the basis of the contract of employment between the plaintiff and the defendant, then at common law the relationship of employer and employee is held to be a contractual one, and there is an implied term in all such contract notices that the employment may be terminated on reasonable notice.

The defendant says that the 3 month period provided for in the Conditions of Service Manual is indicative of what a reasonable notice period is; or would be under a common law employment contract between the plaintiff and the defendant.

The defendant argues that if the dismissal is found to be unjustified, then given that the plaintiff has admitted that her claim is based on contract, they say the law is very clear. They argue that the plaintiff is entitled only to recover the pecuniary loss resulting from the defendant's repudiation of the employment contract. (*Kasimili v Vava'u Press*). The defendant says under clause 12.6 of the Conditions of Service Manuel requiring employees to give three months written notice of resignation, or retirement on the basis of an annual salary of $8,516 being paid at the time of

dismissal, the maximum award of damages that should be awarded in this case would be $2,129.00 and not the $25,000 which is claimed.

The defendant argues damages cannot be awarded for distress occasioned for wrongful dismissal so the plaintiffs claim for loss of reputation and hardship in the sum of $20,000 is not available in law. The defendant argues the unreported case of *AISEA* is irrelevant to the present case. The defendant sets out in detail the plaintiffs entitlement to holiday pay and the retirement fund.

Rebuttal

The plaintiff says the defendant's introduction and reference to the case of *Kasimili v Vava'u Press* [2002] TLR 168 is a submission of criticism and not one of merit. The passage quoted from *Kasimili*'s case is obiter. It was made by the Chief Justice at the end of his judgment after finding for the plaintiff.

The issue of quantum varies from one case to another. It is a relative question depending on the circumstances of each case, the position of the employee, the loss suffered and manner of dismissal. In the case of *Koloa v Helu* [1999] TLR 227 Finnigan J. at page 237 referred to the question of damages and reasonableness as an implied term in employment contracts.

He said:

> *"This is that damages are recoverable on the basis of breach of an implied term, but are recoverable primarily to compensate for the breaches of the contract. Next, for wrongful dismissal in breach of contract there are settled principles for calculating damages assessed on the plaintiffs proved financial loss, and damages are available for distress and humiliation that arises from the manner of the dismissal."*

In the *Kasimili* case, the plaintiff had no experience in the advertising industry and the term of his employment was uncertain. However the Chief Justice held that his entitlement was $50 a week plus 5% commission on payment of advertising space sold by him. In such a situation the small award of $457.92 (2 weeks wages plus commission) and comment of the Chief Justice was not surprising.

Five years later the Chief Justice in the unsettled case of *Vulaono 'Aisea v FIMCO* CV.678/07 made an award of damages for wrongful dismissal based on more than 6 months wages. The plaintiff was in charge of the defendants shop at Vava'u and on a salary of $17,000.00 per annum. The plaintiff says the facts of the present case are similar to *Vulaono 'Aisea*'s case. In the present case the plaintiff was in charge of the defendant's largest duty free shop situated at the departure lounge, Fua'amotu Airport. She was on a salary of $11,544.00 which was reduced by $3,028.00 to $8516.00 on 9 January 2008 prior to her suspension and dismissal.

In wrongful dismissal cases the Courts in Tonga apply the common law principles and the law of contract with slight adaptation to local conditions. Employment and a good position and income for a Tongan family are very difficult to obtain. Employment opportunities are limited and scarce. Once you are dismissed for alleged wrong doing you are thereafter not employable, particularly if you are in the middle age group or above. You are also ridiculed in the small community you live.

The reference to the sum of $50,000.00 claimed as precluding any negotiation for the resolution of this matter - is totally unfounded. When the plaintiff wrote in February 2008 and complained about her treatment the defendant ignored it. When she was dismissed her lawyer wrote to the defendant. They did not reply. After the action was commenced, it was referred to mediation and up to and including the trial there has not been a single gesture or suggestion that the case should be settled. The defendant maintained the claim should be dismissed with costs.

The defendant's submission on this point is, one of paying lip service to a principle which it did not apply or made any attempt whatsoever to do so. The defendant should have stated the amount claimed as being divided into 3 parts-

i.e.

(i) Loss of employment- $25,000.00
(ii) Loss of entitlement- $5,000.00
(iii) Distress humiliation etc- $20,000.00

There are 3 separate and legitimate heads of claim clearly stated in the statement of claim.

Contract of Employment

The plaintiff claims the defendant with respect appears to miss the point. They say any employment is a form of contract. The proof of the conditions of employment and the signing of a contract of employment is another matter.

The General Manager DW1 Paula Taumoepeau did not witness the agreement between the defendant and the plaintiff or, serve the Conditions of Service Manual on the plaintiff. DW1 was asked, "Whether there was a signed declaration (by the plaintiff) pursuant to condition 18 of the Manual. The answer DW1 gave was "NO". There was no evidence that the Head Office of the defendant company was destroyed in the riots of November 2006.

Decision to Dismiss

The plaintiff says the explanations given in paragraphs 3.2 and 3.3 of the defendant's written submissions appear, to be confused.

Part of the statement of evidence in paragraph 3.3 of the defendant's submissions goes to the issue of wrongful dismissal. It reads-

> *"When asked why he decided to dismiss the plaintiff Paula Taumoepeau said that although stock shortages of minor amounts are expected in the normal course of business, whilst the plaintiff had been OIC there had been stock shortages in November and December 2006— which had been admitted by the plaintiff - followed immediately thereafter by further and much larger shortage at the end of December 2006"*

The plaintiff did not admit the losses. She challenged it in her letter of 12 January 2008 she disputed the loss of the takings for 30/12/07 and the responsibility for its loss.

The penalty for the shortages were set out in Exhibit B (letter dated 9/1/2007) as follows-

a) Suspended without pay for 2 weeks with effect from January 2007.

b) Demotion from Sales Supervisor to Assistant Sales Supervisor.

c) The salary was reduced by $3,028.00 from $11,544.00 to $8,516.00.

d) She is to pay the retail value of the shortages of $2,312.80 before 16/1/2007.

e) She is not to be considered for salary increment until after 8/1/2008.

f) She is not to be assessed or considered for promotion until after 8/1/2008.

g) Any further lapses will be treated severely.

It is submitted when the explanation of the plaintiff in Exhibit C (letter dated 12/1/2007) is considered or is taken into account the penalties imposed above are severe, unreasonable and draconian. Further in imposing the penalties the General Manager failed to follow the procedure set out in the conditions of Service Manual dated 10/9/02 which he claimed as binding on the plaintiff.

The explanation of the plaintiff in Exhibit "C" (letter dated 12/1/07) disputed the shortages and method of stock taking in the following respects-

a) The variances are due to miscounting and wrong input by Kiko and Kivalu (from head office).

b) The shortage for November of $393.80 was for 3 Crunchie T/size x 250g and 2 Picnic T/Size x 250g left in the computer but there was no stock in the shop when she was placed there as Supervisor (rotated there). It was wrongly charged to her and Kivalu was asked to adjust these but was never done.

c) The Departure Shop is the biggest shop in the company and the shortage for December should be divided between her and the staff responsible for each section. The staff-were warned and the procedure of the staff sharing the loss has been applied as a company practice in previous years.

d) Unfair deployment of staff. The number 3 OIC at the arrival shop is smaller than the Departure shop where the plaintiff was the only OIC.

e) Unfair decision to pay all the shortages by the 16/1/2008 which is within 1 week from the date of General Manager's letter. Two of the staff from the other shops had shortages of over $2312.80 in their respective shops but were given time to pay by deduction from their salary.

The procedure for Disciplinary Cases is set out in paragraph 13.2.4 (b) (iii) in the Conditions of Service Manual. It states:

> *"(b)(iii) General Manager- shall at the earliest opportunity sent a letter to the employee setting out clearly the following:*
> *The charge (s)*
> *The facts including any documents relied upon to support the charge.*
> *Invite the employee to submit any representation within the following 7 days.*
> *Management shall maintain full and detailed account of the case including the representation made by the employee for any further consideration*

Exhibit "B" is the letter dated 9/1/2008 with the penalties was send to the plaintiff without warning requesting the plaintiff to explain the shortages. When the letter was received the plaintiff immediately responded and asked for her explanation to be considered. It was ignored, as was the procedure for disciplinary action. Her treatment can only be described as very unreasonable, and contrary to the defendants declared Rules of Procedure.

The injustice in the decision to dismiss is clear from the evidence of the General Manager- see passage of evidence set out in paragraph 3.2 hereof. This is the type of unreasonableness referred to by Finnigan J in *Koloa v Helu* (supra). His Honour held that there is a principle at law implied in contracts of employment that the parties must conduct themselves in a way that is not likely to destroy or seriously damage their relationship.

At page 234 paragraph 2 to the end of the passage the Judge said:

> *"This principle is illustrated in a 1997 case about repudiatory breach in an employment contract, Malik v. Bank of Credit and Commerce International SA [1997] 3 All ER 1 (HL). At p 5f and following Lord Nicholls made the following observation:*
>
> *...[the bank in that case] was under an implied obligation to its employees not to conduct a dishonest or corrupt business. This implied obligation is no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages…*
>
> *The trust and confidence required in the employment relationship can be determined by an employer, or indeed an employee, in many different ways. I can see no justification for the law giving the employee a remedy if the unjustified trust-destroying conduct occurs in some ways but refusing a remedy if it occurs in others. The conduct must of course, impinge on the relationship in the sense that looked at objectively, it is likely to destroy or seriously damaged the degree of trust and confidence the employee is reasonably entitled to have in his employer...*
>
> *Further, he commented (at p 5h and j and p 6a):*

> *[To contravene this principle, the employer's] conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer...*
>
> *A breach occurs when the proscribed conduct takes place...*
>
> *Proof of a subjective loss of confidence in the employer is not an essential element of the [employer's] breach...*
>
> *That is the principle that governs the present case. There is implied into the employment contract of these parties a term that the employer would not conduct itself in a way that, when objectively viewed, was likely to destroy or seriously damage the degree of trust and confidence that the plaintiff was reasonably entitled to have in his employer.*
>
> *I hold that the employer was bound by an implied term of the contract to act reasonably when it exercised its right to dismiss the plaintiff. I hold that it was bound further not to conduct itself in a way that, objectively viewed; was likely to destroy or seriously damage the degree of trust that the plaintiff was entitled to have in the second defendant as his employer."*

The plaintiff says the power of the General Manager to dismiss is not questioned. It is the procedure that he must follow and whether he has followed it correctly or not. Refer to paragraphs 4.2 to 4.9 of the plaintiff's closing submissions dated 29/4/09.

Further the reference in paragraph 3.4 of the defendant's submission to Chief Inspector Helepiko's letter is incomplete. Paragraph 2 of that letter makes the point clear-

> *"All the witness and evidence in connection with the theft <u>is not sufficient to be used to accuse anyone or to issue</u> etc..."*
> *(*underlined by Counsel*)*

<u>Crucial Issues for Determination</u>

With respect there is a misconception in the defendant's submission on the two fundamental issues i.e.

(i) Whether the plaintiff embezzled the cash and
(ii) Whether the plaintiff was negligent and as a result caused the money to go missing?

If these issues are not relevant then what was the reason for the plaintiff's dismissal? Was she being dismissed for the missing money or for the November and December 2007 shortages in stock for which she was already punished? Alternatively was she being dismissed for both reasons relating to shortages in stock and for the missing money?

If the dismissal is based on any one of those grounds, it is submitted the dismissal was wrong. Refer paragraphs 4.2 to 4.9 of plaintiff's closing submissions dated 29/4/2009.

The conduct of the defendant falls under the categories of unreasonableness described by Finnigan J. in *Koloa v Helu* (supra) and by Lord Greene in - *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

In the latter case Lord Greene was classifying and defining what constituted unreasonableness in exercising a statutory discretion. At page 229 paragraph 2 the Justice said-

> *It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretion often use the word "unreasonable" in a rather comprehensive sense.*
>
> *It is frequently used as a description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider.*
>
> *He must exclude from his consideration matters which are irrelevant to the matter that he has to consider.*
>
> *If does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."*

Towards the end of the same paragraph, Lord Greene continued:

> *"Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith."*

It is noted that Lord Greene in the *Wednesbury* case was dealing with the application of "reasonableness" in relation to the exercise of statutory discretion which is not the issue in the present case. However when the General Manager exercised the power of dismissal over the plaintiff and relies on any of the following grounds for dismissal i.e.

> On the shortage of stock in November and December 2007, OR
> On both the shortage of stock and missing money OR
> On the missing money only

That decision would be offensive or unreasonable for the reasons already submitted.

It is submitted that the defendant has misunderstood the point of unfair treatment of the plaintiff. The submission is directed towards the question of damages on unreasonable treatment referred to by Finnigan J. in *Koloa v Helu* (supra).

The reference to Public Enterprise was made because the defendant repeatedly described or referred to the defendant as a private company registered under the

Companies Act. The plaintiff's pleadings and submissions are clear as to the grounds for the wrongful dismissal.

Further the status of the defendant as a public enterprise is defined by law.

Damages

Whether the claim is for $25,000.00 or $5,000.00 or $20,000.00 the defendant will still incur costs in defending it. The attitude of the defendant is expressed very clearly in its submissions particularly paragraph 4.2 where it is submitted:

> *"It is not for the plaintiff or this Honourable Court to question the fairness or appropriateness of Paula Taumoepeau's decision to dismiss the plaintiff.*
>
> *The only relevant factor is that he followed the guidelines in the conditions of Service Manual and acted within the scope of his authority in deciding to dismiss her".*

It was submitted that there were other occasions of discussions where the defendant made it clear that settlement was out of the question.

The claim is not limited to general damages for wrongful dismissal only but also includes a claim for distress and humiliation and for her unreasonable treatment and stigma of dishonesty.

In addition the plaintiff is seeking payment of her pension including the defendant's contribution under the superannuation fund.

The defendant repudiated the employment contract by virtue of the wrongful dismissal. As a result it is not open for the defendant to shelter under the umbrella of 3 months notice stated in the Conditions of Service Manual. The defendant could have given 3 months notice - but it elected not to do so.

Conclusion

Based upon the evidence presented in this case - that is to say -both the oral and written evidence: - submitted by both parties.

I find and accept the following:-

- That there was a valid contract of employment in existence, between the parties in this case — that is to say existing between the plaintiff and the defendant company.
- A contract of employment - has been adequately evidenced by the plaintiffs working record- with the defendants company over a considerable period of time [five years and one month's duration] with the plaintiff working in an office — and holding certain responsibilities and obligations
- The terms and the conditions of the plaintiff's employment are in my view contained in and fully documented - in the Conditions of Service Manual produced to this court - in defence bundle as EXHIBIT A. The Conditions of Service in my view, form part of the plaintiffs contract of

employment and I believe she had full knowledge of them.

- It was admitted that the plaintiff was the defendant company's senior employee [at all material times] and was employed as the Officer in Charge of the defendant's duty free shop at the Fua'amotu International Airport in November and December 2006.
- As the OIC at Pua'amotu International Airport the plaintiff was responsible for the day to day management of the duty free shop - and its day to day running - coupled with duties concerning the supervision of locally employed staff.
- The plaintiff by her contract of employment- was responsible for the security and safety of all stock - and all money on the premises belonging to her employer - with a duty to account for same.
- I find as a fact on the evidence before me- that during the tenure of the plaintiff's employment in November and December 2006 that there were two incidents of stock shortages in both November and December 2006 and I was told in evidence that stock shortages were a normal occurrence within the industry.
- The stock shortages at Fua'amotu International Airport occurring in November 2006 - was in the sum of $393.80
- The stock shortage at Fua'amotu International Airport occurring in December 2006 was in the sum of $1919.00.
- The total shortages at Fua'amotu International Airport amounted to $2312.80 — and the OIC the plaintiff - was responsible for those shortages and had a duty to account for same.
- On the evidence - I find as a fact the Plaintiff repaid - monies from the two stock shortages for the months of November in the sum of $393.80 and December 2006 in the sum of $1919 to her employer. Though in my view the plaintiff should -have been heard on a proper affordable payment schedules - under the heading or guise of "Rules of Natural Justice."
- I find as a fact the plaintiff was penalized by her employer in the following manner. The plaintiff was suspended for 2 weeks without pay — further:-
  - i) The plaintiff was demoted.
  - ii) The plaintiff was demoted by seven [7] pay increments thus the plaintiff argues- $3,028.00 was deducted from her salary.
  - iii) The plaintiff was receiving $11,544.00 per annum and her salary was reduced to $8,516.00 (reduced by a quite significant amount)

- On the evidence before me-I find as a fact the plaintiff- was significantly penalized for stock shortages at the airport during the months of November and December 2006.
- I find as a fact that in accordance with the terms of the procedures set out in the Conditions of Service Manuel - the GM DW1 conducted an internal investigation into the loss of money $7,112.00- and stock shortages - BUT was his investigation into these shortages properly documented - and was it fair? Should the investigation have been delegated to another member of staff?
- The GM - DW1 reported the loss of takings of $7,112.00 to the police as he is perfectly entitled to do - and in my view he should do — as would any prudent manager, or employer in his position.
- I accept the defendant companies Manuel of Conditions of Service - do not require DW1 to wait for the result of the police enquiry - before dismissing the plaintiff, - however, perhaps with hindsight- it would have been reasonable and prudent for the GM - DW1 to have waited for the police report - before he terminated the plaintiffs employment with the company — more especially after she was a long term employee of 5 plus years employment.
- I accept DW1 as the GM - is and was perfectly entitled to make a decision that the plaintiff could not be trusted to perform her duties as the OIC of the Airports duty free store — but the question remains was the GM properly informed of all the facts - before he made his decision to dismiss the plaintiff— [who as I said before was a long term employee of the defendant company].
- As regards the stock shortages in November and December 2006 the GM - DW1 had in fact effectively demoted the plaintiff and he had clawed back the stock shortage loss - in other ways. This court is bound to ask could the GM not have found the plaintiff an alternative job within the organization - with less responsibility - whilst he awaited the result of the police investigation before he dismissed her. After all he said in evidence had the police report come back before he took his decision he would NOT have dismissed the plaintiff.
- The court accepts the fact that there were stock shortages and these shortages were repaid by the Plaintiff. I say again the court was also told by DW1 shortages were an accepted practice in the industry and by repaying the shortages the company did not suffer any loss.
- **Critically in this case — AND I find as a fact on the evidence and admissions** — the takings [the money] and

contents of the plastic bag on the 30th December 2006 in the sum of $7,112.00 were handed to Kivalu Tuiono by the plaintiff because I accept the plaintiff's evidence and the defence admission.

- I find as a fact that Kivalu Tuiono left the airport premises with the bag containing ALL the money [the $7,112.00] on the 30th December 2006— this finding of fact is based upon all the evidence before me.
- I heard no evidence from any source that the plaintiff had to accompany Kivalu in order to lodge the money [the takings] at the Head Office.
- There was no evidence presented to this court to rebut the evidence of the plaintiff that she and Emalita Ngungutau counted the $7,112.00 in the presence of Kivalu Tuiono, and placed it in the plastic bag and handed it to Kivalu to take away on the 30th December 2006 —and accordingly I accept the plaintiffs evidence in its entirety.
- Therefore I also find as a fact - the plaintiff cannot have been held responsible for the loss of the $7,112.00 therefore the plaintiff should never have been made to pay the sum of $7,112.00 back — this is essentially BECAUSE that loss — MUST lie elsewhere - most likely in the hands of Kivalu Tuiono - or others- at the company Head Office.
- Accordingly any deduction made by the defendant company covering the loss of $7,112.00 I rule was unlawfully deducted by the defendant company more especially because the money was deducted - prior to the conclusion of the ongoing police investigation.

In respect of the dismissal of the plaintiff from her post with the defendant company — I agree with Mr. Edwards — and I find as a fact the conduct of the defendant company in this particular case - falls under the categories of *unreasonableness* described by Finnigan J. in *Koloa v Helu* (supra) and Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

- Because it is true discretion must he exercised reasonably. In this case I find it was not.
- What does that mean?
- Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretion often use the word "unreasonable" in a rather comprehensive sense.
- It is frequently used as a description of the things that must not be done, i.e. someone rushing to judgment.
- For instance, a person entrusted with discretion must direct himself properly in accordance with the law.
- He must call his own attention to the matters which he is bound to consider.

- He must exclude from his consideration matters which are irrelevant to the matter he has to consider.
- If does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."
- It is so unreasonable that it might almost be described as being done in bad faith.
- Should the GM have entrusted the investigation to another member of staff- my answer is yes. One cannot and should not be the investigator the judge and the jury.

Finding

I find for the Plaintiff in this case - today I intend to reserve determining the issue of damages - in the very distinct hope - that both parties may come to an agreement as regards to - future reemployment of this plaintiff in another post within the company.

I also wish to say on the facts of this case - the plaintiff cannot be regarded as DISHONEST by her actions. I totally reject that assertion - based upon hearing -all of the evidence.

For various reasons I have decided to adjourn this case to the 16th July 2009- for negotiations between the parties - to see if a settlement over the plaintiff's reemployment - might ensue - benefitting everyone.

Oceania Printing Technologies Ltd v PSS Ltd

Supreme Court, Nuku'alofa
Andrew J
CV 74/2009

3 June 2009; 5 June 2009

Practice and procedure – security for costs application - dismissed

The defendant in a civil action made an application for security for costs against the plaintiff. The application sought for the plaintiff to pay the sum of $15,000 as security for the defendant's costs of the proceedings and that the action between the parties be stayed until the plaintiff gave such security. The defendant claimed that the plaintiff was a counter defendant in other civil actions and if it was ordered to pay costs in that matter, it may be unable to pay the costs of the defendant in the action if ordered to do so. The defendant also claimed that the plaintiff failed to pay costs when ordered to do so in other applications and that the relationship between the parties was indicative of the fact that the plaintiff would not be disposed to pay any costs in this case even if it was ordered to do so.

Held:

1. It could not be said that the plaintiff might be unable to pay any costs if awarded against him. He had some assets in the jurisdiction, for example he was a 1/3 owner of the defendant company and had other businesses in Tonga. Further, it appeared on balance that he may at least be partially successful.
2. An order for security for costs was not justified and the application was dismissed.

Rules considered:
Supreme Court Rules 2007

Counsel for the plaintiff/respondent : Mr Niu
Counsel for the defendant/applicant : Mrs Stephenson

Ruling

This is an application by the defendant for security for costs. The application seeks for the plaintiff to pay the sum of $15,000 as security for the defendant's costs

of the proceedings and that the action between the parties be stayed until the plaintiff gives such security.

The applicant says that one Pradeep Narayan is a director and shareholder on the Plaintiff company together with his wife Reeta Narayan and between them they control the operations of the Plaintiff. It is noted that the Pradeep Narayan was one of 3 directors of the defendant company and still owns one third of the shares in the defendant company.

The defendant says that the plaintiff is a company incorporated in New Zealand with its registered office in Auckland and that it has no assets of significance in the Kingdom of Tonga. It says that the plaintiff is a counter defendant in other civil actions and if it is ordered to pay costs in that matter; it may be unable to pay the costs of the defendant in the present case if ordered to do so. It also says that the plaintiff has failed to pay costs when ordered to do so in other applications and that the relationship between the parties is indicative of the fact that the plaintiff would not be disposed to pay any costs in this case even if it was ordered to do so. These matters are set out in the affidavit evidence of the two other directors of P. S. S. Limited.

The plaintiff's claim in these proceedings is essentially for monies owing from the sale of various office equipment as supplied to the defendant by the plaintiff. At the heart of the dispute is an alleged verbal agreement said to have been made between the parties. That is, as asserted by the defendant and denied by the plaintiff.

The defendant acknowledges that it is ordinarily resident out of the jurisdiction of the Court and that it is true that that is a ground upon which the Court may order security for costs to be paid by the plaintiff but says that the Court must consider all the circumstances before ordering that it would be first to award security for costs. O. 17 Rule 1 provides that where on the application of a defendant to any proceeding it appears to the Court that:-

> (a) the plaintiff is ordinarily resident out of the jurisdiction, or
> (b) the plaintiff may be unable to pay the costs of the defendant if ordered to do so, or
> (c) the plaintiff has not disclosed his true address to the Court.

The Court may, if after having regard to all the circumstances of the case it thinks first to do so, order that all the actions be stayed until the plaintiff gives security for the defendant's costs of the proceeding in such sum and in such manner as the Court may determine.

The defendant says that it has a strong case against the defendant who has already admitted that $9,021.43 is owing to the plaintiff. Further, the defendant says that:

> - There was no verbal agreement between the parties as alleged.
> - That it has not breached any court order and that the issue of costs being paid by defendant on those costs being taxed.

- That it will pay any costs awarded against it and that it does have and will have sufficient funds and assets to pay any such costs if ordered to do so.

80 It seems to me, looking at all the circumstances of this case, that it could not be said that the Plaintiff might be unable to pay any costs if awarded against him. Further he does have some assets in the jurisdiction. He is for example a 1/3 owner of the defendant company. He has other businesses in Tonga so that he has a substantial presence here. Further, it appears on balance that he may at least be partially successful in these proceedings, if it has been shown as it appears, that at least some amounts are owing to him and if as said that the dispute is as to when and if any debt is owing.

In all of these circumstances I do not think, on balance, that an order for security for costs is justified.

90 I dismiss the application. Costs of this application to be costs in the cause.

Pohiva anors v Solomon

Court of Appeal, Nuku'alofa
Ford CJ
AC 18/2009

10 June 2009; 10 June 2009

Practice and procedure – application to set aside court orders – court was not persuaded – application dismissed

On 20 October 2008, in a civil defamation proceeding, the respondent succeeded in obtaining summary judgment against the appellants with an award of general damages in the sum of $250,000 and aggravated damages also in the sum of $250,000. Subsequently a receiver was appointed to enforce the judgment. The court made orders on 8 and 13 May 2009 that granted leave to the appellants to appeal out of time, to appeal against an interlocutory order and then granted a stay of the proceedings before the Supreme Court pending the determination of the appeal in the Court of Appeal. The respondent applied for an order setting aside those orders.

Held:

1. The Court was not persuaded that the orders in question ought to be set aside. If there was any injustice the Court was satisfied that it could be remedied by the Court of Appeal when it heard the appeal in 28 days time. The respondent's applications were accordingly dismissed.

Rules considered:

Court of Appeal Rules 2007
Supreme Court Rules 2007

Counsel for the appellants	:	Mr Tu'utafaiva
Counsel for the respondent	:	Mr Afeaki and Mrs Faka'osi

Ruling

[1] The respondent has applied for an order setting aside orders I made on 8 and 13 of May 2009 respectively granting leave to the appellants to appeal out of time; to appeal against an interlocutory order and granting a stay of the proceedings before the Supreme Court pending the determination of the appeal in the Court of Appeal.

[2] The application had been set down for a Chambers hearing on 3 June 2009 but at that hearing junior counsel for the respondents sought an adjournment for another week to allow senior counsel from New Zealand to be present. The adjournment was granted.

[3] At the Chambers hearing on 10 June I heard submissions and indicated to counsel that I had earlier read the extensive written submissions filed by the respondent. The thrust of Mr Afeaki's submissions were that his client had not been given the opportunity to be heard on the applications. It was contended that the orders were consequently "erroneous in law, contrary to natural justice and unfair and unreasonable."

[4] Although it is conceded that a hearing would have been desirable, the rules do not require such a hearing. There was particular urgency associated with the appellant's application for leave to appeal and the stay order because the Court of Appeal session for 2009 is set down to commence on 29 June and the cases to be included in the list were in the process of being finalised. The call-over for the 2009 Court of Appeal session had been held back on 9 April. As soon as the final fixture list had been confirmed, the relevant documentation had to be dispatched to the appeal judges in Australia and New Zealand. Time, in other words, was at a premium. The few weeks leading up to the Court of Appeal session each year is invariably the busiest period for the court staff.

[5] The other factor, relevant to the stay application, was that a receiver had been appointed on behalf of the respondents and he was taking active steps to execute the judgment the appellants sought leave to appeal against. Unless the applications were acted on promptly the object of the appellant's appeal could well have been nullified.

[6] Although I did not hear argument on the point, it may be that it was not necessary to obtain special leave to appeal against an "interlocutory order". Interlocutory orders are generally orders made by the court granting appropriate interim relief or remedy pending the final determination of the proceeding. The interlocutory order in question struck out the appellant's statement of defence and, to that extent, it could be said to be a final determination of the proceeding. I stress, however, that this point was not taken before me.

[7] Order 7 (1) of the Court of Appeal Rules provides that an application for leave to appeal or for leave to appeal out of time may be made ex parte supported by an affidavit and may be determined by a single Judge without a hearing. Order 9 of the Court of Appeal Rules provides that an order granting a stay of execution may be made either by the Court of Appeal or a Judge of the Supreme Court. The rule does not require a hearing.

[8] In his written submissions, respondent's counsel referred to the appellants' application as having been made inter partes. The appellants' application followed the usual format provided for in the Supreme Court Rules. The Supreme Court Rules 2007 did away with the old ex parte/inter partes nomenclature. Order 13, which prescribes the rules covering all applications to the Court, provides that the Court may deal with an application without a hearing in the circumstances provided for by Order 13 Rule 4. Rule 4(e) provides that the Court may deal with an application without a

hearing if it considers it appropriate in the interests of justice to dispense with a hearing.

[9] The case in question is a civil defamation proceeding. On 20 October 2008 the respondent succeeded in obtaining summary judgment against the appellants with an award of general damages in the sum of $250,000 and aggravated damages also in the sum of $250,000. Subsequently, as indicated above, a receiver was appointed to enforce the judgment.

[10] In support of the respondent's application for an order setting aside the orders made on 8 and 13 May, a lengthy affidavit was filed by junior counsel for the respondent alleging that the orders in question had "serious prejudice" on the respondent. When asked at the Chambers hearing to explain the serious prejudice she was referring to, counsel replied: "Solomon continues to be defamed."

There was no affidavit filed by the respondent personally alleging any prejudice.

[11] Given the pending hearing in the Court of Appeal, it would not be appropriate for me to make any further observations on the submissions made by the respondent's counsel on the facts of the case. Suffice it to say that I have considered all the material before me but I have not been persuaded that the orders in question ought to be set aside. If there is any injustice I am satisfied that it can be remedied by the Court of Appeal when it hears this particular appeal in 28 days time. The respondent's applications are accordingly dismissed.

Schaumkel v Australia and New Zealand Banking Group Ltd

Supreme Court, Nuku'alofa
Andrew J
CV 58/2008

10 June 2009; 15 June 2009

Practice and procedure – applications to strike out and for security for costs – dismissed

The plaintiff claimed that the defendant had no right under the contract of employment to terminate without notice and could not terminate without right to be heard. The defendant claimed in a case of a private employer, there was a right of summary dismissal and the defendant could dismiss at will. The defendant made an application to strike out the plaintiff's claim for wrongful dismissal or in the alternative that the plaintiff pay security for costs.

Held:

1. The plaintiff had a right to bring her action and the issue as to whether there was any breach of a term of the contract should be litigated. The claim should not be struck out.
2. Requiring the plaintiff to pay security for costs was likely to have the effect of excluding the plaintiff from being able to bring her case. The application was not granted.
3. Both applications were dismissed.

Cases considered:

Cauchi v Air Fiji [2005] Tonga LR 154
Hougland v Tonga Family Planning [1989] Tonga LR 87

Counsel for the plaintiff : Mr Taumoepeau
Counsel for the defendant : Mr Tu'utafaiva

Judgment

This is an application to strike out the Plaintiff's claim for wrongful dismissal or in the alternative that the Plaintiff pay security for costs.

There is no dispute that the Plaintiff was employed by the Defendant commencing in about January 2001. There was an employment contract dated 25th January, 2001.

The Plaintiff (in Paragraph 10 of the Statement of Claim) says that the defendant has no right under the contract of employment to terminate without notice and cannot terminate without right to be heard. The defendant/applicant says that this is a case of a private employer and that he can dismiss at will. Further it is said that this is not a case where administrative law is applicable and where natural justice might apply so that the issues of a right to be heard and dismissing without notice do not apply in this case.

In other words that there is a right of summary dismissal in a normal contract of employment case. Reliance is placed on *Hougland v Tonga Family Planning* [1989] Tonga LR 87.

The pleadings in the Statement of Claim are to be considered as being capable of proof by the Plaintiff. The discretion to strike out must be sparingly exercised see *Cauchi v Air Fiji* [2005] Tonga LR 154.

In this case there is a contract. The question is, has the employer broken any terms of the contract. That includes express and implied terms. It involves questions of fact. I do not think that it is as straightforward as saying that the employer can simply dismiss at will whatever the circumstances.

I would not strike the claim out. I think the Plaintiff has a right to bring her action and the issue of whether there is any breach of a term of the contract to be litigated.

I would not strike out the claim.

In relation to security for costs I think this is likely to have the effect of excluding the plaintiff from being able to bring her case. She is currently residing in New Zealand where it is said that she has secured employment. There is evidence that she and her family have assets in the community. I would not grant an order for security for costs.

Both applications are dismissed.

I order that the costs of these applications be costs in the cause.

The Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Fepale anors

Land Court, Nuku'alofa
Andrew J
LA 8/2008

10 June 2009; 15 June 2009

Practice and procedure – application to strike out – reasonable cause of action – plaintiff had standing – application dismissed

The plaintiff was the lessee of two allotments was in occupation for the past 29 years paying rent. The plaintiff claimed that the original owner of the allotments died in 2003 and as there were no lawful heirs the allotments reverted to the crown. The plaintiff had built a church in lease 3859 and the land in lease 3860 was used as a playground. The plaintiff claimed that it did not know and was not consulted as lessee by the first and second defendants when they applied for the grant of the allotments. Further it was claimed that the Ministry of Lands knew that the plaintiff had valid leases over the allotments but did not consult the plaintiff before granting leases to the first and second defendants. There was an issue as to the granting of allotments where they were lawfully occupied by a lessee. The plaintiff claimed that the grants made by the Minister of Lands to the first and second defendants were invalid. The first and second defendants applied to strike out the plaintiff's action on the grounds that the statement of claim disclosed no reasonable cause of action, and that the plaintiff had no standing (locus standi) to bring the action.

Held:

1. The Court considered that the plaintiff's claim was a legitimate one and one that it was entitled to make. It was a reasonable cause of action based on the circumstances. The interests of the plaintiff were clearly at stake.
2. The plaintiff had the appropriate standing to make the claim.
3. The application for strike out was dismissed.

Counsel for the plaintiff	:	Mr Niu
Counsel for the first and second defendants	:	Mr Edwards
Counsel for the third defendant	:	Mr Kefu

Judgment

This is an application by the 1st and 2nd defendants to strike out the plaintiff's action: There are 2 grounds advanced namely that the statement of claims discloses no reasonable cause of action and secondly that the plaintiff has no standing (locus standi) to bring this action.

No Reasonable Cause of Action

Briefly stated, the decision of the Minister of Lands to grant 2 town allotments to the 1st & 2nd Defendants is being challenged.

The Plaintiff is the lessee of the two allotments in question and has been in occupation for the past 29 years and is paying rent. The Plaintiff's claim is that the original owner of the allotments died in 2003 and as there were no lawful heirs the allotments reverted to the crown. The plaintiff had built a church in lease No.3859 and the land in lease 3860 was used as a playground. The Plaintiff says that it did not know and was not consulted as lessee by the first and second defendants when they applied for the grant of the allotments. Further it is claimed that the Ministry of Lands knew that the plaintiff had valid leases over the allotments but did not consult the plaintiff before granting them to the 1st & 2nd defendants. There is an issue as to the granting of allotments where they are lawfully occupied by a lessee. There appear to an issue as to the granting of an allotment to an adopted son of the landowner. The plaintiffs refer to the authority of 'INOKE FAFA and others, decision of the Court of Appeal in AC 03/2006, decision of the 16th August, 2006.

The Plaintiff's cause of action (as pleaded in clause 15 of the Statement of Claim) is that the grants made by the Minister of Lands to the 1st & 2nd defendants were and are invalid.

The 3rd defendant's attitude to these applications is that it takes a neutral stance as to the conflict between the parties but acknowledges that the questions of law which are raised relate to important issues such that this case may be something of a test case.

I consider that the Plaintiff's claim is a legitimate one and one that it is entitled to make. I consider it be a reasonable cause of action based on the circumstances which have been referred to. The interests of the Plaintiff are clearly at stake.

I consider that there is a proper cause of action and that the plaintiff has the appropriate standing to make this claim.

I would not strike the claim out.

The application is dismissed. Costs of this application to be costs in the cause.

Polynesian Limited v Fonua anor

Supreme Court, Nuku'alofa
Andrew J
CV 107/2009

16 June 2009; 17 June 2009

Practice and procedure – injunction sought seizing business – doubt as to liability of defendants – injunction denied

The plaintiff claimed that the defendants guaranteed the payment of air fares for the Tongan Volleyball team to travel to Australia and back. It appeared that the first defendant wrote a letter on the 4th December 2008 in which he appeared to guarantee the payment of the air fares. He mentioned that the second defendant would also be liable to pay off the debt. The plaintiff applied for an interim injunction that the graphic design and other business of the defendants at Loumaile Lodge be seized by the plaintiff and not to operate until the debt of $18,614.56 plus 16% interest was paid. The application was opposed.

Held:

1. There was doubt as to whether the second defendant had guaranteed the debt. Further, the Court was told that the first defendant had no particular interest in the property or involvement in the business.
2. The Court was not prepared to make the order for an injunction that seized the business. The application was dismissed.

Counsel for the plaintiff/applicant : Mr Fakahua
Counsel for the defendant/respondent : Mrs Stephenson

Judgment

The applicant/plaintiff seeks an interim injunction against the first and second defendants.

They seek an order that:

> "That the graphic design and other business of the defendants at Loumaile Lodge at the corner of TAUFA'AHAU Road and Laifone Road is now seized by the plaintiff and not to operate until they pay their debt in the sum of $18,614.56 plus 16% interest per annum since February 2008 until paid"

The application is opposed.

This matter revolves around whether the defendants guaranteed the payment of air fares for the Tongan Volleyball team to travel to Australia and back. It appears that the first Defendant wrote a letter on the 4th December 2008 in which he appears to guarantee the payment of the air fares. He does mention that Ms. Tanginoa (the second defendant) shall also be liable to pay off the debt. However that letter is signed only by Mr Fonua. There is a letter dated 25th March 2009 whereby the lawyer for the defendants advise that her clients will commence to pay the money once the interest payment has been sorted out. There is no direct reference to Ms. Tanginoa. I think in the circumstances there is some issue of whether Ms. Tanginoa has guaranteed the debt. The injunction is seeking to seize her property. I am told that the 1st defendant has no particular interest in the property. I think that the seizure of the business is a matter which might only occur until after judgment. As there is some doubt as to Ms. Tanginoa's position in this matter I am not prepared to issue an order seizing the business. I am told that the 1st defendant has no involvement in the business described as the graphic design business at Loumaile Lodge.

In these circumstances I am not prepared to make an order for an injunction to seize this business.

I would dismiss the application and order that costs of the application be costs in the cause.

Application by Latu for Illegitimation of Birth

Supreme Court, Nuku'alofa
Ford CJ
FA 129/2006

17 June 2009; 19 June 2009

Legitimacy – application to change birth certificate record to illegitimate - incorrect birth certificate – no basis for application – application struck out

Practice and procedure – application to strike out – no chance of success – struck out

The applicant, who was 75 years of age, made application to the Registrar General on 18 December 2006 to amend the birth certificate relating to his son, Sione 'Atu Latu (the respondent), to record his birth as being "illegitimate". He claimed that Sione's birth had been registered as legitimate by mistake. The applicant claimed that at the time the respondent was born in 1960 he (the applicant) was living in a de facto relationship with the respondent's mother, 'Akata Peeki, and he did not marry 'Akata until 7 January 1961 (after the date of the respondent's birth). The applicant filed a birth certificate showing the respondent's date of birth as 15 January 1960 and a marriage certificate confirming the date of his marriage to 'Akata as 7 January 1961. 'Akata had been married to one Sione Takaunove and the decree absolute in respect of that marriage was not issued until 17 March 1960. The respondent applied to strike out the applicant's application on the grounds that there was no proper basis for the application because the birth certificate that had been produced showed an incorrect date of birth for the respondent.

Held:

1. The Registrar confirmed that the birth certificate showing the respondent's date of birth as 15 January 1960 was incorrect and that the actual date of the respondent's birth was 19 October 1960.
2. The respondent's legal status was governed by the provisions of the Legitimacy Act (Cap 32). As his mother was no longer married at the time of his birth the respondent was deemed to have been legitimated as from the date of her remarriage to the applicant. The application by the applicant to have the respondent's status recorded as illegitimate could not possibly succeed.
3. The application was struck out.

Statute considered:
Legitimacy Act (Cap 32)

Counsel for the applicant : Mrs Vaihu
Counsel for the respondent : Mr Edwards

Judgment

[1] The applicant, who was 75 years of age at the time, made application to the Registrar General on 18 December 2006 to amend the birth certificate relating to his son, Sione 'Atu Latu (the respondent), to record his birth as being "illegitimate". He claimed that Sione's birth had been registered as legitimate by mistake. The matter has been delayed because I ordered that the application had to be served on the respondent's mother who lives in Hawaii and on the respondent himself who lives in North Carolina, USA. The applicant had difficulties in locating the exact whereabouts for service of both the respondent and the mother.

[2] The thrust of the applicant's claim was that at the time the respondent was born back in 1960 he (the applicant) was living in a de facto relationship with the respondent's mother, 'Akata Peeki, and he did not marry 'Akata until 7 January 1961 which was after the date of the respondent's birth. Along with his application, the applicant filed a birth certificate showing the respondent's date of birth as 15/1/1960 and a marriage certificate confirming the date of his marriage to 'Akata as 7 January 1961. The reason for the application is not apparent from the papers before the Court but presumably, as in most such cases, it will be related to hereditary entitlements.

[3] On 25 February 3, 2009, Mr Edwards, acting for the respondent, filed an application to strike out the applicant's application upon the grounds that there was no proper basis for the application because the birth certificate that had been produced showed an incorrect date of birth for the respondent. The present Ruling relates to the respondent's strikeout application.

[4] In support of the strikeout application, Mr Edwards filed an affidavit obtained from the Court Registrar, Frederick Tuita, in which the Registrar confirmed that the birth certificate showing the respondent's date of birth as 15 January 1960 was incorrect. The Registrar attached as an exhibit to his affidavit another birth certificate which he deposed showed the correct date of birth which was 19 October 1960. The Registrar was not called as a witness but no challenge was made by Mrs Vaihu to the accuracy of the contents of his sworn affidavit. Unfortunately, however, because the Registrar did not give evidence I was unable to explore how the birth certificate showing the incorrect date of birth came to be in existence.

[5] The significance of the correct date of birth is that the respondent's mother, 'Akata, had been married to one Sione Takaunove and the decree absolute in respect of that marriage was not issued until 17 March 1960 which, of course, was after the date of birth shown in the birth certificate produced by the applicant but before the date of birth shown in what transpires to be the correct birth certificate.

[6] Mr Edward's strikeout application was based on section 3(1) and (2) of the Legitimacy Act (Cap 32) which states:

> "3.(1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Tonga, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens."
>
> (2) Nothing in this Act contained shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born."

[7] The respondent's legal status is governed by these provisions. As his mother was no longer married at the time of his birth he is deemed to have been legitimated as from the date of her remarriage to the applicant. For this reason the application by the applicant to have the respondent's status recorded as illegitimate cannot possibly succeed. The application is, accordingly, struck out. The respondent is awarded costs to be agreed or taxed.

Moapa Enterprises Trading as JM Store v Island Beverage Ltd

Supreme Court, Nuku'alofa
Ford CJ
CV 976/2007

11, 12 May 2009; 26 June 2009

Agency – question of authority and whether principal – defendant failed to establish liability

Both the plaintiff and the defendant were retailers trading in the buying and selling of a variety of food products, beverages and other grocery products. In about 2004 an informal trading arrangement was entered into between the two companies under which each would buy produce from the other for onward sale to the public. That arrangement was entered into between the owner of the plaintiff, Mr Rudra Prasad, and the owner of the defendant, Mr Tanusia Paea. The goods were supplied on credit so that no cash would exchange hands but every so often there would be a reconciliation. The evidence was that goods purchased from the defendant by the plaintiff were ordered by its manager, Mr Rohit Raj, and goods purchased by the defendant from the plaintiff were ordered by the defendant's Managing Director, Mr Paea. That arrangement carried on until early 2007 when Mr Raj left the plaintiff and returned to Fiji. The plaintiff issued proceedings against the defendant in October 2007 claiming the sum of $46,280.25 "in respect of goods supplied" to the defendant plus costs. The case was referred to mediation in May 2008 with the outcome being that the defendant accepted liability for the debt in the sum of $30,201.25 but liability in respect of the balance of $16,079 was left unresolved and referred back to the court for determination. The dispute was over two particular orders Mr Raj placed around the time that he left the company which amounted to a total of $16,079. The defendant claimed that that sum should be deducted from the money it owed the plaintiff because it was made up of the cost of goods it had sold to the plaintiff. The plaintiff, on the other hand, disputed this contention and claimed that the goods sold under the two orders in question were not consumer goods of the type covered by the trading agreement referred to above but items of furniture and accessories which Mr Raj had purchased on his own account to take back with him to Fiji.

Held:

1. The defendant accepted that the onus of proof lay with the defendant to prove that Mr Raj had actual or ostensible authority from the plaintiff to

enter into the contract for the purchase of the items listed and that it was a matter of fact as to whether ostensible authority existed in respect of the particular act for which it was sought to make the principal libel.

2. The mere assertion by Mr. Raj to Mr. Paea that he (Mr. Raj) had the authority to purchase the furniture and other items in the invoices in question was insufficient in itself to create a contract of agency binding upon the plaintiff. The Court was satisfied that Mr. Paea was fully aware of the limitations on Mr. Raj's authority as agent to purchase goods on behalf of the plaintiff. That authority was restricted to food products, beverages and other grocery items. It did not extend to furniture or the other items detailed in the invoices in question. There was no evidence that the plaintiff by its conduct had ever represented that Mr. Raj's authority to act as agent had been extended to cover the purchase from the defendant of household furniture and there was no evidence of any subsequent ratification of the purchases.
3. The defendant failed to establish that the plaintiff was liable for meeting the costs of the purchases. The plaintiff succeeded in its claim and judgment was entered accordingly in the amount of $16,079.

Case considered:
A-G for Ceylon v Silva [1953] AC 461

Counsel for the plaintiff	:	Mr Tupou
Counsel for the defendant	:	Mr Corbett

Judgment

Background

[1] The plaintiff issued proceedings against the defendant in October 2007 claiming the sum of $46,280.25 "in respect of goods supplied" to the defendant plus costs. The case was referred to mediation in May 2008. The outcome of the mediation was that the defendant accepted liability for the debt in the sum of $30,201.25 but liability in respect of the balance of $16,079.00 was left unresolved and referred back to the court for determination. The case went to trial on that part of the claim only.

[2] It was common ground that both the plaintiff and the defendant are retailers trading in the buying and selling of a variety of food products, beverages and other grocery products. In or about 2004 an informal trading arrangement was entered into between the two companies under which each would buy produce from the other for onward sale to the public. That arrangement was entered into between the owner of the plaintiff, Mr. Rudra Prasad, and the owner of the defendant, Mr. Tanusia Paea. The agreement was that each company would buy produce off the other as and when required. The goods were supplied on credit in the sense that no cash would exchange hands but every so often there would be a reconciliation.

[3] The evidence was that goods purchased from the defendant by the plaintiff were ordered by its manager, Mr. Rohit Raj, and goods purchased by the defendant from

the plaintiff were ordered by the defendant's Managing Director, Mr. Paea. That arrangement carried on until early 2007 when Mr. Raj left the plaintiff and returned to Fiji.

[4] The dispute is over two particular orders Mr. Raj placed around the time that he left the company. Those orders amounted to a total of $16,079.00 and that sum represents the amount in dispute. At the mediation hearing, as at the trial, the defendant claimed that that sum should be deducted from the money it owed the plaintiff because it was made up of the cost of goods it had sold to the plaintiff. The plaintiff, on the other hand, disputed this contention and claimed that the goods sold under the two orders in question were not consumer goods of the type covered by the trading agreement referred to above but items of furniture and accessories which Mr. Raj had purchased on his own account to take back with him to Fiji.

The evidence

[5] The court did not hear from Mr. Raj. The parties apparently do not know where he now resides. The plaintiffs present manager told the court that he started working for the company on 1 February 2007 and Mr. Raj had left the company shortly before that date. He said that Mr. Raj actually left Tonga for Fiji on 3 February 2007.

[6] The two orders in question were invoice No. 10506 dated 29/12/06 in the amount of $15,600.00 and invoice No.10525 dated 3/2/07 in the sum of $479.00. The goods sold under each are described in the invoices in the Tongan language but the translation reads:

Invoice 10506

(a) 1 set bed, mirror, draw, chair
(b) 1 set chairs and table.

Invoice 10525

(c) Bed cover
(d) Long Pillow
(e) Single pillow
(f) Safe

[7] In his closing, counsel for the plaintiff made certain submissions on the evidence relating to these invoices which did not appear to be disputed and, in any event, I accept them as proven. First, he stressed that the two invoices in question had the name "Rohit" (Mr Raj's first name) as the customer and on invoice No.10506 were written the words "deliver to his home". Secondly, all other invoices from the defendant produced in evidence have the "Customer" described as "JM Store". Thirdly, the goods listed in all the other invoices issued by the defendant to the plaintiff are recorded as food products, beverages and normal grocery products and, putting to one side the two invoices in question, there was no evidence that any other type of goods were ever sold by the defendant to the plaintiff.

[8] The point just made is illustrated in the defendant's reply to a request by the plaintiff for further and better particulars of the statement of defence. In response to a request to provide particulars of the goods supplied by the defendant to the plaintiff

along with particulars of their value and the date of supply, the defendant stated in particulars filed on 28 February 2008:

> *"FURTHER PARTICULARS*
>
> *All invoices of the defendant company for the plaintiff company which includes two invoices of Mr Rohid (sic) acting for an on behalf of the plaintiff company are attached here and a summary of the details are as follows:*

Invoice Nos	*Customer*	*Date*	*Description*	*Value*
6378	*JM Store*	*15/9/2006*	*Eggs*	*$500.00*
7220	*" "*	*22/9/2006*	*Beef&Rice*	*$2,622.50*
7268	*" "*	*26/9/2006*	*Eggs&Onions*	*$695.00*
7289	*" "*	*29/9/2006*	*Tray of eggs*	*$1,000.00*
7465	*" "*	*30/10/2006*	*Veg.&Fruit*	*$1,110.20*
7767	*" "*	*12/10/2006*	*100 Tray eggs*	*$1,100.00*
8003	*" "*	*13/11/2006*	*Mixed goods*	*$2,813.90*
8004	*" "*	*13/11/2006*	*Snacks & Noodles*	*$362.40*
8326	*" "*	*20/10/2006*	*Eggs*	*$1,100.00*
8376	*" "*	*26/10/2006*	*18 Kgs Dripping*	*$2,175.00*
8684	*" "*	*09/11/2006*	*20 Kgs Onions*	*$215.00*
10506	*Rohid (sic)*	*29/12/2006*	*Furniture*	*$15,600.00*
10525	*Rohid (sic)*	*03/02/2007*	*Furniture & Safe*	*$479.00*
			TOTAL	*$29,773.00 "*

[9] Another observation made by counsel for the plaintiff in relation to the transaction covered by invoice 10525 dated 29/2/2006 was that, on that occasion, Mr. Raj had paid a cash deposit of $150 towards the payment of the goods. That was admitted by the defendant. Counsel asked rhetorically why would the cash deposit have been paid? He went on to submit that, "it was because these goods were bought personally by (Mr. Raj) and that Tanusia Paea knew, or ought to have known, that these goods were not for the account of JM Store."

[10] During his time in Tonga Mr. Raj lived in a rented house at Longolongo. Evidence was given for the plaintiff by a Mr. Reddy and a Mr.Kumar. Both these men

worked for the plaintiff and they were friends of Mr. Raj. Mr. Reddy was Mr. Raj's next-door neighbour at Longolongo. He saw the new bed, chairs and table "and stuff like that" at Mr. Raj's home and at the latter's request he assisted in loading the furniture into Mr. Raj's container to go to Fiji. He told the court that Mr. Raj mentioned to him at loading time that he had purchased the items from the defendant. He also mentioned that it was his personal furniture. Mr. Reddy's evidence was that the items in the two invoices in question had not been delivered to the plaintiffs store but directly to Mr. Raj's home.

[11] Mr. Tanusia Paea told the court that he was the managing director of the defendant and a 95% shareholder. He said that he authorised the sales recorded in the two invoices in question and he "okayed the release of the goods" to Mr. Raj because he was the manager of JM Store. He said that he recalled Mr. Raj coming into his office on 29 December 2006 and he asked if he could be given a discount on the goods listed in invoice 10506. The witness continued in evidence:

> "He told me it was for the residence -- that the furniture is for his residence that he resides in. I asked him if JM Store paid for his furniture and he said, "yes, under my contract." He said he would guarantee it if JM Store did not pay me -- that JM Store would supply me with even goods in value to the value of the goods I am giving him."

[12] In cross examination Mr. Paea elaborated on this part of his evidence. He said, "I did it on trust. He resided in Tonga and was the boss of JM Store. That is the only reason I authorised this huge amount."

[13] Before Mr. Paea gave his evidence, 21-year-old Heilala Tukia gave evidence for the defendant. She had worked in the office of the defendant company and had written out the two invoices in question. Although she came across as a very pleasant young woman, I had reservations about the credibility of some parts of her evidence. Some of these matters were explored by Mr. Tupou in cross examination and the witness had to be reminded that she was giving evidence on oath. Although she no longer works for the defendant Ms. Tukia seemed overly conscious of the presence in court of her former boss, Mr. Paea. Ms. Tukia told the court that she had accompanied the driver when the goods listed in each invoice were delivered and she said that they were delivered to JM Store and not to Mr. Raj's home at Longolongo. I do not accept that part of her evidence. The delivery driver denied that she had accompanied him.

[14] The delivery driver could not recall anything about the delivery of the goods in invoice 10525 but he told the court that the furniture itemised in invoice 10506 was delivered to JM Store. He said that Mr. Raj was there at the time and he simply unloaded the furniture and returned. In relation to this aspect of the evidence, I prefer the evidence of the plaintiffs witness, Mr. Reddy. He told the court that the furniture was taken directly to Mr. Raj's home at Longolongo and the invoice itself had contained the instruction, "deliver to his home". On balance, I am satisfied that the goods in invoice 10506 were delivered directly to Mr. Raj's home and, again on balance, I find that the goods in invoice 10525, which were not bulky items, were, as

Mr Tupou submitted, likely to have been taken directly by Mr. Raj in his vehicle. After all, they were purchased on 3 February 2007 which was the very day that Mr. Raj departed Tonga for Fiji. Given his travel arrangements that day, Mr. Raj is unlikely to have placed his faith in a timely delivery of the goods by the carrier.

Discussion

[15] The thrust of Mr Corbett's submissions for the defendant is summed up in the following paragraphs:

> *"31. Rohit was Manager as agent of the plaintiff. It is through this representation that the defendant was induced into a contract with the Rohit (sic).*
>
> *32. Mr. Paea for the defendant believed that Rohit had apparent and ostensible (authority) to obtain furniture as he was the Manager of the plaintiff. As per the terms of trade the goods would be paid for by offsetting the amount owed by mutual exchange of goods.*
>
> *33. The plaintiff have (sic) breached the terms of trade by not offsetting the furniture obtained by Rohit against there (sic) company account and instead have argued that this purchase of the goods was of a personal nature. This leaves the defendant in a precarious position of recovering nothing of the goods sold as Rohit has left the country and no one knows where he is or seen him in over two years.*
>
> *34. The plaintiff should bear the responsibility for paying for the goods to the defendant as Rohit was an employee and agent of the plaintiff and at no time did the plaintiff reject the terms of trade with the defendant over the two-year period, 2004 to 2007."*

[16] For the plaintiff, Mr. Tupou submitted that the purchases recorded in invoices 10506 and 10525 were made by Mr. Raj, "in his personal capacity and for his personal use. They were not bought for or on behalf of the plaintiff. He had no authority to make this purchase nor did he have any apparent or ostensible authority to do so." Counsel went on to submit:

> *"29 h. Mr. Paea also said that Rohit told him that the purchase was in accordance with his contract of employment with the plaintiff which authorised the purchase of furniture for his home. With such a large valued purchase, $15,600, and a purchase that was out of the ordinary, I submit that Mr. Paea was put on notice and required proof of the authority of the contract of employment to make sure that what Rohit told him was correct. However, there is no evidence that Mr. Paea saw the contract or asked to see the contract . . .*

> *i. Mr. Paea also said that he relied on Rohit saying that he guaranteed the payment for the goods supplied with the supply of goods of equal value from the plaintiff to the defendant. This guarantee was accepted on face value by Mr. Paea without taking full consideration of the very unusual nature of this purchase from all those that existed during the trading relationship between the parties over the past two years."*

The law

[17] Mr. Corbett correctly accepted that the onus of proof lies with the defendant to prove that Mr. Raj had actual or ostensible authority from the plaintiff to enter into the contract for the purchase of the items listed in invoices 10506 and 10525 and that it is a matter of fact as to whether ostensible authority existed in respect of the particular act for which it is sought to make the principal libel. Mr. Corbett relied for this statement of principle on a passage in *Halsbury* 4th ed Vol 1(2) para 29. In the same passage, however, there is another statement which is of particular relevance to the present case. It reads:

> "The principal cannot set up a private limitation upon the agent's actual authority so as to reduce the ostensible authority, for, so far only as third persons are concerned, the ostensible authority is the sole test of his liability. If, however, the agent is held out as having only a limited authority to do, on behalf of his principal, acts of a particular class, the principal is not bound by an act outside that authority even though it be an act of that particular class" (emphasis added). The same point was expressed succinctly in the judgment of the Privy Council in *A-G for Ceylon v Silva* [1953] AC 461, 479:
>
> > "All "ostensible" authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a "holding out" by the principal."

[18] Whether in any case there has been a representation by a principal, express or implied, that an agent had authority to enter into the particular transaction in question or whether the principal by his conduct subsequently ratified the acts done by the agent are all questions of fact to be determined objectively. The matter is judged from the viewpoint of a reasonable person dealing with the alleged agent.

[19] An agent has no authority to act other than for the principal's benefit. *Bowstead & Reynolds on Agency* (18th Ed) states (3-009):

> *"It has never been doubted that an agent who is not acting for his principal but for his own benefit is acting beyond the scope of his authority."*

The text then goes on to refer to cases that have held,

> *"that there is no apparent authority where the third party ought to have realised that the agent was acting for his own benefit: the inference is that he could not have had actual authority."*

Conclusions

[20] Applying the foregoing principles to the present case, it is apparent that the mere assertion by Mr. Raj to Mr. Paea that he (Mr. Raj) had the authority to purchase the furniture and other items in the invoices in question is insufficient in itself to create a contract of agency binding upon the plaintiff. I am satisfied that Mr. Paea was fully aware of the limitations on Mr. Raj's authority as agent to purchase goods on behalf of the plaintiff. That authority was restricted to food products, beverages and other grocery items. It did not extend to furniture or the other items detailed in the invoices in question. There is no evidence that the plaintiff by its conduct had ever represented that Mr. Raj's authority to act as agent had been extended to cover the purchase from the defendant of household furniture and there is no evidence of any subsequent ratification of the purchases.

[21] It is clear from Mr. Paea's evidence that he was aware of the significant difference between the goods normally purchased by Mr. Raj for the plaintiff and the items purchased on 29 December 2006 and 3 February 2007. As Mr. Tupou submitted, Mr. Paea was on notice. As a prudent businessman, particularly having regard to the large amounts of money involved in the first invoice, he should have made further inquiries, for example, by contacting Mr. Prasad who he knew was the principal of the plaintiff company to obtain confirmation that the purchases could be charged against the company's account. Mr. Tupou also correctly submitted:

> *"It was easy for Tanusia Paea to make a phone call to Rudra Prasad to confirm that the purchases made by Rohit were in order. At the hearing, Tanusia gave evidence of his telephone conversations with Rudra and even made a call to him during the trial."*

[22] For whatever reason, Mr. Paea did not take such precautions. Instead he took a commercial risk and trusted in Mr. Raj. Unfortunately, as it turned out, his trust was misplaced. The defendant has failed to establish that the plaintiff is liable for meeting the costs of the purchases in question.

[23] The plaintiff succeeds in its claim and judgment is entered accordingly in the amount of $16,079.00. The plaintiff is also entitled to costs to be agreed or taxed and the award of costs is to include the sum of $242.00 which was an expense reasonably incurred in connection with the case by the plaintiff through its former lawyer.

Moapa Enterprises Trading as JM Store v Island Beverage Ltd

Supreme Court, Nuku'alofa
Ford CJ
CV 976/2007

4 September 2009; 7 September 2009

Practice and procedure – application for extension of time to appeal – length of delay significant and unexplained – application dismissed

The full facts are set out in [2009] Tonga LR 265

The defendant applied for an extension of time for appealing the judgment of the court delivered on 26 June 2009 and reported at [2009] Tonga LR 265. An additional application was made for a stay of any enforcement proceedings in respect of the said judgment pending the appeal. Both applications were opposed by the plaintiff who contended that they lacked merit and substance. The plaintiff submitted that the defendant was likely to take advantage of any stay of proceedings by transferring ownership of assets to another company and he contended that there was already evidence to that effect.

Held:

1. It was entirely in the discretion of the Court to grant or refuse an extension of time. The factors which were normally taken into account in deciding whether to grant an extension of time for serving a notice of appeal were: (1) the length of the delay; (2) the reasons for the delay: (3) the chances of the appeal succeeding if time for appealing was extended; and (4) the degree of prejudice to the would-be respondent if the application was granted.
2. The length of the overall delay was significant and was not satisfactorily explained. In the draft grounds of appeal, there was not one point of law relied upon and the Court was not persuaded that the defendant made out even an arguable case on appeal.
3. The justice of the case lay against the granting of the relief sought.
4. The Court declined to grant an extension of the time for appealing. It followed that the application for a stay was also dismissed.

Cases considered:
Revici v Prentice Hall Inc and others [1969] 1 All ER 772
Van Stillevoldt BV v El Carriers [1983] 1 All ER 699

Statute considered:
Court of Appeal Act (Cap 9)

Rules considered:
Court of Appeal Rules 1990

Counsel for the plaintiff : Mr Tupou
Counsel for the defendant : Mr Corbett

Judgment

The application

[1] Application has been made by the defendant for an extension of time for appealing the judgment of this court delivered on 26 June 2009. An additional application has been made for a stay of any enforcement proceedings in respect of the said judgment pending the appeal. Both applications are opposed by the plaintiff who contends that they lack merit and substance. Counsel for the plaintiff submits that the defendant is likely to take advantage of any stay of proceedings by transferring ownership of assets to another company and he contends that there is already evidence to that effect.

The judgment

[2] In the judgment dated 26 June 2009 the plaintiff was successful in recovering the sum of $16,079.00 together with costs for goods supplied under two invoices dated 29 December 2006 and 3 February 2007 respectively. The claim originally had been for total of $46,280.25 covering goods supplied over a greater period but the proceeding was referred to mediation in May 2008 and the defendant accepted liability in the sum of $30,201.25. Liability in respect of the balance of $16,079 was referred back to this court for determination.

[3] The background to the dispute was that both parties were retailers trading in the buying and selling of a variety of food products, beverages and other grocery products. From about 2004 they operated under an informal trading arrangement whereby each would buy produce from the other for onward sale to the public. The goods were supplied on credit in the sense that no cash would exchange hands but every so often there would be an accounting reconciliation.

[4] The defendant maintained that the goods supplied under the two invoices in question amounting to $16,079.00 came within the informal arrangement referred to and sought to offset that amount against the total sum it owed to the plaintiff. The plaintiff disputed that contention and claimed that the goods sold under the two orders in question were not consumer goods of the type covered by the trading agreement

but items of furniture and accessories which the manager of the plaintiff company had purchased not for the plaintiff but in the manager's personal capacity to take back with him to Fiji upon his leaving the plaintiff's employment in February 2007. In response to that contention the defendant argued that the plaintiff's manager had apparent and ostensible authority to purchase the furniture and other items as agent for the plaintiff.

[5] The court held that the defendant's owner was aware that the plaintiff manager's authority to make purchases from the defendant as agent was restricted to food products, beverages and other grocery items and it did not extend to the furniture and accessories in question.

Time for appealing

[6] Under section 10 of the Court of Appeal Act (Cap 9) (as amended) and Order 5, Rule 2(1) of the Court of Appeal Rules 1990 an appeal to the Court of Appeal in a civil case must be commence within 42 days after the date of judgment by lodging with the Registrar notice of appeal together with the prescribed fee.

[7] Order 4, Rule 1 of the rules provides that the Court or a single Judge may, on such terms as he thinks just, order that the time within which a person is required to or authorised to do any act be extended or abridged.

The delay

[8] It was common ground that the 42-day appeal period in this case began to run on 26 June and expired on 7 August 2009. The defendant's application was not filed, however, until 25 August 2009. Counsel for the defendant, Mr Corbett, explained the delay in these terms. Between 25 June and 13 July he was on a trip to New Zealand and he did not receive the judgment until 14 July. He then tried on several occasions to meet with his client to discuss the judgment but he could not contact him. He eventually met with his client on 14 August and provided him with a copy of the judgment. Application for leave to appeal was filed on 25 August. In Chambers, Mr Corbett confirmed that his client had instructed him to appeal on 14 August. Counsel explained that the subsequent delay on his part in acting on those instructions resulted from work pressure.

[9] Mr Tupou made the point that Mr Corbett would have been aware that the judgment could have been released at any time while he was in New Zealand and he should have arranged for other counsel to collect the judgment and report to him. In all events, as Mr Tupou stressed, when he eventually picked up the judgment on 14 July Mr Corbett would have realised immediately that the 42 day period for appealing was already running and it behoved him in those circumstances to take prompt action to ensure that the appeal was filed prior to the 7 August.

Relevant principles

[10] The principles relevant to an application for an extension of time for serving a notice of appeal are stated in The Supreme Court Practice (the White Book), 1991, para 59/4/4 in these terms:

> "It is entirely in the discretion of the Court to grant or refuse an extension of time. The factors which are normally taken into account in deciding whether to grant an extension of time for serving a notice of appeal are: (1) the length of the delay; (2) the reasons for the delay: (3) the chances of the appeal succeeding if time for appealing is extended; and (4) the degree of prejudice to the would-be respondent if the application is granted."

I would simply add that this criteria should not be taken to rule out the consideration of any other factor relevant to the exercise of the court's discretion.

[11] As was stated in *Revici v Prentice Hall Inc and others* [1969] 1 All ER 772 (the headnote):

> "The rules of the court must be observed and it mattered not that the plaintiff had offered to pay the costs and that no injustice would be done to the other side. If there was non-compliance with the rules it must be explained and prima facie if no excuse was offered no indulgence should be granted."

Discussion

[12] The length of the overall delay in this case is significant and it has not been satisfactorily explained. Given Mr Corbett's absence in New Zealand until 13 July it was up to him, as Mr Tupou submitted, to make an extra effort as soon as practicable upon his return to ensure that he contacted his client and obtained instructions regarding an appeal. It is inconceivable that it would have taken one month for Mr Corbett to meet with his client, after all his client runs a local retail store. In Chambers Mr Corbett explained that during the one-month period between 14 July and 14 August he tried to telephone his client on two or three occasions and on one occasion he went to his store but "he was not available". With respect, that explanation is rather unsatisfactory as is the explanation proffered for the additional 11 day delay after counsel received instructions from his client on 14 August to go ahead and file an appeal.

[13] The defendant did not set out any grounds of appeal in its application filed on 25 August but these were ordered by the court and draft grounds of appeal were filed on 3 September 2009. They are incorporated in 15 separate paragraphs. Mr Corbett was asked at the Chambers hearing to identify what he considered to be the defendant's two strongest grounds of appeal and he identified the following paragraphs:

> "b. The building where Island Beverage is located also sells furniture. This is confirmed in the evidence of Mr. Dharmen Prasad for the respondent when he met with Mr. Paea for the appellant in 2007 that he saw furniture in the building.

> o. It is interesting to note in the evidence for the respondent Mr Reddy stated, "... the furniture came up to but not for JM Store (respondent) went to Rohit at Longolongo." This evidence supports the evidence of Mr. Paea and Ms. Tukia that the furniture was delivered to a house at the back of the appellant store."

[14] These are factual matters which the court duly took into consideration in reaching its decision. Similarly, the other grounds of appeal also refer to evidentiary matters. There is not one point of law relied upon in the draft grounds of appeal. I am not persuaded that the defendant has made out even an arguable case on appeal.

[15] The plaintiff claims that it will suffer prejudice if the applications are granted on the grounds that when a bailiff officer went to execute a writ of distress he was informed that the defendant's shop was now owned by Island Furniture which owned all the goods. Mr Tupou submitted, "I fear that the defendant may be shifting ownership of goods between his companies like Island Furniture thus leaving no goods upon which the writ of distress can be executed against the defendant As was stated by Griffiths LJ in *Van Stillevoldt BV v El Carriers* [1983] 1 All ER 699, 704 h, whether or not a party suffers prejudice "is undoubtedly a very important factor to weigh in the balance."

[16] There is another factor relevant to the exercise of the court's discretion and that relates to the defendant's lack of good faith. As noted above, in May 2008 the defendant accepted at a mediation referral that it was in debt to the plaintiff in the sum of $30,302.25 and on 5 February 2009 the court made an order requiring the defendant to pay that amount to the plaintiff "forthwith". The defendant has blatantly ignored that court order and no part of the judgment debt has been paid. In those circumstances, I fail to see why the defendant should be granted a special indulgence by the court on this occasion.

Conclusion

[17] While the period of delay in itself may not be fatal to the application, when taken with the other factors I have referred to such as the absence of an arguable case on appeal, the likely prejudice to the plaintiff and the lack of good faith on the part of the defendant, I conclude that the justice of the case lies against the granting of the relief sought.

[18] In the exercise of my discretion, therefore, I decline to grant an extension of the time for appealing. It follows that the application for a stay is also dismissed. The plaintiff is awarded costs on the application to be agreed or taxed.

Valevale v Loto'aniu anor

Land Court, Nuku'alofa
Andrew J
LA 15/2008

20-22 April 2009; 30 June 2009

Land law – purported power of attorney – fraudulent – tenancy agreement invalid

The plaintiff claimed that she held a valid tenancy right to use the first defendant's town allotment at Ma'ufanga until February 2035. She entered an agreement with the first defendant's father (since deceased) based on a power of attorney which purportedly was an authorisation by the first defendant to his father to act on his behalf in dealing with his allotment as he might wish. The first defendant claimed that this authority (or so called power of attorney) was a forgery and that he had never given any such authority or power of attorney to his father. The plaintiff sought the following orders against the defendants: a declaration that the plaintiff had a valid tenancy right over the allotment up to 25th February 2035; judgment for liquidated damages for every day the plaintiff's tenancy right had been disturbed; judgment in the sum of $1,800 for damages to the fence; a restraining order against the defendants not to disturb or interfere with the tenancy rights of the plaintiff, her agents and subtenants on the allotment; and costs.

Held:

1. The Court found that the so called authorisation or Power of Attorney which the first defendant's father produced was a fraud and that the tenancy agreements which were then entered into were invalid and the plaintiff's claim that she had a valid tenancy right over the allotment up until 25 February 2035 must fail.
2. The plaintiff faced the difficulty that the agreement she did have was not registered as required by s 126 of the Land Act.
3. The plaintiff's claims were dismissed. She did not have a valid tenancy agreement in relation to any part of the town allotment. The Court gave judgment to the defendants with costs as agreed or taxed.

Statutes considered:

Evidence Act (Cap 15)
Land Act (Cap 132)

Counsel for the plaintiff : Ms Tonga
Counsel for the defendants : Mr Edwards

Judgment

This is an action by the plaintiff against the defendants in regards to a town allotment situated at Ma'ufanga and now registered in the name of the first defendant. That land is described as "FAKAPALE" Area 772 m2 Plan 5306 LOT 3 (D/G 322/46) Registered Date 20/04/1993.

The plaintiff is seeking the following orders against the defendants:

(i) A declaration that the plaintiff has a valid tenancy right over the allotment up to 25th February 2035.
(ii) Judgment for liquidated damages in the sum of $150 per day as from August 2007 for every day the plaintiff's tenancy right has been disturbed, together with interest of 10% per annum (approximately $1,095,000.00 and interest of approximately $109,500.00)
(iii) Judgment in the sum of $1,800 for damages to the fence.
(iv) A restraining order against the defendants not to disturb or interfere with the tenancy rights of the plaintiff her agents and subtenants on the allotment.
(v) Costs.

At the outset I make the observation that the second defendant appears to have been acting as the attorney for the first defendant in the various proceedings between the parties and it is difficult to see how she could be personally liable in this case.

The background to this matter is as follows:-

> The first defendant's father was SIONE FIE'EIKI FATAI or SIONE FATAI LOTO'ANIU. In 1988 the allotment was allocated to him but not then registered to him as he already had a registered town allotment at Houma (s 48 of the Land Act provides that no person who already holds a tax allotment or town allotment shall be granted a second allotment of the same kind)

On the 28th September 1988 a tenancy agreement was entered into by the plaintiff and Sione Fie'eiki Fatai. That agreement (as cited) provided, inter alia, as follows:-

(i) That Sione is the owner of the building on his town allotment.
(ii) Kimiko (the plaintiff) is obliged to complete renovations of Sione's house and she is permitted to build in front or at the rear of the existing building and not to build beyond half of the allotment.
(iii) All the renovations and new buildings to belong to Sione
(iv) The term of the agreement is for 15 years expiring on 30th September 2003.

(v) The annual rental was fixed at $300 a month and to be paid 6 months in advance in the sum of $1,800.00.

(vi) Kimiko is permitted to carry on her own business on the property.

(vii) Kimiko is only permitted to bring a person to carry on her business or stay in the dwelling house if she is overseas, sick or unable personally to attend to her own business.

(viii) There was no subletting provision in the agreement.

Two subsequent agreements were entered into in 1998 or 1999 and on 10th March 2004. That is the 2nd and 3rd agreements. The 2nd agreement extended the term of the plaintiff's tenancy to the 25th January 2035. That agreement is said to reflect the plaintiff's right to continue with her tenancy and her right to have subtenants, agents, heirs or devisees on the allotment.

The agreement of the 10th March 2004 ("the 3rd agreement") is said to be a variation of the 1st and 2nd agreements and the term of the plaintiff's tenancy is said to have been further extended to the 28th February 2035. Further it is said that the plaintiff has paid in full for the rental up to 28th February 2035.

Sione Fie'eiki Fatai (or Sione Fatai Loto'aniu as he was also known) was not the registered holder of the land. As already stated he was the registered holder of a town allotment at Houma. In 1988 Kelekolio Loto'aniu, the grandfather of the first defendant was the registered holder. He died in 1991 and the allotment was then registered on the first defendant on the 20th April, 1993.

The plaintiff's claim to a valid tenancy right over the allotment and buildings

The plaintiff claims that she has a valid tenancy right over the allotment and buildings. It is submitted:

(a) The person SIONE rented his house on the allotment to the plaintiff from 1988.

(b) Sione never registered the allotment but his authority over the allotment was never questioned, by any person.

(c) Until about 2nd December, 2004 (when the then counsel for the first defendant and the 2nd defendant) wrote to the Plaintiff and required her to vacate the allotment was a period of over 16 years since the plaintiff had the tenancy right over the allotment and the buildings thereon.

(d) Sione's tenancy agreements with the plaintiff gave her permission for renting his house, build new buildings, and use and occupation of half of the allotment by her and her sub-tenants and the right to carry out her business on the allocated portion of the allotment.

(e) The plaintiff, in 1999 had paid for her tenancy up to January, 2035.

(f) The plaintiff, in March 2004 further paid for her tenancy up to 28th February, 2035.

(g) From the date of registration to the 2nd December 2004, a period of over 11 years, the first defendant never

questioned nor disturbed the plaintiff's tenancy on the allotment.

(h) That between 2nd December 2004 to present, the first defendant did not issue court proceedings against the plaintiff until August 2007 when he forcibly evicted the plaintiff by removing her newly erected fence, stopped her agents and fenced the whole allotment. At that time, the plaintiff had first finished filling her allocated area of the allotment with coral rocks and was to start erecting a new building.

(i) The first defendant did not question Sione (his fathers) management and dealings regarding the allotment. He was satisfied with whatever arrangement his father did in regards to the allotment. He knew of the plaintiff's tenancy, yet he never discussed or questioned his father regarding the terms of the tenancy arrangements on agreements over the allotment.

(j) That by conduct and practice, the first defendant permitted, accepted and agreed with whatever arrangement or dealings for rental and tenancy regarding the allotment. Therefore, it is said, he is stopped from evicting the plaintiff or disturbing her tenancy rights.

(k) The plaintiff has paid for her tenancy and it would be a breach of natural justice and fairness to evict her taking into account that the first defendant knew of her rental tenancy subject to whatever arrangements and agreements she entered into with Sione, the father of the defendants, but chose not to check or put limitations over Sione's power or right regarding the allotment.

The allotment

As stated the town allotment was registered on the name of TEVITA FATAI LOTO'ANIU (the first defendant) on the 20 April, 1993 and it was to be known as FAKAPALE.

The plaintiff is claiming that she has the undisturbed right to use the first defendant's town allotment until February 2035 and that claim is based on the three agreements referred to. Those tenancy agreements state that SIONE FATAI LOTO'ANIU is the registered holder of the town allotment. This is incorrect.

Further, the plaintiff's claim is founded on a letter of authorisation dated 15 March 1999 which the plaintiff refers to as a power of attorney which purportedly was an authorisation by the first defendant to his father (Sione) to act on his behalf in dealing with his allotment as he might wish. The 1st defendant says that this authority (or so called power of attorney) is a forgery and that he had never given any such authority or power of attorney to his father.

That authority is in the following terms and I quote:

" "AUTHORITY CONCERN"

> This letter is simply an authorization that authorised Mr Sione Loto'aniu, who is my father, to duly have the authority over my land situated at Ma'ufanga, Tongatapu, Tonga.
>
> "He is also assigned to have every right and obligations to any existing contract between me and another party regarding the said land.
>
> "He can lease, rent or do anything to the said land.
>
> Dated this 15th day of March 1999
>
> .....
> (signed) TEVITA LOTO'ANIU
>
> .....
> Witness
> SEVULONI R. VALENITABUA
> BARRISTER & SOLICITOR
> COMMISSIONER FOR OATHS

The plaintiff in her Statement of Claim says that the defendant's father showed her this original power of attorney given to him by the first defendant which had been notarized and dated the 15 day of March 1999 "and a photocopy of the said power of attorney was given to the plaintiff whilst the father held the original" she claims that the first defendant is bound by this 'power of attorney' and that her tenancy rights cannot be disturbed by the defendant until after February, 2035.

Authority or 'power of attorney'

SIONE FATAI LOTO'ANIU the father of the first defendant, who has and will be referred to as Sione is now deceased. There is some evidence that in 1999 Sione went to Fiji where the 'Power of Attorney' was produced. There is some corroboration of this in that the witness to the document bears a Fijian name. The Plaintiff agreed that the power of attorney was shown to her after Sione had returned from Fiji. The first defendant (hereinafter referred to as Tevita) says that he was never in Fiji in 1999; he says he never executed this document and that it is a forgery.

Having heard the evidence of Tevita I accept him as an honest and reliable witness. He says that the signature on the document is not his and is clearly a forgery.

On the whole of the evidence and in all the circumstances including circumstantial evidence I am convinced that this document whether it be called an 'authorisation' or 'a power of attorney' is a forgery and I so find for the following reasons:-

- I accept the evidence of Tevita that this is not his document and that it does not bear his signature.
- The name of the first defendant on the 'authority' is not the same as his name appearing on the Certificate of Registration of Ownership. The name 'FATAI' is omitted.

> The signature of TEVITA LOTO'ANIU is completely different from the handwriting or signature of the Tevita which appear on a Power of Attorney dated 13th December 2004 which he signed before a Magistrate. It is different to the signature on his passport (which coincides with the signature on the said Power of Attorney and it coincides with his signature of his US Green Card (a resident card for the USA)

Section 76 of the Evidence Act provides as follows:

> "In order to ascertain whether any signature or writing is that of the person by whom it purports to have been written, any signature or writing on that of the person by whom it purports to have been written any signature or handwriting or writing admitted or proved to be the satisfaction of the court to have been written by that person may be compared by a witness or by the court or the jury with the one which is to be proved although that signature or writing could not be admissible as evidence for any other purpose"

I am satisfied that Tevita's signature as appearing on his passport and on earlier documents produced and on the US green card is his genuine signature [see Evidence Act s 75(2)] I am satisfied pursuant to s 76 of the Evidence Act, that the signature on the authority is not Tevita's signature. I am satisfied that the 'authority' is a forgery and that it was produced or caused to be produced by SIONE.

- There is further circumstantial evidence. The plaintiff had assisted SIONE financially. Sione had previously mortgaged the land and he defaulted with his loan repayment. The plaintiff paid off the loan, apparently as she wanted to secure a proper tenancy agreement. I accept the evidence that Sione wanted further financial assistance. The Plaintiff in her own words and in her submissions required Sione to provide proof of security of her Tenancy which led to Sione presenting the power of attorney dated 15 March 1999. It is no great leap of faith to see that Sione was driven to obtain an 'authorisation' whereby he could then execute the tenancy agreement and that he took the extraordinary step of going to Fiji to have it prepared, where presumably it would be difficult to check its authenticity or genuineness.
- There is a letter dated 2/11/2004 from the Law office of SIONE TEISINA FIFITA on behalf of Sione to Tevita stating:
  "I am sending this letter to you as a warning that you must now sign the letter to the Minister of Lands for Sione to lease the allotment to anyone he wish" There then

> follows a threat of prosecution if he (Tevita) did not sign the authorisation for Sione to leave the allotment to anyone he wished.

If Sione already had a power of attorney authorising him to have full authority to lease the land or do anything with it that he wished, why was it necessary to write this letter.

For all of these reasons and in all of the circumstances I find that the so called authorisation or Power of Attorney which Sione produced was a fraud and that the tenancy agreements which were then entered with are invalid and the plaintiff's claim that she has a valid tenancy right over the allotment up until 25 February 2035 must fail.

Additionally the plaintiff also faces the difficulty that the agreement she did have was not registered as required by s 126 of the Land Act.

I should add that the Plaintiff is not shown to have been complicit in any fraud. It has been said that even if the 'authority' is proved to have been fraudulent then that should not be a bar to her claim taking into account that she acted in good faith. That she has paid rental up to 2035 and that Tevita had known of her rental tenancy. I am not sure of what Tevita knew of the agreements made by his father. He lived in the US and appears to have taken an active interest when he returned to Tonga. I might add here that the land is currently vacant.

But fraud is fraud and the tenancy agreements have been proved to be fraudulent such that they are invalid. There is a consequence that if that is ignored then Tevita, who is the registered owner, might be liable under this claim to an amount of $1,098,000.00 plus interest and such a claim ultimately comes back to agreements which were fraudulent, and that cannot be legitimate.

For all of these reasons the plaintiff's claims are dismissed. She does not have a valid tenancy agreement in relation to any part of 'FAKAPALE' PLAN 5306 LOT 3.

I give judgment to the defendants with costs as agreed or taxed.

Manakofua anor v Police

Supreme Court, Nuku'alofa
Andrew J
AM 6/2009

2 June 2009; 30 June 2009

Criminal law – appeal against conviction and sentence – dismissed

The appellants were convicted of the offence of common assault. The first appellant was sentenced to pay $300 to the complainant within one month, or one month imprisonment, and the second appellant was sentenced to pay $50 for each of two counts of assault. They appeal against conviction and the first appellant appealed against sentence.

Held:

1. The Court considered that the Magistrate was the one who heard the evidence and it was within his powers to reach the conclusion that he did which was not shown to be in error. The appeal against conviction was dismissed.
2. The Court did not consider the fine of $300 to be excessive. The appeal against sentence was dismissed.

Case considered:

Giles v Police [1999] Tonga LR 102

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the appellants	:	Mr Pouono
Counsel for the respondent	:	Ms Mafi

Judgment

The appellants are appealing against their conviction and sentence in the Magistrates Court on the 13th February 2009. The appellants were convicted of the offence of common assault contrary to s 112(a) of the Criminal Offences Act.

The respective sentences were as follows:

(1) RAYMOND MANAKOFUA – sentenced to pay $300 to the complainant within one month, or one month imprisonment.
(2) 'AKANESI MANAKOFUA – charged with 2 counts of assault, and sentenced to payment of $50 on each count.

I understand that only the first appellant is appealing against sentence.

APPEAL AGAINST CONVICTION

The grounds of appeal are:

(i) His worship failed to consider the defence of property as raised by the defendant in his decision and even if he did consider, he failed to give due weight to this ground of defence.
(ii) The prosecution failed to prove beyond reasonable doubt that all the allegations and particulars in summons number 25/09.

This case concerned some dispute over property or some items in a house. As I understand it, the complainant and the appellants had resided in a house. The complainant received a notice to vacate and she did so. Then the complainant's younger sister went back to the house to collect part of a shower which she claimed was theirs. There also seems to have been an argument about a Bill. A shouting match ensued, then the complainant and others came back to the house and it is said that she complained to the appellants about having shouted at her sister. The complainant was then assaulted. It appears that the first appellant (a male) punched the complaint. She was then kicked whilst she was on the ground. The second appellant (the wife of the 1st appellant) then joined in the assault.

The appellants argue that they were acting in defence of their property. Further that the complainant had been to the police and that she should have waited for the police to come rather than coming herself to the house and causing trouble by shouting at them. That behaviour, it is said, will inevitably cause an assault. The appellants, again it is said, acted naturally by responding to the shouts of the complainant by assaulting her.

I cannot accept those submissions. The defence of property does not arise on these facts. This was a male who punched and kicked a woman who maybe was shouting at him over what was really some domestic type dispute. That does not reasonably raise a defence of protection of property. Nor can it justify being punched and kicked. In any event the Magistrate heard this evidence and did not accept that defence. I think that was correct and in any event he was the one who heard the evidence and it was within his powers to reach that conclusion which is not shown to be in error. See for example *Giles v Police* [1999] Tonga LR 102.

I would dismiss the appeal against conviction.

SENTENCE

The 1st appellant received a fine of $300.

I do not consider this fine to be excessive. The appellant (a male) punched and kicked the complainant when she was on the ground. She received bruising to the

face. Two people were assaulting her and she must have been defenceless in these circumstances. The appellant could have received a term of imprisonment as he was a first offender but that does not make the punishment included (given the nature of the assault and the circumstances in how it was inflicted) to be excessive.

I dismiss the appeal against sentence.

80 The appeal is dismissed.

The findings of the Magistrates Court are confirmed in all respects.

Tonga v Falepapalangi

Supreme Court, Divorce Jurisdiction, Nuku'alofa
Andrew J
FD 36/2009

12 June 2009; 30 June 2009

Divorce – ground of unreasonable behaviour – ground not established – petition dismissed

The parties married on 25 February 1992 and had two children. In 2008 the husband left the matrimonial home. The husband petitioned for divorce on the grounds that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with her. The Petitioner claimed that there was a denial of conjugal rights which was largely brought about by the respondent's excessive religious beliefs and that he could not reasonably he expected to live with the respondent. The respondent responded that the relationship was both a loving and caring one until the petitioner met his current de facto wife. The petitioner also claimed custody of the two children.

Held:

1. That unreasonable behaviour ground for divorce was largely introduced to deal with domestic violence and acts of aggression and abuse. It was not the role of the Court to decide what might be an appropriate level for the exercise of conjugal rights beyond which it could be said that a petitioner could not be reasonably expected to live with the other party. The Court found that the Petitioner's real motivation was that he wanted to re-marry and he did not want to have to wait for the 2 year period of separation to pass when he would be eligible to obtain a divorce.
2. The petition for divorce was dismissed.
3. Maintenance and custody arrangements were to remain the same.

Statute considered:

Divorce Act (Cap 29)

Counsel for the petitioner : Mr Fifita
Counsel for the respondent : Mrs Vaihu

Judgment

This is a petition for divorce on the ground, pursuant to s 3(c) of the Divorce Act, that the respondent has behaved in such a way that the petitioner cannot be reasonably be expected to live with her. There is also a claim for custody of the two children of the family.

The parties were married on the 25th of February 1992. There is no dispute that in recent times (last year) the petitioner left the matrimonial home.

The unreasonable behaviour which the Petitioner claims is that there has been a denial of conjugal rights which has been largely brought about by the Respondent's excessive religious beliefs and that in these circumstances he cannot reasonably he expected to live with the respondent. The respondent says that this is not true and that the relationship was both a loving and caring one until the petitioner met his current de facto wife.

I think this ground for divorce was largely introduced to deal with domestic violence and acts of aggression and abuse. It is hardly the role of the Court to be deciding what might be an appropriate level for the exercise of conjugal rights beyond which it could be said that a petitioner could not be reasonably expected to live with the other party. No doubt all relationships are different.

But in this case I think the Petitioner's real motivation is that he wants to re-marry and he does not want to have to wait for the 2 year period of separation to pass when he will be eligible, to obtain a divorce. On the facts of the case I think the Petitioners claim of the denial of conjugal rights is exaggerated, motivated I think, by his desire to re-marry as soon as he can. I found the respondent to be a mature and reasonable person who was quite open about her marriage and who said that they had enjoyed a loving and caring relationship. I accept her as an honest and reliable witness.

For these reasons I am not satisfied on the balance of probabilities that the Petitioner has established the ground for divorce.

I dismiss the petition for divorce. Costs are awarded to the respondent.

Maintenance

The petitioner agrees that he will pay maintenance. An interim order was made in the sum of $150 per fortnight. The respondent is seeking $100 per child per fortnight and $50 accommodation costs.

The Petitioner earns some $455 per fortnight out of which both parties agree that $100 per fortnight goes and should go to his sister. But the respondent is also employed and receiving a wage. The Petitioner is also responsible for a new family.

In the circumstances I believe the claimed amount is too high and I would confirm the interim order and award the sum of $150 per fortnight.

Custody

The children of the marriage remain with their mother. The Petitioner's claim to custody does not seem to me to have been pursued to any great extent.

I would award custody of the two children of the marriage to the Respondent with reasonable rights of access to the Petitioner.

Koloi v Finau

Land Court, Nuku'alofa
Andrew J, Assessor George Blake
LA 5/2008

5 May 2009; 3 July 2009

Land law – order to vacate land not complied with – contempt of court – liable to imprisonment if not complied with
Practice and procedure – application for stay of judgment – no grounds – refused

On 18 September 2008 the defendant, Siosaia Finau, was ordered to vacate the allotment at Tofoa s/plan 3403 lot 36 forthwith including his family and possessions on the allotment. There were further orders that the defendant and his family be restrained from entering the plaintiff's Town allotment and that failure to comply with this order would amount to contempt of court. The defendant failed to comply with any of these orders. The plaintiff sought orders granting leave to apply for an order of committal against the defendant and an order that the defendant be committed to prison. The defendant applied to stay the execution of the judgment dated 18 September 2008. That application was some eight months out of time.

Held:

1. It was not an answer for the defendant to simply say that he was filing for a further claim. His claim had been litigated and dealt with ad nauseum and the defendant simply did not comply with any court order and had been so refusing for a number of years. Judgment ordering him to vacate the land was obtained legitimately. The Court refused to stay the judgment of the 18 September 2008.
2. The defendant deliberately failed to comply with the court orders and this amounted to a contempt of court.
3. The defendant was granted another to vacate the allotment. Failure to comply may result in his being imprisoned.

Rules considered:
Land Court Rules 2007
Supreme Court Rules 2007

Counsel for the plaintiff : Ms Tonga
Counsel for the defendant : Mr Tu'utafaiva

Judgment

Introduction

In this case the defendant Siosaia Finau was ordered to vacate the allotment at Tofoa s/plan 3403 lot 36 forthwith including his family and possessions on the allotment.

That order was made on the 18th September 2008. There were further orders that the defendant and his family be restrained from entering the plaintiffs Town allotment and that failure to comply with this order would amount to contempt of court. He has failed to comply with any of these orders. The plaintiff now seeks orders:

(i) granting leave to apply for an order of committal against the defendant and
(ii) an order that the defendant be committed to prison.

The defendant has now applied to stay the execution of the judgment dated 18th September 2008. That application is some 8 months out of time.

The plaintiff is the lawful registered holder of this town allotment, it being granted to him on the 19th of January 2007 after there had been a lengthy period of dispute regarding the allotment. On the 19th March 2007 the defendant was ordered to vacate the allotment within 3 months. He continued to ignore and disregard all notices/ demand requiring him and his family to remove their belongings and vacate the allotment and the plaintiff then filed proceedings in LA 5/2008. The writ and statement of claim in this matter were served on the defendant on the 22nd April 2008. The 28 days required for the defendant to file his statement of defence lapsed on the 20th May 2008. The hearing proceeded in 8th September 2008 undefended. The plaintiff together with Mr. Matekitonga from Ministry of Lands adduced evidence in support of the Plaintiffs case. That hearing resulted in the orders of the 18th September 2008 which have already been set out. Again as stated, the defendant ignored all of the Court orders to vacate. The Committal hearing was set down for hearing on the 22 May 2009. Counsel for the defendant stated that the application was not disputed and counsel were to make submissions in writing. Counsel for defence were to make submissions by 29 May 2009. They have just been received now.

I should say here that the dispute over this land has been going on for some 18 years. In 1997 a judgment of the Supreme Court cancelled, the then registration of the land and ordered the Minister of Land, to decide de novo how the land should be allocated. There were conferences and meetings with the former Minster of Lands as well as the current Minister with regards to title to the land. The land was always granted to the plaintiff and the defendant at that time refused all orders to vacate.

The defendant ignored the proceeding, in LA5/2008 when the above orders were issued against him. Again, as stated he ignored all orders to vacate.

Prior to the hearing of the application for contempt the defendant has applied to stay the execution of the judgment of the 18 September 2008. His reason being that

he says he has filed another claim against the Plaintiff and also the Minister of Lands but to date no writ or statement of claim has been seen.

ORDER 7 of the Land Court Rules provides for the enforcement of judgments and orders. By virtue of ORDER 7 Rule(1)(3) the rules of the Land Court provide for an order of committal. ORDER 29 Rule 5 of the Supreme Court Rules provides that where any person disobeying a judgment or order not to do an act the judgment or order may be enforced by an order or committal under ORDER 38.

It is not an answer, in these circumstances, for the defendant to simply say that he is filing for a further claim. His claim has been litigated and dealt with ad nauseum and the defendant will simply not comply with any court order and has been so refusing for a number of years. Judgment ordering him to vacate the land was obtained legitimately.

For all of the reasons I refuse to stay the judgment of the 18th September 2008.

The defendant has deliberately failed to comply with these orders and I am satisfied that in these circumstances this amounts to a contempt of court.

I grant the defendant one more month from today's date ie to the 3rd August 2009 to vacate the land and remove his belongings failure to comply may result in his being imprisoned.

The defendant has made submissions long after the time allocated and when the court could not delay its ruling any longer. I do not think it is invalid to seek the defendants family to vacate the property as well. It is just common sense that they need to vacate as well otherwise the whole order to vacate would be largely ineffectual. Further formal proof of the Plaintiffs claim was heard. Additionally the Plaintiff was entitled to seek an order to vacate and I do not see that his claim should fail because he did not apply for an order for possession of land.

The test for contempt of court is whether there is a real risk of undermining public confidence in the administration of justice. That is the position here where the defendant has simply ignored all orders of the Court for a number of years now.

ORDER

1. The defendant SIOSAIA FINAU is found to be in contempt of court for failure to comply with the orders of the Court. The application for committal is granted.
2. The defendant's application to stay the execution of the Judgment of the 18 September 2008 is refused.
3. The defendant and his family is ordered to vacate the allotment by the 3rd August 2009.
4. Further failure to vacate the land will render the defendant liable to imprisonment.
5. Costs are awarded to the Plaintiff as agreed or taxed.

Vea v Filipe

Land Court, Nuku'alofa
Andrew J
L 21/2009

8 June 2009; 3 July 2009

Land law – eviction sought – agreement to be joint tenants – estopped from evicting defendant
Estoppel – eviction sought – relied on agreement to be joint tenant – eviction application dismissed

The parties executed an agreement on the 5th November 2007 that provided that they would run and operate a gas station and store at Pangai, Ha'apai. In essence the defendant was to provide the finance to build the business. It was agreed that the defendant would have a 51% share of the business and the plaintiff 49%. The defendant was to be the Chief Executive Officer and the plaintiff the operational manager. The land was leased to the plaintiff but the defendant claimed that the agreement was that the land would be leased to both parties. The plaintiff sought the eviction of the defendant and his business from his land being a piece of land in Pangai, Ha'apai located at the intersection of Holopeka Road and Velitoa Road being deed of lease No.7624 duly registered on the 27th August 2007.

Held:

1. The Court found that the defendant relied on the agreement that he was to be a joint tenant. Equity recognised and empowered a right to occupy and use the property where the person in occupation acted in reliance upon the representation or the acquiesance of the person having a proprietary interest in the land. If the defendant were evicted he would lose everything on the basis of an agreement whereby he was to be a joint tenant.
2. The plaintiff was estopped from evicting the defendant.
3. The application for the eviction of the defendant and his business was dismissed.

Case considered:

Tafolo v Vete [1998] Tonga LR 171 (CA)

Statutes considered:
Constitution of Tonga (Cap 2)
Public Holidays Act (Cap 51)

Counsel for the plaintiff	:	Mr Pouono
Counsel for the defendant	:	Mr Mangisi

Judgment

The plaintiff seeks the eviction of the defendant and his business from his land being a piece of land in Pangai, Ha'apai located at the intersection of Holopeka Road and Velitoa Road being deed of lease No.7624 duly registered on the 27th August 2007.

The parties executed an agreement on the 5th November 2007. That agreement which was also described as a partnership provided that they would run and operate a gas station and store at Pangai, Ha'apai. In essence the defendant was to provide the finance to build the business. It was agreed that the defendant would have a 51% share of the business and the plaintiff 49%. The defendant was to be the Chief Executive Officer and the plaintiff the operational manager.

The contentious part of the agreement in clause 7 which states and I quote:

> " 7) That Sione Mateialona Filipe provides finance for the rent or lease of land where the business is located at Pangai, Ha'apai"

The defendant says that at the end of the Clause the following words were added "and the lease to be registered in the parties names." This is disputed.

It is apparent that prior to the agreement of the 5th November, 2007 the parties had sought to obtain a suitable piece of land upon which to build a gas station. Since May/June 2007 the plaintiff had approached his relative, Viliami Langi to lease his land which was deemed to be suitable for a gas station. The land was duly leased to the Plaintiff. But the defendant says that the agreement was always that the land would be leased to both of them. The defendant says that the agreement was that he would provide the finance and the plaintiff was to obtain the land. He says it would have made no commercial sense for him to provide the finance and the plaintiff to obtain a lease solely in his own name. He relies on the additional words, in handwriting, which were added to clause 7.

The plaintiff denies that there were any such words, handwritten, in clause 7. The defendant is adamant that there was and that is what was agreed upon. Further he says that the Plaintiff had acquired the lease through fraud and deceit by not informing the defendant that the lease would be under his name only nor informing the landowner of his involvement with the defendant. Consequently, it is argued that the plaintiff is estopped from evicting the defendant from the property.

A $136,000 loan had been taken out in September 2007 (2 months prior to the written agreement) whereby the loan agreement is charged over the defendant's term deposit totalling T$250,000. The defendant was to provide the finance and the plaintiff was to obtain the land. It does seem to me that it would not have made commercial name for the defendant to provide the finance and build the gas station (as was done) without there being a joint lease. Moreover I accept the evidence of

'Olive Filipe who said that she was a supervisor/secretary and she had drafted the agreement of the 5th November 2007, on the 2nd November 2007. She said it was given to the plaintiff and then it came back to her with those additional words deleted. She said that after speaking to the defendant the words were added again and she was present when both parties eventually signed the agreement with the additional words to clause 7 being agreed upon.

I think that in this case the defendant relied upon that agreement. In *Tafolo v Vete* [1998] Tonga LR 171 the Court of Appeal held that equity will recognise and empower a right to occupy and use the property where the person in occupation has acted in reliance upon the representation or the acquiesance of the person having a proprietary interest in the land. If the defendant were now evicted he would presumably lose everything on the basis of an agreement whereby he was to be a joint tenant.

The Plaintiff's claim here is only to evict the defendant. For all of the above reasons I find that the plaintiff is estopped from evicting the defendant at this stage.

I note that there are other proceedings before the Court involving this whole business arrangement.

I should refer to an argument advanced by the plaintiff that this agreement on the 5th November 2007 was made on a public holiday. It is argued that the agreement was null and void because Sunday the 4th November was Constitution day and the following Monday the 5th was celebrated as the public holiday. The argument goes that Clause 6 of the Constitution says, inter alia, that any agreement made on that day shall be null and void and of no legal effect.

Then s 3 of the Public Holidays Act provides that no person is compellable to do any act on a public holiday which he was compellable to do on a Sunday.

However, I do not find that this means that any agreement made on a Sunday which is null and void will also be null and void on the next Monday where it is a public holiday as consequence of Constitution day having fallen on the Sunday. The Public Holidays Act is talking about person not being compellable to do any act on a public holiday which he would not be compellable to do on a Sunday. There is no suggestion here of the parties being compellable to do any act. They simply made an agreement on the Monday without giving any thought to it being a public holiday.

The application for the eviction of the defendant and his business is dismissed.

Costs to the defendant as agreed or taxed.

Takai v Westpac Bank of Tonga

Supreme Court, Nuku'alofa
Shuster J
CV 784/2007

13-15 May 2009; 8 July 2009

Employment law – wrongful dismissal claim – found the plaintiff acted fraudulently – dismissal justified

The plaintiff worked for the Westpac Bank of Tonga, the defendant. In July 2007 the plaintiff applied to the defendant for a short term overdraft facility the amount of which was the subject of the dispute. The plaintiff claimed the overdraft was for $30,000, the bank claimed the overdraft was for $2,000. The bank received information there might have been an irregularity in the plaintiff's overdraft application from an employee. The 30,000 overdraft facility which had been applied to the plaintiff's account was cancelled and an internal investigation was commenced by the bank. After a full investigation the plaintiff was dismissed by the Bank on 11th July 2007. The plaintiff filed suit for wrongful dismissal and sought damages as follows: damages of $50,000, exemplary damages of $60,000, and costs.

Held:

1. Within the banking industry in particular it was a well-established principle that the public and the employer will insist upon utmost trust, honesty, loyalty, and confidence from each and every employee, given the nature of work performed within the banking industry where staff are dealing with large volumes of money, loans, confidential materials having access to many numerous customers' accounts on a daily basis. The defendant bank need only show an employee's conduct as to his or her breach or breaches of well-established banking practices and procedures, coupled with a proven allegation of fraudulently altering or defacing any bank document or documentation, would amount to a serious breach. This would entitle the bank to immediately and summarily dismiss an employee.
2. The Court concluded on the evidence the plaintiff filled out an application for a $2,000 overdraft which more likely than not would have been approved and the plaintiff submitted same. At some point in time the plaintiff retrieved her application form and replaced page two with the $30,000 sum and she reattached that page.

3. The bank was entitled to summarily dismiss the plaintiff.

Counsel for the plaintiff	:	Mr Edwards
Counsel for the defendant	:	Mr Waalkens

Judgment

This is a claim by the plaintiff Mrs Nita Takai for wrongful dismissal from her employment with the Westpac Bank of Tonga on the 11th July 2007. The case was not able to settle by way of mediation, so the matter proceeded to trial - from 13-15th May 2009. I am grateful to counsel, for their comprehensive written submissions, which I have taken into account in this my judgment.

Background

The plaintiff was 20 years of age when she commenced her initial employment with the Westpac Bank, of Tonga on 25th October 2000. The plaintiff is married; there are two children of the marriage, the plaintiff's husband works in New Zealand.

In June 2007 the plaintiff was employed as a personal banking manager in the Westpac Personal Business Unit she received a basic salary of $12,882.00 per annum.

In March 2007 the plaintiff secured a loan of $223,966.00 from the Westpac Bank to build a house on her husband's allotment — to purchase a motor vehicle, and service existing debt. The housing loan included, and was conditional on the plaintiff's parents and husband acting as guarantors; the family allotment secured the agreement with the bank.

In July 2007 the plaintiff - FURTHER - applied to the Westpac Bank for a short term overdraft facility - the amount of which is the subject of dispute, over which we heard evidence during the course of the trial. Whereas the plaintiff claims the overdraft was for $30,000.00, the bank claims the overdraft was for $2,000.00. The banks evidence is that they would not have approved any more than $2,000.00 as the plaintiff was at the very limit of her debt / loan serviceability ratio of [49.5%] of her salary.

Upon the bank receiving information there might have been an irregularity in the plaintiff's overdraft application, from an employee, Mrs. S Fifita - a $30.000.00 overdraft facility which had been applied to the plaintiffs account was cancelled and an internal investigation was commenced by the bank.

After a full investigation by the bank into the circumstances of the plaintiff completing and filing her overdraft application, the plaintiff was dismissed from employment with the Bank on 11th July 2007, by letter of that same date. The evidence revealed the dismissal had been approved by the Banks Head Office in Sydney.

As a result of her dismissal the plaintiff felt aggrieved, she sought the assistance of her lawyer Mr. Edwards, who wrote to the Bank on her behalf – seeking a review of the dismissal. However her written request for a review of the decision to dismiss the plaintiff was refused by the Bank — the plaintiff issued proceedings to seek redress via the Court process.

The plaintiff filed suit for wrongful dismissal – by way of damages as follows:-

a) Damages of $50,000.00
b) Exemplary damages of $60,000.00

c) Costs

Common Ground

It is common ground: - in a wrongful dismissal case, awards in Tonga vary - awards do not follow similar awards in New Zealand Australia or the United Kingdom, because these countries have industrial laws and Employment Courts dealing with these types of cases. In Tonga the Courts historically apply the common law principles, and the law of contract with slight adaptations to local conditions.

The plaintiff also argued — in the United Kingdom, Australia, New Zealand and other developed countries, if you lose your employment it is not too difficult to obtain re-employment elsewhere this is not the case in Tonga because the prospect of obtaining further employment is and will be always be remote because Tonga is a small island with very limited employment opportunities.

The plaintiff argues if someone is dismissed from a position in Tonga, then everyone gets to know about the circumstances of dismissal. Consequently the plaintiff says dismissal from employment carries with it a stigma of dishonesty or: - suspected wrong doing. The defendant bank argues however this point is irrelevant in this type of case, and it should not have been advanced in the plaintiff's closing submissions, when no evidence on the point was called.

The Contract of Employment

Under the plaintiff's employment contract with the Westpac Bank, the plaintiff is regulated by the terms of the contract — subject to the implied terms of reasonableness. It was accepted by the plaintiff that the defendant has the right to dismiss, if it wishes, by giving the requisite notice, or payment of salary in lieu of notice.

Additionally the plaintiff accepts the defendant has the right to dismiss - for misconduct or dishonesty. The plaintiff says however, if the defendant wrongly exercises its right to summarily dismiss the plaintiff and, the dismissal is not justified - the employment contract is thereby repudiated - it is then, not open to the defendant to try to rely on a month's notice - as provided for in the agreement.

The plaintiff says in the present case, the defendant chose to dismiss the plaintiff summarily. If that is wrong then the defendant, cannot shelter under the umbrella of one months notice provided for under the employment contract. The plaintiff argues the implied term of the employment contract to act reasonably - is relevant and important when the defendant exercised its right to dismiss the plaintiff. They say the circumstances surrounding the alleged misconduct and dishonesty and the manner in which the defendant arrived at its decision to dismiss was wrong in fact and in law - whereas the defendant bank strongly disagrees.

The defendant bank, says this case raises - two issues for determination by the Court.

[1] Whether the plaintiff has established the allegation of wrongful dismissal.

[2] If so, then what is the appropriate relief given the plaintiff's claim for general and exemplary damages.

The Evidence

The plaintiff testified in July 2007 she was desirous of obtaining a temporary overdraft of $30,000.00 — to purchase materials for a women's Katoanga a display of Tongan handicrafts and artifacts mats, tapper, baskets at a venue for sale- a Katoanga is an important ceremony in the village life and community. One of the Katoanga's was to be held in Tonga, and the other in Niua. The plaintiff claims her mother and sister who reside in the U.S.A were involved in the Katoangas.

The plaintiff says these goods have a high value and her participation was an opportunity for the sale and export of Tongan artifacts, In essence the plaintiff said the $30,000 overdraft was to purchase goods for the Katoanga and sell them, the whole family was involved and it was anticipated the $30,000 overdraft would be repaid in full by the end of September 2007.

The plaintiff fully accepts and fully recognized she had a problem with a $30,000 overdraft [the amount required] because of her relatively low salary and her existing mortgage debt - which she agreed approached 49.5% of her monthly salary. The plaintiff told the court she sought the advice of her relationship manager -Taniela Ponefasio. She claimed she discussed the amount of the overdraft, the purpose, security and repayment with him. The plaintiff said she was advised to see Malakai Sika the Bank's Manager Credit and Risk.

On 11 June 2007 the plaintiff saw Malakai Sika and discussed the amount of the overdraft, the purpose of the overdraft, security, and repayment details she told him of the involvement of her mother and her sister who lived in the USA in the venture. The plaintiffs told the court she told both managers her sister had money in the USA which would cover the $30.000.00 required, but that money was earmarked for her sisters application for permanent residency the sister needed funds to show she had sufficient money to support herself in the USA. The plaintiff explained to Malakai Sika the overdraft was really for her sister and mother; but the overdraft would be taken out in the plaintiff's name.

The plaintiff testified she told the managers sufficient money would be available by the end of September 2007 - because by then the handicrafts would be sold and the proceeds would be more than adequate to repay the Bank's $30,000 overdraft - in full. The plaintiff testified; - Malakai Sika approved the overdraft in principle, and instructed the plaintiff to submit her application. The plaintiff reported the outcome of her meeting with Malakai Sika to Taniela Ponefasio she testified Taniela was busy BUT he told her to prepare the submission - and let him check and sign the forms later.

The plaintiff prepared her submission and took the application to Malakai Lomu Sika — BUT—the application was sent without Taniela Ponefasio's signature. The plaintiff said her submission was placed with a bundle of applications she took from Taniela Ponefasio's table to Malakai Sika for approval. The plaintiff agreed that Taniela had not signed the submissions. The plaintiff readily acknowledged this fact throughout her interviews, and whilst giving evidence in court. According to her evidence; and throughout her interviews with the Bank officials, the plaintiff maintained Malakai Sika approved a $30,000 overdraft - not one for $2,000.00.

The plaintiff also testified she herself prepared document 8 of the defendant's production

> • *"THE OFFER AND ACCEPTANCE LETTER FOR THE $30.000 OVERDRAFT*

The plaintiff testified both she - and her husband signed the documentation but she admits the two signatures were not witnessed by a Bank Officer - as required by Bank policy. The plaintiff said it was policy that loan submissions and the Offer and Acceptance Documents were submitted to the bank's legal department to check, which *would* be on or about the 14 or 15 June 2007 - the plaintiff told the court she left on the 15 June 07 - for a week's vacation to New Zealand.

Whilst the plaintiff was in New Zealand the court heard the witness Ms Simaima Fifita claimed she saw a copy of the first page of the plaintiff's submission lying beside the photocopier - and Ms Fifita reported her finding to Mrs. Melaia Tu'ipulotu. Shortly after the finding of the first page of the submission — both Simaima Fifita and Mrs. Melaia Tu'ipulotu met with Malakai Sika — and as a consequence of the meeting, the plaintiffs overdraft facility for 30,000 PA was cancelled and removed from the Banks computer system.

It is common ground between 25th June and 5th July 2007 the plaintiff was interviewed by bank officials and she was subsequently suspended from employment on full pay.

On 11th July 2007 the plaintiff was dismissed by letter of the same date. The letter of dismissal stated the reason for the plaintiff's dismissal - as follows:

> *"... The Bank regards your misconduct in not following Bank's procedures as serious. This is clearly a breach of the Westpac Bank of Tonga code of conduct and the Bank will not tolerate any type of fraudulent behaviour that leads to a loss of confidence and trust in your services".*

The plaintiff was aggrieved by the Bank's decision and as a result, the court heard the plaintiff through her lawyer formally requested the Bank to review its dismissal decision of 11th July 2007. The plaintiff said, the crucial grounds for a review of the decision was stated in the plaintiff's lawyers letter - dated 20 August 2007 to the defendant as follows:

> *5th Para. Page 4 - "The loan documents were incomplete in several respects and it is the normal function of the legal section to check and defer and/or decline any application that is incomplete or has errors in it".*
>
> *1st Para. Page 5 - "As regards to not following the Bank's procedures it should be noted that the head of loans namely Malakai L. Sika should have corrected this matter at the very outset. The plaintiff was presenting her own application and the application or submissions were not signed by Taniela Ponefasio. Further Ponefasio should not have directed Nita to complete the form and give it to him for his signature."*

The plaintiff argued there was no loss to the Defendant Bank or any gain to herself (the plaintiff) by this action. However the request for a review of the plaintiff's

dismissal by Counsel for the plaintiff - was declined by the Defendant bank - and the matter went to trial.

The dismissal letter stated that the Bank regarded the misconduct in not following the Bank's procedures as serious. Because the procedures that she failed to follow, were not stated in dismissal letter, the plaintiff asked for a copy of the report which recommended dismissal. This was never supplied to her, and the request by the plaintiff for a copy of the report - was admitted by Mr. Rob Buick - in his evidence before the court.

It is common ground the plaintiff was accused of not having her submission signed by Mr. Taniela Ponefasio and, her signature and that of her husband - were not witnessed by an authorized Bank Officer. The plaintiff readily admitted the two accusations against her. The plaintiff explained that she was directed by Taniela Ponefasio to prepare her submission and give it to him later to sign. The preparation of the submission should have been completed by Taniela but because he was too busy, he directed the plaintiff to complete it. That direction was against policy and the code of conduct. It was an act of non-compliance with procedures and the plaintiff says it is significant to note that no punitive or any other action was taken against the Relationship Manager.

The plaintiff is accused of not getting Taniela Ponefasio to sign the application. The plaintiff's application was not signed by Taniela but was submitted to Malakai Loinu Sika for approval. It was not rejected. Further it was claimed by Mr. Buick in his report that Taniela said to Nita to give him the completed application for checking and signing before it was submitting to the credit department. The relationship Manager did not submit the plaintiff's application and the Credit Manager received it and approved it. He saw Nita and not Taniela. Both Managers were at fault but no disciplinary action was taken against either (or both) of them for not following or ensuring that the procedures of the Bank were followed.

The other misconduct alleged against the plaintiff related to her and her husband - signing the acceptance of the terms and conditions of the overdraft without their signatures being witnessed by an authorized Bank Officer.

The application was submitted to the legal section to check before it could be finalized. The legal section would have picked up that the application was not signed by Taniela Ponefasio, and it would without doubt have noted that the signatures of the plaintiff and her husband were not witnessed. The plaintiff says there was no intention to act fraudulently nor can such an intention be implied from the evidence on that point. The explanation given by Taniela Ponefasi, and the plaintiff was to the effect that it was a busy week for both of them and they were short staffed because of absences and leave on account of the Free Wesleyan Church Annual Conference that week. The plaintiff was also leaving on vacation leave for one week that Fridy 15 June 2007.

These explanations were referred to in Mr. Rob Buick report. The plaintiff asserts it would appear that Ms. Buick did not consider this when he recommended the plaintiffs dismissal. The evidence reveals the application for the $30,000.00 overdraft was cancelled and taken out of the system. The plaintiff says this was not due to any report from the legal section of the Bank (where no evidence was called) but because of the action of Simaima Fifita and Melaia Tu'ipulotu - already referred to.

The plaintiff says there was also the defendant's suggestion that the pages of the plaintiff's loan application were changed after approval which is a theory -as there was no clear evidence to support it. There was a conflict of evidence between Nita and Malakai Lomu Sika. The decision to dismiss the plaintiff - because of serious misconduct in not following Bank's procedure and for fraudulent behaviour was not justified the plaintiff says it was harsh and extreme and was a conclusion which was not supported by the facts.

The Report and the Recommendation - by Mr Buick

The plaintiff claims the report and the recommendation of Mr Buick (Defendants Documents — D10) was significant for its omission in the following regards:

i) Reference to the role of the legal section of the Bank to check and defer and/or decline any application that is incomplete and/or has errors in it. Before this could be done, Simaima Fifita and Melaia Tu'ipulotu had intervened.

ii) That the overdraft application was cancelled and the $30,000.00 overdraft facility was taken out of the computer system.

iii) That there was no loss to the Bank or any gain to the plaintiff.

The report was misleading and wrong as the Westpac Head Office at Sydney was misinformed - when it was stated -

> *"Nita is aware of what the Banks recommendation to Sydney: - will be in relation to her continued employment with Westpac Bank of Tonga"*

The plaintiff argues this is an incorrect statement of fact for consideration by the Westpac Bank's Head Office. The evidence on this point is clear. The plaintiff was suspended and she was informed that further investigations were being carried out.

On 11 July 2007 a letter of dismissal was handed to her. The plaintiff asked for a copy of the report made to Head Office, in relation to her dismissal. This assertion was admitted by Mr. Buick in his evidence in chief and in cross examination and Mr. Buick confirmed that no copy of a report was given to the plaintiff. The plaintiff asserts she was never told or made aware whilst she was on suspension - that she would be dismissed for fraudulent behaviour. The recommendation in the last paragraph of the report is as follows:

> *"It is the Bank's recommendation given the incidence as detailed above that Nita Finan Takai employment is terminated due to numerous breaches in the Banks policies and procedures".*

The recommendation for the plaintiff's termination expressly stated "numerous breaches in the Banks policies and procedures" whereas the dismissal letter went further and accused her of fraudulent behaviour.

The recommendation notice used the phrase — *"that Nita Finaze Ta/cal employment is terminated"* It is not clear that it be terminated by notice under clause 11(b) or dismissal under 11(c) of the employment contract.

The situation was not made any clearer when the decisions of Peter Capell and Ben Rex are considered. [Defendants documents 11.] One person says, that he support termination and other person says he supports dismissal. The report contained an unproven theory and allegation that the first page of the submission was changed. The plaintiff said there are two points to be noted —

[1] That the file was taken out of the system by Simaima Fififta and Melaia Tu'ipulotu and they saw both saw Malakai Lomu sika whilst the plaintiff was on vacation.

[2] When Mr. Buick raised the staple holes on the application form with the plaintiff, she said they were not there before. The plaintiff also strongly denied that the overdraft was for $2,000.00. There was a difference between her evidence, and that of Matakai Lomu Sika on the overdraft amount.

The plaintiff says following factors should have been taken into account-

i) Malakai Sika admitted in cross examination that if the amount was for $2,000.00 only — then it would not have been necessary for Nita to see him it would have been approved.

ii) The plaintiff had seen and sought advice from Taniela Ponefasio.

iii) According to her evidence the plaintiff discussed the same facts discussed earlier with Taniela Ponefasio and Malakai Lomu Sika.

iv) The only difference between Taniela Ponefasio and Malakai Lomu Sika is that Taniela said the amount was $30,000 whereas Malakai said no amount was mentioned. The evidence from Malakai is less than credible. The plaintiff discussed repayment and who was involved and how it was to be repaid and for Malakai Lomu Sika to say that the amount was not mentioned is - very odd and strange. The plaintiff says the central purpose of the meeting concerned the amount required, the required security and how it was to be repaid.

v) In Malakai Sika's evidence he said the amounts of $4,000.00 or $5,000.00 were mentioned in his meeting with the plaintiff.

In a conflict of evidence situation between Malakai and the plaintiff, the plaintiff says it was wrong for Mr. Buick to conclude that fraud was being committed. In the amended statement of defence, paragraphs 15 thereof - refers to dishonesty. Under cross examination the plaintiff was accused of dishonesty in trying to obtain the overdraft and to have run away. The plaintiff says there was no evidence of

dishonesty, and she has not run away from her mortgage commitments. The family has gone to New Zealand her husband is earning more money in New Zealand to assist with the mortgage repayments. The plaintiff argues she is entitled to the benefit of the doubt, rather than for Mr. Buick to conclude, that she was fraudulent.

The Defendant Bank's Version

The defence as advanced can be summarized as follows:

i) The defence denied the plaintiffs claim.
ii) The plaintiff did not follow the Banks procedures - and the failure to do so — constitutes serious misconduct / or dishonesty.
iii) The misconduct or dishonesty consisted of— and by
   a. Submitting her own application to the Credit and Risk Manager - without Taniela Ponefasio's signature.
   b. Preparing and signing the formal Offer and Acceptance of the terms and conditions of the overdraft - without the same being witnessed by an authorized Bank Officer.
iv) Under paragraph 11(c) of the employment contract dated 25/10/2000 – the bank was and is - authorized to dismiss - for misconduct.
v) The defendant Bank says the dismissal was justified.
vi) If the dismissal was not justified, then the defendant says damages should be limited to one month's pay of $1,073.00.

The defendant says the crucial issues in this case will ultimately turn on the analysis and the view taken on the nature of the alleged misconduct, and the circumstances under which the misconduct occurred. The defendant says there are basically two omissions or misconduct. The misconduct occurred because the officers concerned were performing under work pressure at the time and, the plaintiff was preparing to go on vacation.

This fact is mentioned in part in Mr. Buick's report (Defendants production — Document 10)

> *"Nita asked Taniela to complete the application and submit it to the Credit Dept for approval Taniela advised Nita he was unable to process immediately due to workflow, (other RM away on leave and numerous requests in front of Nita's)."*

The defendant says errors started from the advice to the plaintiff to complete her own loan application. Taniela admitted in cross-examination that this trouble would not have occurred if he had completed the application in the first place, rather than delegating it to the plaintiff applicant. The witness Malakai Sika knew the procedure to be followed and allowed the plaintiff to submit her own application. These safeguards were not observed by the various Bank Managers involved and that is and was admitted by the Defendant Bank.

The plaintiff - says the plaintiff explained to Mr. Buick — and said in evidence that she was under pressure and she made a mistake. The plaintiff said throughout the

course of her evidence she was very frank and she freely admitted her failure to follow procedures. The plaintiff said she was aware of the procedure and the fact that the Bank's legal section would check, and would also vet the application, to confirm whether — the application was in order or not. However the evidence revealed that function was not completed because it was prematurely terminated by Simaima Fifita and Melaia Tu'ipulotu - and the 30,000 overdraft facility was detected and, it was taken out of the computer system.

Included in Mr. Buick's report recommending termination of the plaintiffs employment was the alleged changing of pages in the application which together with the omissions referred to in paragraph 6.1 hereof constituted —

a) A factor which should not have been taken into account in the decision making process.
b) Relevant factors which were omitted and should have been taken into account in the decision making process.

Under the meaning of the word reasonable as defined in the *Wednesbury* case (Supra), the inclusion of (a) and exclusive of (b) above in the decision making process would render the decision bad on the grounds of unreasonableness.

In paragraph 22 of the amended statement of defence it states that if the summary dismissal was wrong the defendants liability "by virtue of the provisions set out in paragraph 14(c)" would be limited to one month pay of $1073.50. There is no paragraph 14(c) in the amended statement of defence or the employment contract. There is a paragraph 15(c) in the amended statement of defence which combines the provisions of paragraphs 11(b) and (c) of the employment contract as to giving of one months notice for termination and the right to dismiss summarily.

My Conclusions

Because I have heard and I have fully recorded all the evidence and I chose also to rely upon the very helpful written submissions of both Mr. Edwards for the plaintiff and Mr. Waalkens for the defendant, I do not intend to rehearse the defendants evidence in full in this particular case. At common law, every employer is entitled to expect from each and every one of his or her employees; complete loyalty, honesty and integrity, whilst at work. In essence every employee must faithfully discharge his or her duty to their employer and be honest in all dealings between the respective parties.

Within the banking industry in particular - it is a well established principle, that the public and the employer will, insist upon utmost trust, honesty, loyalty and confidence from each and every employee, given the nature of work performed within the banking industry; where staff are dealing with large volumes of money, loans, confidential materials — having access to many numerous customers' accounts on a daily basis.

In the Banking Industry these obligations, and dare I say near perfect qualities, are expected in each and every employee, from the General Manager to the Office Cleaner, in fact from anyone who is engaged to work in the banking industry. These principles are accepted and now enforced worldwide - these qualities in staff members are considered vital for the very survival of a vibrant, honest, trustworthy, and increasingly International Banking Industry.

I agree with the Defendant's argument that the defendant bank need only show an employee's conduct, as to his or her breach or breaches of well established banking practices and procedures, coupled with a proven allegation of fraudulently altering or defacing any bank document or documentation, would amount to a serious breach - and would entitle the bank to immediately and summarily dismiss - an employee.

I also accept because: - every complaint or every allegation of impropriety (or dishonesty) in the banking industry must of necessity be thoroughly investigated - it must follow that whenever a complaint is made to a member of management; that a thorough investigation into each and every complaint must take place, and at the earliest opportunity.

In this case the facts reveal - that at a point in time in June 2007 whilst the plaintiff was away in New Zealand on leave, a member of the Banks staff - Mrs. Fifita found what she considered to be a questionable page of a document, at the side of a photocopy machine at the Westpac Bank office which concerned her. The document Mrs. Fifita found was a single page of an application for an overdraft submitted by the plaintiff to the bank. The witness Mrs. Fifita testified the document raised her concerns about the amount of overdraft claimed. Mrs., Fifita reported her findings to her supervisors. After which two bank officials met and reported their suspicions to senior management, and an investigation into the plaintiffs conduct commenced.

As a result of the complaint received from Mrs. Fifita - an overdraft facility of $30,000.00 which had been applied to the plaintiffs account was immediately cancelled, and the authority to allow her to overdraw to the amount of $30000.00 was removed from the bank's computer system.

The evidence also revealed that at a point in time the plaintiff telephoned the Westpac Bank from New Zealand whilst she was on leave, she queried a cheque on her account which had not been paid by the bank- the cheque was made out to a builder. When the plaintiff returned to work from leave in New Zealand she was questioned by management about her application for the overdraft, the investigation focused on the amount of $30,000.00 viz a viz $2,000.00.

The investigation by banks senior management took place over a period of time, and at its conclusion the plaintiff was asked to comment on her version of events -by the witness Mr. Buick. The investigation focused on page two of the loan submission and an unusual number of staples on page two i.e. 2 sets - viz and viz an expected 1 set of staple marks.

At the conclusion of Mr. Buick's investigation the plaintiff was suspended from work on full pay and she was sent home on the 5th July 2007. After the banks local management had obtained clarification from Head Office in Sydney the plaintiff was subsequently dismissed from the Bank's employment on the 11th July 2007 by letter.

Until that date the plaintiff had been suspended on full pay.

I Accept and Find as a Fact - or Facts

1. The plaintiff was at all material times employed by the Westpac Bank of Tonga, via a contract of employment; the terms of which were regulated by Conditions of Service to the Bank, and the Terms and Conditions of

Service - as such it is implied that the plaintiff of necessity owed a duty of care to her employer.

2. I also accept the plaintiff was bound by the Westpac banks rules and regulations these rules and regulations were contained in the various policy manuals, which were made available to all staff members - including the plaintiff.

3. I accept that a level of an authorized overdraft of $30.000.00 for this particular plaintiff— who was a junior bank employees, would be unprecedented — based on the plaintiff's stated means, her ability to pay, or to repay the full debt upon demand, and by listening to the evidence adduced by the various bank staff members.

4. I do find as a fact that any application for an authorized overdraft of $30.000.00 would be declined by any responsible bank lending officer, knowing all the facts of tins case - as they would have pertained to this particular plaintiff - at that time in June 2007.

5. I also find as a fact that at the time the plaintiff made her overdraft application in June 2007, the Westpac Bank was facing tight liquidity. I accept the evidence the bank had placed tight restrictions on lending but small loans were still being made by the defendant bank to good customers.

6. I find as a fact that a more normal overdraft facility of- $1,000 to $5,000 would more likely than not, be the norm for a junior banking officer based upon the evidence of the Westpac lending officers and the Acting GM Mr. Buick- which evidence I fully accept as truthful.

7. It is clear the plaintiff had absorbed 49.05% of her outgoings to income - in servicing her authorized housing loan; a loan which she had just obtained in March 2007 in the sum of $223,966.00 - for a house a car and to consolidate debt— I saw and I heard evidence to that effect and that evidence I accept.

8. The courts notes item 6 of the bundle — which is the plaintiffs credit history for her housing loan, the responsible bank officer had placed in writing - a caveat on the plaintiffs credit file —to say that there were to be, "*No further increase or suspension, until this debt is substantially reduced*." this evidence is crucial to this case - and it is evidenced by – tab 6 and is evidence - which I fully accept.

9. Following a complaint of possible irregularities by an internal staff member Mrs. Fifita, I find as a fact a thorough and a proper investigation took place into the circumstances of the allegations of misconduct and or fraud, [dishonesty] against the plaintiff, and that

investigation was carried out by responsible senior bank officials.

10. The investigation into the alleged irregularity was conducted by more than one senior member of the banks staff that fact came out quite clearly in the evidence given in court the officers talked to the various staff members involved in the plaintiff's loan application and its processing.

11. I find as a fact the various investigating bank officers pooled their findings and from the evidence I heard - I conclude a proper determination of the evidence took place- with the plaintiff being kept informed, as the investigation went on— as is required by the bank's policies, procedures and natural justice.

12. I find as a fact the plaintiff was given every opportunity to comment on the allegations made against her and, that the banks investigation was appropriately witnessed throughout, by at least two bank officers at all times, and I find as a fact that the plaintiff was never alone with Mr. Buick at any time.

13. I confirm I cannot not believe the plaintiff- when she told the court she did not know of the existence of, or, of polices contained in the Westpac Banks Staff Policy handbook. The assertion beggars' belief, when the plaintiff had worked for the bank for so long, working in a responsible lending position such as hers.

14. There is no doubt in my mind on hearing the evidence I find as a fact the second sheet of the plaintiffs overdraft-loan application had in fact been changed or replaced. That assertion -is clearly evidenced by an extra set of staple holes on page 2 of the application, also because I heard, and because I accept the evidence of the computer expert when he explained that the second page of the plaintiff's application; must have been inserted later within the bundle. In other words the whole document had been charged in form or had been altered.

15. I fully accept the evidence of the computer expert, that the serial numbers inserted at the bottom of the pages on the application- on pages 1, 3 and 4 differ - completely -from page 2, that in mind I also accept the explanation for the difference in the serial numbers on the pages of the loan application given by the computer expert. He testified the serial numbers came from different sources - and were printed at different times.

16. In my respectful view the expert's evidence conclusively proved- the plaintiff's four page loan document had the original page 2 removed, when page 2 of the original application was removed, it was then replaced with a fresh

page number 2 indicating a request for a $30,000.00 overdraft - the expert concluded that is why the serial numbers differ.

17. The only reasonable conclusion I come to, is that the changing of page 2, benefited ONLY the plaintiff and NO ONE ELSE - and the changing of page number 2 in the plaintiffs overdraft application in my view does amount to a fraudulent act.

18. Further the evidence from the computer expert was clear, that the plaintiff's application for an overdraft—was not initiated on the plaintiff's computer, and the transaction was not recorded on the plaintiff's computer's hard drive.

19. The computer expert told the court the plaintiff's overdraft transaction was initiated or created via a temporary file folder - and as a result no substantive record remains on the banks computer files.

20. On the other hand and to her credit, the plaintiff accepts she made mistakes and she blames others for these mistakes - the various supervisors who gave evidence, and the management for her non compliance with the banks procedures in this application. The plaintiff testified she was told by her management colleagues to fill in her own application forms which I accept. That's fair enough, but the plaintiff was NEVER told to create or fill out the necessary Formal Offer and Acceptance Letter I heard no evidence to that effect and she did.

21. The Offer and Acceptance Letter clearly formalizes the loan and by filling that form in herself - the plaintiff compounded her offence.

22. It is clear to me, that at the time when the loan application was made - money must have been extremely tight for the plaintiff [and her family] she had by all accounts a large loan in existence, the plaintiff had travelled to New Zealand, and whilst there she received information a cheque to her builder, had been returned by the bank unpaid, as a result the plaintiff telephoned the bank from New Zealand and queried the nonpayment of her cheque.

23. The evidence revealed the $30,000.00 overdraft the plaintiff had asked for had been loaded onto the bank computer system when the plaintiff left for New Zealand (or shortly afterwards) but - before the plaintiffs loan's application had been fully checked by the Bank's legal department.

24. The overdraft facility of $30,000.00 was apparently frustrated when the front page of the application document was found at side of the photocopier by Ms Fifita, it was then the overdraft facility was detected and was removed immediately from the banks system by

senior management. Was that the reason the cheque to the builder bounced?

With all these points in mine, I have come to the following conclusions - based upon the evidence. The plaintiff made out a loan application for a temporary overdraft in the sum of $30,000.00.The plaintiff knew full well, that based upon her then current salary and her existing debt - the facility of a $30,000.00 overdraft would be declined by any responsible bank officer.

I conclude on the evidence the plaintiff filled out an application for a $2,000.00 overdraft which was more likely than not [with her work history] would have been approved and the plaintiff submitted same. I conclude on the evidence at a point in time the plaintiff retrieved her application form and replaced page two with the $30,000.00 sum, she reattached same - and that is why there were two staple marks on that page 2, as found and described by Mr. Buick, and only one single set of staple marks on pages 1, 3, and 4.

This theory also explains the difference in the computer generated serial numbers at the bottom of page two of the application. I conclude the 4 pages were not from the same computer run — and the evidence from the computer expert indicated page one, two three and four were certainly generated from a temporary file and not a hard drive and that evidence I fully accept. There is only one person who could have benefited from this course of action, and that would be the plaintiff.

It is my view the substitution of page two on the loan application constituted a fraudulent act, which coupled with the plaintiffs misconduct in submitting her own overdraft application and submitting her own letter of offer and acceptance -was contrary to the banks written policies and procedures - based upon all the evidence I have to conclude the bank were entitled to summarily dismiss the plaintiff as of the 11th July 2007 or even before.

Accordingly

Because I agree with the Defendant's argument that the defendant bank need only show an employee's conduct, as to his or her breach or breaches of well established banking practices and procedures, coupled with a proven allegation of fraudulently altering or defacing a bank document or documentation, would amount to a serious breach, then that would then entitle the bank to immediately and summarily dismiss an employee.

My Ruling

- I find for the DEFENDANT BANK in this case,
- In my view the defendant *was* fully justified in summarily dismissing the plaintiff on the 11th July 2007 based upon the evidence the bank had in its possession at the material time.
- In my view the defendant bank carried out a full and fair investigation in accordance with bank policy, and it came to a just conclusion based on the evidence.
- I have one criticism to make - when Mr. Buick was asked for a copy of the report by the plaintiff the report should

670 have been supplied to the plaintiff [or her counsel] by the defendant bank as being in the interest of Justice.

- Costs are awarded against the plaintiff, to be taxed by the Chief Registrar - if they are not agreed.

Pisima'ake v R

Court of Appeal, Nuku'alofa
Ford P, Burchett, Salmon, and Moore JJ
AC 16/2009

29 June 2009; 10 July 2009

Criminal law – robbery – appeal against conviction – evidence rejected without explanation – unsafe conviction – retrial ordered

On 3 February 2006 the complainant was robbed of $467. The Crown alleged it was the appellant who took the bag of money from the complainant. Identification was a key issue at the trial. The 30-year-old appellant, who was not represented by counsel, elected to give and call evidence on his own behalf. He denied carrying out the robbery. He was a taxi driver by occupation and his evidence was that on the night in question he was engaged in carrying out taxi work around Nuku'alofa and he was not present at the scene of the crime. The appellant was convicted and sentenced on a charge of robbery to 5 ½ years imprisonment. The appellant appealed against his conviction and sentence.

Held:

1. The trial judge accurately directed himself in relation to the *Turnbull* warning on identification but for reasons that were not apparent from the judgment, he appeared to have rejected the evidence of the two independent witnesses called by the accused in relation to identification without making any adverse findings as to their credibility.
2. The Court concluded that the conviction was unsafe and, accordingly, in the interests of justice, allowed the appeal and ordered a new trial. At the retrial, it would be open to the accused to call the fresh evidence if he so desired. The new trial should be conducted by a different judge, so that justice would manifestly be seen to be done.

Cases considered:

R v Owen Roger Clarke [2008] EWCA Crim 2650
R v Turnbull [1977] 1 QB 224 (CA)

Statutes considered:

Criminal Offences Act (Cap 18)
Magistrates' Courts Act (Cap 11)

Counsel for the appellant : Mr Pouono
Counsel for the Crown : Mr Kefu

Judgment

Introduction

[1] The appellant appealed against his conviction and sentence on a charge of robbery contrary to section 154(1) of the Criminal Offences Act. Following a trial before Shuster J. he was convicted and sentenced on 11 February 2009 to 5 1/2 years imprisonment.

[2] As part of his appeal, the appellant also sought leave to call fresh evidence. We agreed to hear his application for leave along with his substantive appeal. At the conclusion of the hearing on 29 June 2009, we allowed the appeal and ordered a retrial. The appellant was granted bail and released from Hu'atolitoli Prison. We indicated that we would give the reasons for our decision at a later date and we now do so.

[3] An unusual feature of the case was that at the preliminary inquiry in the magistrate's court held back in March 2006, the presiding magistrate upheld a no case submission made by the appellant's then counsel at the end of the Crown case and discharged the appellant. The Attorney General then intervened, pursuant to section 37 of the Magistrates Courts Act, on the ground that he considered that the accused should not have been discharged. The accused was subsequently arrested on a warrant issued by Webster C.J. and committed for trial. As part of that exercise the Attorney General was provided with a complete transcript of the preliminary hearing and that transcript was also made available to the trial judge and to us at the appeal hearing.

The facts

[4] The trial judge summarised the relevant facts as follows:

> *"On the 3rd February 2006 the complainant UINISENI KIVALU was employed as an accountant at a Hot Bread Shop, she went by car over to her main office in order to deposit the daily shop takings of $467.00. The Crown says whilst the complainant was standing outside her Head Office, the accused approached the complainant and started a conversation with her. At a point in time he raised his fist, as if to strike at the complainant. The Crown alleges, the complainant in apprehension of being punched, moved backwards and into a defensive position, in order to defend herself. At this point the Crown says the accused reached out and pulled a bag of money from the complainant, which contained takings of $467.00 after stealing the money, the accused ran away, so the Crown say the offence of robbery is complete".*

[5] Identification was a key issue at the trial. The 30-year-old accused, who was not represented by counsel, elected to give and call evidence on his own behalf. He denied carrying out the robbery. He was a taxi driver by occupation and his evidence was that on the night in question, which was 3 February 2006, he was engaged in carrying out taxi work around Nuku'alofa and he was not present at the scene of the crime. The Crown did not call any other eyewitness apart from the complainant. The accused called evidence from two eyewitnesses. In his conclusions, the trial judge made no adverse finding regarding the credibility of the two witnesses called by the accused but he did note that they did not see the offender's facial features whereas the complainant said "she saw him face-to-face standing right in front of her."

[6] The complainant did not know the accused and she had never seen the offender before. Her evidence was that when she alighted from her vehicle at her head office it was starting to rain. She continued:

> *"I noticed that there was a guy who's walking from the verandah of the country fried chicken he walked up to me and asked if I was the wife of Malamala. I replied to him no the wife of Malamala has already stayed (sic) from the hot bread, this time he was walking up to me with the cup which he had brought from the shop and he was standing in front of the vehicle for I was about to close the door and he started to as if he was going to touch me and I backed off at this time my right hand was holding the paper with the plastic bag with the money inside between the money and the paper he grabbed money and he ran off with it."*

[7] The complainant estimated that the robbery happened between 10 and 10:30 p.m. She said that after the robbery she started to run after the offender but then gave up and began crying. Her manager asked her why she was crying and then he told her to come into his office and explain what happened. There is a reference in the evidence to a person called "Joe" (in the preliminary inquiry he was referred to as "Joey"). After the robbery the complainant called out to Joe and she admitted in cross-examination that Joe was angry at her for not looking after the money and allowing the offender to run off with it. Joe worked at the Country Fried Chicken Restaurant and a witness described him as a friend of the boss. The witness said that he heard Joe swear at the complainant after the robbery.

[8] The following morning, which was a Saturday, the complainant went to see Lu'isa Malamala whom she referred to in evidence as "the wife of Malamala" and according to the transcript asked "if there was anyone with the behaviour of stealing." The transcript continues:

> *"1st Witt: And the wife of Malamala told me that the only person she knew that was like that was Nisifolo.*
> *Pros: Why did you go to the wife of Malamala and ask about the individual who you saw robbed you from the side?*
> *1st Witt: The reason was because that night the individual asked me about the wife of Malamala and I went to Malamala and asked her if anyone had the behaviour of stealing and she asked me why and I told her*

what happened and she said why don't we go to the residence of that boy."

[9] The two women then went in search of Nisifolo. First, they went to a place that he was renting opposite the hospital but he was not there and then they went to his home but he was not there either. Lu'isa then borrowed the complainant's mobile phone and she rang Nisifolo. Lu'isa was asked in cross-examination at the preliminary inquiry if she knew the appellant's phone number and she replied, "Yes, I had lied and told him that I was separated from my husband so he could come and take me." As a result of the phone conversation, Lu'isa found out that the appellant was at a Chinese shop, the two women then drove to the Chinese shop and as they drove past they saw the appellant. Lu'isa then hid and the complainant got out of the car and pretended that she was going to buy something. After the appellant walked out of the Chinese shop, the complainant went and asked the woman at the counter what he had purchased and she told her that it was a phone card. She asked if he had purchased anything else and the store women replied that there was nothing else.

[10] The complainant said that she was able to identify the appellant as the offender because he was wearing the same clothes that he had worn the night before and she also said that he had the same features. She explained that he was wearing black shorts, black T-shirt and a red bandanna and he had long hair. The complainant did not describe the offender's build at trial but in cross-examination at the preliminary inquiry she had described him as "short and skinny" and then, a few questions later, as "short and chubby". She was challenged on this evidence and was asked to state what description was correct. She answered that he was "short and chubby." The complainant did not speak to the appellant and she last saw him on the other side of the road from the Chinese store standing under a mango tree having a conversation with another man. The complainant then drove to the police station and lodged a complaint dropping Lu'isa off at her home on the way. It is not clear from the evidence on what day the accused was arrested but he made a written statement to the police on 10 February 2006 denying any involvement in the offence.

[11] Another witness called by the Crown was Sela Vea who worked at Country Fried Chicken. She recalled serving a customer with an ice cream and 2 cups of drink about 10 minutes before the robbery. She could not describe the customer's clothing or face but she said he was wearing a red bandanna. The witness said that there were other customers inside the restaurant at the time. In cross-examination by the accused she was asked, "is there anyone here in court that you see is close to the feature which you mean?" She answered, "No". In re-examination the witness said that what she meant by this remark was that she could not remember the features of the individual -- only the red bandanna.

The defence witnesses

[12] The two witnesses called by the appellant on the issue of identification both worked at the Country Fried Chicken Restaurant. Neither of them knew the appellant and it was clear from the evidence that the appellant had to go to some lengths to persuade them to give evidence on his behalf. They both had to be subpoenaed. The first was Sione Teu who worked as a cashier at Country Fried Chicken. He said in

cross-examination that he had seen the robbery that occurred. On the night in question he was standing on the verandah of the restaurant before commencing his shift. He saw a boy come up to a girl, "Otara", who also worked at the restaurant and he asked Otara if she wanted to eat some ice cream. The witness said that after that the same boy " carried on what happened, that is, he ran off with the money from this lady Uini he ran off approximately 10 m then I heard Uini shout out for help . . . ". The witness said that the boy who carried out the robbery was wearing " black shorts and also a white greyish hood." He described the boy as "tall and skinny."

[13] The second identification witness called by the accused was 30-year-old Otara Folau. She said that on the night in question she was working at the Country Fried Chicken Restaurant and she went out on the verandah to smoke a cigarette. After she smoked the cigarette a boy walked up to her from inside the restaurant with a cup of drink and an ice cream and he asked her if she wanted the ice cream. She took the ice cream and the individual walked over to the other side of the verandah and stood there. Whilst she was eating the ice cream she noticed the individual again. He was standing over near the fish shop. She said that a short time later she heard the complainant cry out and she saw her standing next to her vehicle and the cup of drink was on the vehicle. She said she "noticed the individual who had taken the money had run off to the bushes near the containers." She also described seeing a man who was "a friend of the boss" walking up to the complainant and swearing at her and asking her why she didn't shout out for help instead of crying whilst the robber ran off with the money. Otara described "the robber" as "skinny and tall" and she said that he was wearing "shorts and a hood."

The fresh evidence

[14] Counsel for the appellant, who was not counsel at the preliminary inquiry, has filed an affidavit sworn by the person he seeks leave to call fresh evidence from, a Mr Fapaiano Kali. Mr Kali is an inmate at Huatolitoli prison. He states that in October 2008 he began serving a 10 year term of imprisonment for armed robbery committed on 23 March 2008. He says that one of his co-accused in the armed robbery was 'Alamoni Makafilia who apparently absconded overseas after the crime but he said that when they were at Halaleva after the robbery and before Makafilia absconded overseas, the latter told him about a "money snatching crime he had committed about February 2006." he said that 'Alamoni was involved in planning the theft with a lady who worked for the company. He continued:

> *"'Alamoni told me that the lady would collect the money and he would snatch the money bag containing the money from him and run away with it. However, 'Alamoni said that something went wrong, for not all the rent was collected, when he snatched the money bag. It was only one rent collected which was the Chip and Fried Chicken Store. As a result, the lady did not have a share in the loot. 'Alamoni went and spent the money. . . . I was sentenced to serve in Hu'atolitoli about October 2008, Nisifolo Pisima'ake was sent to Hu'atolitoli in January 2009. I learned from him his crime in which it related to the story told to me by 'Alamoni*

Makafilia. I got pity on Nisifolo Pisima'ake and I told him the story that was told to me by 'Alamoni Makafilia."

Discussion

[15] It is clear from the foregoing that identification was the key issue at trial. The complainant was asked by the accused in cross-examination why she did not lodge a complaint with the police on the night of the robbery. She replied:

> *"I did not know your name on this night and when I came to give my statement to the Indian he did not tell me to lodge a complaint."*

[16] Had the complainant lodged a complaint with the police on the night of the robbery, the police, as part of their inquiries, would most likely have interviewed Lu'isa Malamala and that could have resulted in them also interviewing the accused. Had that been the situation, the police may well have arranged an identification parade to see if the complainant could identify the accused as the robber. That did not happen. Instead, as the trial judge commented, the complainant "carried out her own investigation."

[17] It was Lu'isa who first suggested that the culprit might have been the accused and it was Lu'isa who tracked the accused down to the Chinese shop where he was buying a phone card. There was no identification parade from which the complainant had to identify the robber. There was only the one person before her at the Chinese shop and that was the accused. The complainant identified the accused in court as the assailant but it may be that the person she was identifying in court was in reality the person she had been able to get a good look at in the Chinese shop.

[18] The complainant had made the approach to Lu'isa Malamala because the robber had asked the complainant if she was the wife of Tevita Malamala. It is clear from the evidence, however, that the accused knew Lu'isa well and, if that was the case, one would have to ask why, if he was the offender, would he have asked such a question. The exact nature of the relationship between Lu'isa and the accused was not explored in evidence but she knew the house that he rented, the house that he owned and his telephone number. She lay down in the car outside the Chinese shop so that the accused would not recognise her. She also told him a lie over the telephone when she was trying to find his whereabouts by saying that she had separated from her husband "so that he could come and take her." All that evidence tends to show that there was a close relationship between Lu'isa and the accused and, if that was the case, the natural question that arises is why would he need to ask the complainant if she was Lu'isa i.e."Tevita Malamala's wife".

[19] In the seminal case on identification - *Reg v Turnbull* [1977] 1 QB 224, 231 the English Court of Appeal said:

> *"On matters of credibility this court will only interfere in three circumstances: First, if the jury has been misdirected as to how to assess the evidence; secondly, if there has been no direction at all when there should have been one; and thirdly,*

if on the whole of the evidence the jury must have taken a perverse view of a witness, but this is rare."

The trial judge accurately directed himself in relation to the *Turnbull* warning on identification but for reasons that are not apparent from the judgment, he appears to have rejected the evidence of the two independent witnesses called by the accused in relation to identification without making any adverse findings as to their credibility.

[20] The extent of the obligation on a judge to give reasons for rejecting various pieces of evidence seems to depend upon the context of each given case: *Regina v Owen Roger Clarke* [2008] EWCA Crim 2650. In that case it was submitted that in his ruling the judge had failed to expressly state why he had decided to reject certain evidence. The court drew on Art 6 (1) of the European Convention [para 43] and held that whether the trial judge had an obligation to give reasons could only be determined in the light of the circumstances of the case but that principle would appear to be equally applicable in Tonga as Art 6 (1) simply provides for the right to a fair trial.

[21] To his credit, the Solicitor General did not seek to downplay the significance of all these issues and, in the finest traditions of the Bar, he conceded that because the appellant was not represented by legal counsel, his defence, which in his words, "involved legal technicalities", may not have been presented as strongly as it could have been and, in all the circumstances, a retrial might be appropriate.

[22] As stated at the outset, after careful consideration of all the evidence, we concluded that the conviction was unsafe and, accordingly, in the interests of justice, we allowed the appeal and ordered a new trial. At the retrial, it will be open to the accused to call the fresh evidence from Mr Kali if he so desires. It goes without saying that the new trial should be conducted by a different judge, so that justice may manifestly be seen to be done.

Hurrell v Naufahu anors

Court of Appeal, Nuku'alofa
Ford P, Burchett, Salmon, and Moore JJ
AC 02/2009

29 June 2009; 10 July 2009

Civil – appeal – police assault and unlawful imprisonment – exemplary damages claimed – appeal allowed
Practice and procedure – parties bound by pleadings
Judicial notice – finder of fact may not act on personal knowledge

For the facts and the Supreme Court judgment, see *Hurrell v Naufahu anors* [2008] Tonga LR 282.

On 8 December 2008 the appellant's claim was dismissed following a judge alone hearing. The appellant was the plaintiff in a civil claim against the police based on alleged false imprisonment and assault. The first two respondents were the police officers allegedly involved. The third and fourth respondents would be vicariously liable if the appellant succeeded in his claim. There were two principal grounds of appeal: first, that the trial judge erred in law in allowing the respondents to argue that the appellant had been released from custody on 7 July 2004 and in making a finding to that effect when they had admitted in their statement of defence that he had been detained and handcuffed between 6 and 10 July; second, that the trial judge erred in law in referring to his personal police experience and that showed he had "leaned to the defendant's side and was prejudicial to the appellant." It was alleged that his comments gave rise to "an apprehension of bias."

Held:

1. No application was made for leave to amend the statement of defence in relation to the admission in question and no leave was granted to withdraw the admission. The appellant specifically highlighted the fact that the admission had been made and, therefore, there was no issue in dispute about the period of time the appellant spent in custody, handcuffed. The appeal must, therefore, succeed on this ground alone.
2. In relation to the second principal ground of appeal, the general rule was that, outside of the doctrine of "judicial notice", no finder of fact may act on their personal knowledge of the facts.
3. Given the Court's conclusions on the primary ground of appeal relating to the admission made in the statement of defence, it then became necessary

to turn to consider whether the respondents were able to justify the period of incarceration as lawful. The tort of false imprisonment was a tort of strict liability. There was no onus on a plaintiff to prove that the imprisonment was unlawful or malicious. The appellant's arrest on 6 July 2004 and his detention overnight at the Central Police Station was lawful. Appellant's counsel conceded that.

4. There was no evidence that the appellant was ever taken before a magistrate. That meant that there was a breach of the provisions of section 22 of the Police Act. That provision required an arresting officer to take or send the arrested person before a magistrate to be charged "without unnecessary delay". That was not done and, therefore, the appellant's detention at the Mu'a Police Station was unlawful. The appellant must succeed in his claim.
5. For false imprisonment and assault (through use of the handcuffs) during the three days at the Mu'a Police Station, taking a broad global approach as to what was an appropriate amount for basic and aggravated damages and taking into account the real value of money in the Kingdom, the Court awarded the sum of $1,500.
6. Exemplary damages were also claimed. Such damages were recoverable if the Court concluded that the defendant in a case had exhibited such high-handed or outrageous conduct that the compensation awarded by way of basic and aggravated damages was an inadequate punishment. Through the unlawful use of handcuffs, the first and second respondents subjected the appellant to inhuman and degrading punishment over a three-day period in an unsuccessful attempt to try to obtain certain admissions from him. The Court had an obligation to make it very clear to the police that they were not above the law and such high-handed and outrageous conduct was always going to attract an additional award of exemplary damages.
7. Under the exemplary damages head the Court fixed a sum of $3,000 making a total damages award of $4,500. The appellant was entitled to costs.

Cases considered:

Carter v Eastbourne Borough Council [2000] 2 PLR 60

Edwards v Pohiva [2003] Tonga LR 231

Palmer v Crone [1927] 1 KB 804

Pioneer Plastic Containers Ltd v Commissioner of Customs and Excise [1967] Ch 597

R v Fricker (Court of Appeal, Criminal Division No: 9807581/Y2, 24 June 1999)

R (on the application of Abdi and others) v Secretary of State for the Home Department [2008] All ER (D) 247 (Dec)

To'a v Inu [2009] Tonga LR 66 (CA)

Wetherall v Harrison [1976] 1 QB 773

Statute considered:

Police Act (Cap 35)

Rules considered:
Prison Rules (Cap 36)

Counsel for the appellant : Mr Fifita
Counsel for the respondent : Mr Kefu

Judgment

Introduction

[1] The appellant has appealed against a judgment of Shuster J. delivered on 8 December 2008 following a judge alone hearing in September 2008. In the judgment under appeal, the appellant was the plaintiff in a civil claim against the police based on alleged false imprisonment and assault. The first two respondents were the police officers allegedly involved. There was no dispute that the third and fourth respondents would be vicariously liable if the appellant succeeded in his claim.

[2] In his statement of claim the appellant referred to two incidents, the first on 28 January 2003 and the second in July 2004. The primary judge found that there was no evidence that the appellant was ever in police custody in 2003 and there was no challenge to that finding. The case below and the appeal, therefore, were concerned only with the July 2004 incident. The appellant claimed that he was falsely imprisoned between 6 and 10 July 2004 and during that period he was handcuffed and unlawfully assaulted by the two police officers who allegedly tightened the handcuffs and moved them around on his arm causing him acute and severe pain. He sought damages under various heads totalling $13,500.00.

[3] In a statement of defence filed on behalf of all the defendants, the Solicitor General admitted that the plaintiff was in custody and handcuffed, between 6 and 10 July 2004 but went on to state in that particular paragraph of the statement of defence:

> *"But further adds that the plaintiff was kept in custody that long because the complainant, owner of the car which the plaintiff had stolen took time coming in to lodge a written complaint. In the end the complainant never came in to the Mu'a Police Station to lodge a written complaint and the plaintiff as a result was released."*

[4] The second respondent, Police Officer Sione Inu, did not give evidence in the case. The judgment records that he currently resides overseas and could not be located.

The facts

[5] The appellant's case was summarised in the judgment below as follows:

> *"The plaintiff claims he was unlawfully arrested on 6 July 2004 and locked in a cell overnight at the Central Police Station even after the owner of the alleged stolen vehicle told*

the police he did not wish to press charges against the plaintiff for stealing his motor vehicle.

The plaintiff alleges on 7 July 2004 he was transported from the Central police Station and further detained at the police station at Mua where he was questioned by the police concerning the alleged criminal activities of his uncle in the Eastern District.

So in essence the plaintiff claims he was unnecessarily and unlawfully held in custody until 10 July 2004. He argues he should have appeared (in person) before a magistrate who should have bailed him. The plaintiff claims he remained handcuffed from his arrest until his release from custody which he says was on Saturday 10 July 2004. While detained at Mua the plaintiff claims the handcuffs were deliberately tightened on his wrist by the second defendant.

The plaintiff claims his blood circulation was affected as a result of overtightening of the handcuffs and as a result he suffered injuries which he says are clearly visible to this day.

The plaintiff says the handcuffs were only released when he asked to use the bathroom: and even then they were only unlocked/released from one of his wrists in order to allow him to use the facilities. The plaintiff also claims he was stood on by an officer whilst he was handcuffed."

[6] In relation to the appellant's arrest the evidence was that on the night of 6 July 2004 police out on traffic patrol in a marked police vehicle received a radio message circulating details of an allegedly stolen motor vehicle. The suspect vehicle was stopped and a police investigation commenced. An officer testified that the offender, who he identified as the appellant, tried to escape or evade arrest by running away however he was caught and detained at the scene. Another officer gave evidence that the plaintiff was not handcuffed following his arrest nor during his detention on the night of 6 July 2004 at the Central Police Station.

[7] The following day, 7 July 2004, the appellant was transferred to the Mu'a Police Station. He was placed in handcuffs when he was transported to Mu'a. The appellant said in evidence that his hands were handcuffed behind his back at Mu'a and the police then proceeded to ask him questions concerning his uncle, with whom he was living, about stolen bulls, stolen goods and property. The appellant said that he was detained at Mu'a until 10 July and he was handcuffed continuously during that time except when he went to use the bathroom and then one hand would be released. He was asked what about when he went to shower and he answered: "I did not have time to go to the shower because Soane and Sione Inu treated me like an animal and at that time I felt like committing suicide."

[8] The appellant said that during the period he was in custody he was interviewed many times and sometimes while he was sleeping the police would come and stand

on the handcuffs or pull them or kick him. He alleged that it was the first respondent who tightened and pulled the handcuffs and did the kicking.

[9] There is no evidence that the appellant was taken before a magistrate at any time during his period in custody. His evidence was that upon his release from the Mu'a Police Station on 10 July he explained to his uncle and his brother what had happened to him and his aunt and sister then took him to hospital where his wrists were examined by a doctor. The doctor was not called as a witness but his report was produced by consent. The primary judge placed significant weight on its contents.

[10] The appellant's uncle said in evidence that he recalled seeing the appellant's hands following his release from custody on 10 July. He described them as "swollen big" and "not touchable". He said the area of the expanded flesh was blistered with brownish water. The witness said that the appellant had to go back to hospital on four occasions for treatment.

[11] The first respondent gave evidence and produced a cell book. He was asked by Crown counsel if there was any entry for the appellant between 6 - 10 July 2004 and he responded that there was not because the appellant had not been in a cell at the Mu'a Police Station during that period. The first respondent said that he recalled the appellant arriving at the Mu'a Police Station at around 4:30 p.m. on 6 July and he "noticed that his hands were beginning to swell and the handcuffs were tight." He said that he gave instructions for the handcuffs to be removed and went on to say that at approximately 6 p.m.: "I released this individual on the grounds that Siaosi did not wish to pursue the complaint."

[12] In cross-examination, the first respondent was challenged on his statement that the appellant had been released on 6 July at 6 p.m. He was asked if there were any documents kept at the police station which would have recorded the release. He replied that the station diary would record the release and they had searched for the station diary for the relevant period but were unable to locate it. The officer was then asked whether the appellant had been taken before a magistrate. He answered, "no" but later conceded that the second respondent may have taken him before a magistrate "to keep him in custody." In re-examination the first respondent was asked:

> *Q. "After you gave the order to release are you able to say what happened? Whether or not he was released or whether Inu (the second respondent) did other work?*
> *A. "No he wasn't released at that time but I did order for him to be released because Siaosi Mafi said that he would not lodge a complaint."*

The judgment

[13] The relevant factual findings by the primary judge are recorded as follows:

> *" * I find as a fact the following day the 7th of July the plaintiff was transferred to Mu'a Police Station.*
> ** I find as a fact the plaintiff was placed in handcuffs when he was transported from CPS to Mu'a Police Station by vehicle, because the officer said so in evidence.*

** I find as a fact that the evidence shows that the handcuffs were removed from the plaintiff when he arrived at Mu'a Police Station.*
** I find as a fact upon hearing all the evidence and studying the police station and logs that the plaintiff was released from custody at Mua on 7 July 2004.*
** I find as a fact that the plaintiff was not in custody on all the dates alleged in his statement of claim i.e. from the 6th-10th July 2004.*
** In essence I find that there was no credible evidence adduced to show the plaintiff was handcuffed during the time he was lawfully detained at CPS and at Mua.*
** Upon hearing all the evidence and considering the credibility of the witnesses I can find no credible evidence that the plaintiff suffered any injuries at the hands of the police from the 6th or 7th July 2004 when I find he was released from custody."*

[14] In relation to the handcuff evidence the judge said:

"The current marks on his wrist are some distance up his arms from his wrist and at the thicker point on the arm. In my experience as a former police officer and chief police officer with over 10 years practical police experience, handcuffs have a natural tendency to rest on the thinnest part of an arm, which is usually just around the wrist. The marks I saw on the plaintiff's arms were higher up and on a much thicker part of the arm, as if someone had pulled the handcuffs back up; and into the thicker part of the arm and settled the handcuffs into the flesh -- perhaps for cause or effect. I then go back to look at the medical evidence before me in this trial -- EVIDENCE WHICH WAS -- admitted by consent. The doctor's report only indicated a blistering on the plaintiff's wrists seen on the 10th July which is three days after the plaintiff's release from custody on the defendant's version of events."

[15] There were other findings including findings scathing of the appellant and his witness in terms of credibility but completely accepting of the first respondent's evidence as expressed in this passage from the judgment:

"Accordingly based upon what I heard in court, evidence under oath, I accept the officer's (the first respondent) evidence as truthful. I accept his evidence in its entirety including his evidence that the plaintiff was released from Mua the same day he arrived, and which I find as a fact was on the 7th July 2004."

Grounds of appeal

[16] There were two principal grounds of appeal. The first was that the trial judge erred in law in allowing the respondents to argue that the appellant had been released from custody on 7 July 2004 and in making a finding to that effect when they had admitted in their statement of defence that he had been detained and handcuffed

between 6 and 10 July. The second principal ground of appeal was that the trial judge erred in law in referring to his personal police experience and that showed he had "leaned to the defendant's side and was prejudicial to the appellant." It was alleged that his comments gave rise to "an apprehension of bias."

Discussion

[17] There is a plethora of authority to the effect that if an allegation made in a statement of claim is admitted then the party who made the allegation need not prove it. Thus, The Supreme Court Practice 1991, (the White Book) para 18/13/2 states:

> *"The effect of the defendant admitting the facts pleaded in the statement of claim is that there is no issue between the parties on that part of the case which is concerned with those matters of fact, and therefore, no evidence is admissible in reference to those facts (**Pioneer Plastic Containers Ltd v Commissioner of Customs and Excise*** [1967] Ch 597)*."*

[18] Bullen & Leake and Jacobs Precedents of Pleadings, 12th Ed. 78 states:

> *"The effect of an allegation which is admitted or treated as admitted is that the party who makes it need not prove it. Thus, if the facts pleaded in the statement of claim are admitted, there is no issue between the parties on that part of the case which is concerned with those matters of fact and, therefore, no evidence is admissible in reference to those facts."*

[19] Cross on Evidence (Seventh Australian Edition) states, 3165:

> *"An admission made in the pleadings or pursuant to a notice to admit cannot, until formally retracted by leave, be contradicted by the party who makes it, and evidence relevant only to such an admitted fact will be rejected as relevant to no issue in the proceedings."*

[20] No application was made in the present case for leave to amend the statement of defence in relation to the admission in question and no leave was granted to withdraw the admission. In his closing submissions, counsel for the appellant specifically highlighted the fact that the admission had been made and, therefore, there was no issue in dispute about the period of time the appellant spent in custody, handcuffed. The appeal must, therefore, succeed on this ground alone.

[21] In relation to the second principal ground of appeal, the general rule is that, outside of the doctrine of "judicial notice", no finder of fact may act on their personal knowledge of the facts. Cross and Tapper on Evidence 11th Ed. (2007) 89, which cites *Palmer v Crone* [1927] 1 KB 804, states (p89): "The general rule is that neither a judge nor a juror may act on his personal knowledge of facts." Recent cases involving alleged breaches of this rule in cases where a judge applied his own specialised knowledge include *R v Fricker* (Clive Fredrick) (CA, Unreported) Court of Appeal Criminal Division No: 9807581/Y2, 24 June 1999; *Carter v Eastbourne*

Borough Council [2000] 2 PLR 60 (a decision of Lord Bingham, sitting as a divisional court judge) and *Wetherall v Harrison* [1976] 1 QB 773. As O'Connor J. observed in *Wetherall* (779): "they (justices) must not, so to speak, start giving evidence in the case because it offends a number of our rules; above all, it is not in the presence of the parties and is not open to cross-examination."

[22] If counsel in the present case had been able to cross-examine on the statement in question made by the trial judge he would no doubt have referred to the allegations made in the statement of claim that when the first two respondents found that blisters on the plaintiff's hands from the handcuffs "were bad, they moved the cuffs to a different position instead of taking them off." Before us, counsel for the appellant contended that the handcuffs had been able to stay in place higher up the arm because they had been tightly secured.

[23] It is always open to a trial judge, of course, to make adverse findings, even strong adverse findings, against a party on credibility and the same applies to positive findings. However, the strongly worded positive finding on credibility in the present case in favour of the first respondent (a serving police officer), may seem somewhat surprising given his conflicting evidence as to when the appellant was released from custody at the Mu'a Police Station and the trial judge's unequivocal endorsement of his evidence does not seem to sit comfortably in a case such as the present where, in his judgment, the judge reverts to and relies upon his own experience and observations "as a former police officer and chief police officer with over 10 years experience."

[24] Given our conclusions on the primary ground of appeal relating to the admission made in the statement of defence, it then becomes necessary to turn to consider whether the respondents have been able to justify the period of incarceration as lawful. The tort of false imprisonment is a tort of strict liability. There is no onus on a plaintiff to prove that the imprisonment was unlawful or malicious. Once a plaintiff establishes the fact of imprisonment, that is sufficient to make out a prima facie case and the onus then falls onto the defendant to prove that the detention was lawful. We agree with the primary judge that the appellant's arrest on 6 July 2004 and his detention overnight at the Central Police Station was lawful. Appellant's counsel conceded that before us. Given his attempt to escape arrest, the arresting officers could perhaps have been forgiven for handcuffing the appellant when taking him into custody at the Central Police Station. It is to their credit that they did not do this.

[25] The evidence is that handcuffs were applied the following day to transport the appellant to the Mu'a Police Station and the first respondent admitted that on arrival he noticed the appellant's hands were beginning to swell and the handcuffs were tight. In their statement of defence, the respondents admitted that the appellant remained handcuffed until he was delivered from the Mu'a Police Station on 10 July 2004. There was no evidence called by the respondents in the court below trying to justify the use of handcuffs. Rule 170 of the Prison Rules (Cap 36) provides that "handcuffs may be used as a means of restraint in the case of a prisoner whose conduct shall be so violent as to render such action necessary." The appellant was not a prisoner in terms of the Prison Rules. He had not even been charged with an offence. Before us,

the Solicitor General quite properly accepted that the use of the handcuffs on the appellant could not be justified in any way.

[26] Even more significantly, perhaps, as indicated earlier, there is no evidence that the appellant was ever taken before a magistrate. Suffice it to say, by reference to another judgment of this court which is being delivered today - *To'a v Naufahu* AC 8/09 (which incidentally involves the same respondents) that finding can only mean that there has been a breach of the provisions of section 22 of the Police Act. That provision requires an arresting officer to take or send the arrested person before a magistrate to be charged "without unnecessary delay". That was not done and, therefore, the appellant's detention at the Mu'a Police Station was unlawful. The appellant must succeed in his claim.

Damages

[27] We accept that the appellant could not be described as a pillar of the community. He did not deny that on the night in question he had been lawfully arrested for theft of a vehicle and for drunk driving. As it turned out, the owner of the vehicle refused to press charges. Those transgressions of the law by the appellant, however, did not make it "open slather" to the police to do as they might. As was stated in a slightly different factual context in *R (on the application of Abdi and others) v Secretary of State for the Home Department* [2008] All ER (D) 247 (Dec):

> *"Those unlawfully detained (if they are unlawfully detained) should have the appropriate remedy, even if "undeserving", no less than those unlawfully detained however "deserving". The law cannot discriminate in such a context: and a broad, and in some respects subjective, appeal to "the merits" should not be permitted to subvert legal certainty and the proper application of firmly established principles."*

[28] At the conclusion of the appeal hearing, we decided that, instead of referring the matter back to the court below, the justice of the case could best be met by our receiving additional submissions and fixing an award of damages. Counsel agreed and we allowed them extra time in which to file written submissions on all aspects of the damages claim. We have taken those submissions into account.

[29] Our approach to the issue of damages mirrors the principles confirmed by this court in *Edwards v Pohiva* [2003] Tonga LR 231. For false imprisonment and assault (through use of the handcuffs) during the three days at the Mu'a Police Station, taking a broad global approach as to what is an appropriate amount for basic and aggravated damages and taking into account the real value of money in the Kingdom, we award the sum of $1,500.00.

[30] Exemplary damages are also claimed. Such damages are recoverable if the court concludes that the defendant in a case has exhibited such high-handed or outrageous conduct that the compensation awarded by way of basic and aggravated damages is an inadequate punishment.

[31] The evidence in the case before us clearly establishes that to be the position. Through the unlawful use of handcuffs, the first and second respondents subjected the appellant to inhuman and degrading punishment over a three-day period in an unsuccessful attempt to try to obtain certain admissions from him. This court has an obligation to make it very clear to the police that they are not above the law and such high-handed and outrageous conduct is always going to attract an additional award of exemplary damages. Under this head we fix a sum of $3,000.00 making a total damages award of $4,500.00. The appellant is entitled to costs in both this court and the lower court in an amount to be agreed or taxed.

Tu'ivai v Tonga Development Bank

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 06, 09, 16 of 2009

2 July 2009; 10 July 2009

Practice and procedure – application for leave to appeal out of time – leave refused

Mr Tu'ivai and others borrowed money from the Tonga Development Bank ("the Bank"). They did so pursuant to a loan agreement for which security was pledged which included mortgages over two tax allotments. The money was not repaid and in March 2006, the Bank commenced proceedings against Mr Tu'ivai and the other debtors. Further proceedings were commenced by the Bank against Mr Tu'ivai and the other debtors. All three proceedings were referred to as "the Proceedings". In the Proceedings the Bank alleged that there had been loan agreements between it and Mr Tu'ivai and the other debtors, the loans had been secured, the money had been lent to Mr Tu'ivai and the other debtors and the money had not been repaid in accordance with the loan agreements. In their defence Mr Tu'ivai and the other defendants put the Bank to proof of its claims. Additionally they raised a defence that the Bank was a statutory authority and was bound to act fairly and had not. Also, Mr Tu'ivai and the other defendants raised a counterclaim to the following effect. The money the Bank lent was to finance an agricultural venture by Mr Tu'ivai and others to grow squash in 2004. It was alleged that the agricultural venture was undertaken under the auspices of the Friendly Islands Marketing Cooperative ("FIMCO"). It was also alleged that the loan application by Mr Tu'ivai and the other defendants was supported by FIMCO. The counterclaim went on to allege that an employee of the Bank (the lending manager) and the general manager of FIMCO entered an illicit and corrupt agreement whereby they would take advantage of a portion of the squash export quota managed by FIMCO and, in order to do so, reduce the loan payments to, or terminate the loan agreement of, Mr Tu'ivai and his other co-venturers. It was further alleged that Mr Tu'ivai's agricultural venture in 2004 failed because of the activities of the lending manager of the Bank and the general manager of FIMCO. Even though Mr Tu'ivai participated in a number of interlocutory skirmishes during November 2008 in the Proceedings, he did not participate in the trial. It follows that Mr Tu'ivai did not take up the opportunity presented by the trial of testing the evidence of the Bank and giving his own evidence or the opportunity of making whatever

submissions he wished to the trial judge and jury in support of his defence and his counterclaim.

Held:

1. The Court dealt firstly with the question of leave to appeal out of time against the order upholding the Bank's claim of "privilege". The touchstone for determining whether documents should be provided through the process of discovery was whether the documents were relevant to the proceedings. Courts were attempting to control and limit the discovery process. Discovery could be extremely expensive, very time consuming and very intrusive. Courts often insist upon being satisfied that the documents sought by the discovery process were truly relevant. The documents sought by Mr Tu'ivai were arguably relevant but only in a very general sense. The Court was correct in upholding the Bank's claim that it did not have to produce the documents. For that reason alone, leave to appeal out of time against the interlocutory order of 28 September 2007 should be refused.
2. There was another reason why leave should be refused. Mr Tu'ivai provided no evidence that explained the delay in seeking leave to appeal. He left it for over a year to challenge the discovery decision and did so only when the trial was imminent. That was far too late.
3. The complaint in the grounds of appeal that the Court allegedly only came to know of the defence and counterclaim on the eve of the trial was without substance. The defence and counterclaim became irrelevant because of the non-appearance of Mr Tu'ivai (save to the extent that the defendants' pleadings contained admissions by the defendants which narrowed the scope of what the Bank had to prove to establish its case). A judge was not obliged to consider a defence or counterclaim if the party raising the defence or pursuing the counterclaim did not appear at the trial. The participation of the party at the trial was necessary to give life to the defence or the counterclaim.
4. Leave to appeal out of time against the order of 28 September 2007 should be refused and the appeal should be dismissed with costs.

Statute considered:

Court of Appeal Act (Cap 9)

The appellant appeared in person
Counsel for the respondent : Mrs Vaihu

Judgment

[1] Before the Court of Appeal are a number of applications and an appeal by Mr 'Amini Tu'ivai and others.

[2] Mr Tu'ivai and others borrowed money from the Tonga Development Bank ("the Bank"). They did so pursuant to a loan agreement for which security was pledged which included mortgages over two tax allotments. The money was not repaid and in

March 2006, the Bank commenced proceedings against Mr Tu'ivai and the other debtors. Those proceedings became CV197/2006. Further proceedings were commenced by the Bank against Mr Tu'ivai and the other debtors which became CV198/2006 and CV 199/2006. We will refer to the three proceedings as "the Proceedings". It appears that in the Proceedings the Bank alleged that there had been loan agreements between it and Mr Tu'ivai and the other debtors, the loans had been secured, the money had been lent to Mr Tu'ivai and the other debtors and the money had not been repaid in accordance with the loan agreements.

[3] In their defence filed on September 2006, Mr Tu'ivai and the other defendants put the Bank to proof of its claims. Additionally they raised a defence that the Bank was a statutory authority and was bound to act fairly and had not. Also, Mr Tu'ivai and the other defendants raised a counterclaim to the following effect. The money the Bank lent was to finance an agricultural venture by Mr Tu'ivai and others to grow squash in 2004. It was alleged that the agricultural venture was undertaken under the auspices of the Friendly Islands Marketing Cooperative ("FIMCO"). It was also alleged that the loan application by Mr Tu'ivai and the other defendants was supported by FIMCO. The counterclaim went on to allege that an employee of the Bank (the lending manager) and the general manager of FIMCO entered an illicit and corrupt agreement whereby they would take advantage of a portion of the squash export quota managed by FIMCO and, in order to do so, reduce the loan payments to, or terminate the loan agreement of (it is not clear from the pleading which is alleged), Mr Tu'ivai and his other co-venturers. It was further alleged that Mr Tu'ivai's agricultural venture in 2004 failed because of the activities of the lending manager of the Bank and the general manager of FIMCO.

[4] The counterclaim also alleged similar corrupt activities in 2005 (for which a further loan was, it appears, provided to Mr Tu'ivai and others) and alleged that the Bank seized Mr Tu'ivai's property (including a tractor and vans) in 2006 (apparently to satisfy the debt arising from the earlier loans) thereby frustrating his attempts to grow and export squash in 2007. In the counterclaim Mr Tu'ivai repeated the allegation that the Bank had to act fairly and also alleged the Bank had engaged in corrupt practices which involved treating him differently to other customers to whom large loans had been made and which had not been repaid or, alternatively, had been forgiven. It was also alleged that loans were made to customers (apparently including Mr Tu'ivai and his co-venturers) in circumstances in which the Bank knew the loans would not be repaid unless the Bank provided further finance for the customers' business activities. Specific complaints, which are unnecessary to summarise, were made about the Bank's lawyers and its legal fees. The defence was amended in October 2006 to allege that the loan agreements were unenforceable as they were tainted by illegality.

[5] The Proceedings then moved down the path to final hearing. On 2 March 2007, Chief Justice Ford made a number of procedural orders concerning the final hearing and also gave Mr Tu'ivai "leave to take out discovery against the plaintiff". Discovery is dealt with by Order 18 of the Supreme Court Rules 2007. The Order makes provision for discovery in the orthodox way. That is, a party required to give discovery must make a list of relevant documents in their possession custody or power, provide the list to the opposing party and subsequently give the opposing

party an opportunity to inspect the documents in the list (unless there are claims of privilege). In the present case, the order of the Chief Justice was complied with in a slightly different way.

[6] Mr Tu'ivai prepared a list of documents he wished to inspect which he forwarded to the Bank or its legal representative on or about 22 June 2007. Mr Tu'ivai prepared a further list which he forwarded on about 2 July 2007. Some of the documents (which were described as files) in the first list obviously were relevant to the Proceedings because they related to the loans to Mr Tu'ivai and the other defendants. It was not obvious that other documents sought (again described as files) were relevant because they only related to transactions between the Bank and other customers. There is nothing before us which suggests that Mr Tu'ivai filed any evidence at that time (or later) establishing how (even arguably) the files concerning other customers were relevant to the Bank's claim against him and the other defendants. It is true that in the defence and counterclaim Mr Tu'ivai and the other defendants alleged corrupt conduct and unfair dealings on the part of the Bank and others but those allegations were made only in a very generalised way.

[7] The dispute about discovery came to the Supreme Court because the Bank objected to producing many of the documents sought by Mr Tu'ivai, arguing that the files of other customers were irrelevant and were confidential. Its objection was initially in a letter to the Registrar dated 26 June 2007 and later in a notice of objection dated 24 August 2007 which was apparently filed with the Court. The notice of objection was accompanied by an affidavit which asserted the irrelevance of many of the documents both to the Bank's claim and the defendants' counterclaim. Mr Tu'ivai filed in Court, it appears, a document which was a reply to the notice of objection. In that notice, Mr Tu'ivai asserted, in a very general way, how the documents he sought were relevant to his case. There was no affidavit in support even outlining the basic facts supporting his allegations in the counterclaim about the Bank's conduct (corruption and preferential treatment).

[8] The dispute was dealt with by Andrew J who made an order on 28 September 2007 upholding the Bank's claim of "privilege" in relation to the disputed documents. While, strictly speaking, the Bank's objection was not based on privilege but on relevance, the effect of his Honour's order was clear. Mr Tu'ivai could not pursue his request for the production of files and other documents concerning other customers and the other material which had been requested which did not relate to his loans. Though the procedures which had been adopted were somewhat unorthodox, it is clear that by September 2007 a point had been reached where Mr Tu'ivai could not obtain all documents he had sought which he contended supported his defence and counterclaim.

[9] The trial date of 1 December 2008 was fixed on 3 April 2008. The trial was to be before a jury. In November 2008, Mr Tu'ivai sought leave to appeal out of time against the interlocutory order made in September 2007 concerning discovery. Andrew J made an order on 24 November 2008 refusing leave to appeal out of time. Several other applications were made in November 2008 challenging either directly or indirectly the September 2007 discovery order and seeking to have the Proceedings stayed until the question of discovery had been resolved at an appellate level. It is

unnecessary for us to detail precisely what each application was and whether it was made to the Supreme Court, on the one hand, or the Court of Appeal on the other and whether any particular application was competent. It is unnecessary because we are prepared to proceed on the basis that this Court of Appeal can entertain an application by Mr Tu'ivai challenging the order of 24 November 2008 of Andrew J (and any similar orders) refusing leave to appeal out of time against the September 2007 order and also consider ourselves whether leave should be given and whether the September 2007 order should have been made. We also can consider and determine the appeal against the final orders made in the trial of the Proceedings on 1 December 2008.

[10] At the trial before a jury, the Bank was successful. Orders were made in the Proceedings (separate orders were made in CV197/2006, CV198/2006 and CV199/2006) giving judgment in favour of the Bank for a nominated amount of money together with orders authorising the Bank to sell property of Mr Tu'ivai which had been provided as security for the loans. Even though Mr Tu'ivai participated in a number of interlocutory skirmishes during November 2008 in the Proceedings, he did not participate in the trial (we were informed that he attended at the very beginning but then left). It follows that Mr Tu'ivai did not take up the opportunity presented by the trial of testing the evidence of the Bank and giving his own evidence or the opportunity of making whatever submissions he wished to the trial judge and jury in support of his defence and his counterclaim.

[11] We deal firstly with the question of leave to appeal out of time against the order of Andrew J of September 2007 upholding the Bank's claim of "privilege". On the material before us, there is little reason to doubt the correctness of the decision of Andrew J. upholding the Bank's claim of "privilege".

[12] The touchstone for determining whether documents should be provided through the process of discovery is whether the documents are relevant to the proceedings. A document can be relevant because it is directly relevant to the proceedings. It can be directly relevant in two ways. The first is because the document supports or assists the case of the party to whom discovery is given (that is, the party who is given the list of documents in the possession custody or power of the opposing party and who can inspect the documents). The second is because the document damages the case of the opposing party giving discovery (that is, the party who is in possession, custody or power of the documents, prepares the list and who must make the documents available for inspection) or another opposing party. A document can be relevant (and therefore must be discovered) in a more indirect way. That is because the document points to a line of enquiry that the party being given discovery (that is, being provided with a list of documents in the possession, custody or power of the opposing party and then inspecting them) might undertake to obtain further material supportive of its case or damaging of the opposing party's case or the case of another opposing party.

[13] However, in many parts of the common law world, Courts are attempting to control and limit the discovery process. Discovery can be extremely expensive, very time consuming and very intrusive. Often Courts insist upon being satisfied that the documents sought by the discovery process are truly relevant in the way discussed in the preceding paragraph. Parties are now often required to justify (and often with

evidence) that the documents are relevant before an order for discovery is made (either an order for general discovery or discovery of specific documents or classes of documents). There is no reason why such an approach should not be taken by the Courts in Tonga so that categories of documents can be excluded and need not be provided in the discovery process.

[14] The documents sought by Mr Tu'ivai in this matter, were arguably relevant but only in a very general sense. They may have been relevant to the case he pleaded in the counterclaim against the Bank (of unspecified acts of corrupt and discriminatory conduct on the part of the Bank) but no evidence was provided of which we are aware in September 2007 which would have justified requiring the Bank to produce the files of a number of its customers (which were obviously confidential) and similar or related information. In our opinion it would have required something more than the bare general allegation in the pleadings (Mr Tu'ivai's defence and counterclaim) to have justified requiring the Bank to produce the files it objected to concerning other customers. Some evidence would have been necessary to establish that the pleaded allegations had substance. There was none. In those circumstances, Andrew J was correct in upholding the Bank's claim that it did not have to produce the documents. For that reason alone, leave to appeal out of time against the interlocutory order of 28 September 2007 should be refused.

[15] However there is another reason why leave should be refused. Mr Tu'ivai has provided no evidence explaining the delay in seeking leave to appeal. It appears, from some of the documents in the file, that Mr Tu'ivai may have been in prison at the time the dispute arose about discovery. His address for service in the lists prepared in June and July 2007 was Hu'atolitoli Prison. However his address for service in his reply to the Bank's objection filed in September 2007 was a residential address in Kolomotu'a. Even if Mr Tu'ivai was in prison in September 2007, it is not apparent to us that he could not have forwarded the documentation to the Court seeking leave, within time, to appeal against the interlocutory order of Andrew J. He left it for over a year to challenge the discovery decision and did so only when the trial was imminent. That was far too late.

[16] We turn now to consider the appeal against the final orders made in favour of the Bank at the trial on 1 December 2008. We can put to one side a number of grounds which raise procedural issues (including the effect of clause 94 of the Constitution) about what Andrew J did in November 2008 concerning the September 2007 order. We can put them to one side because we are prepared, as we earlier indicated, to deal with Mr Tu'ivai's application for leave to appeal out of time against the September 2007 discovery order as well as deal with the appeal. However, we should make one comment about Mr Tu'ivai's reliance on the fact that he had, immediately before the trial, made an application for a stay of the Proceedings. It would have been clear to Mr Tu'ivai at the time the trial was held during the day on 1 December 2008, that no stay order had been made. Mr Tu'ivai was not entitled to assume that because he had applied for a stay order, it was unnecessary for him to appear at the trial to test the evidence of the Bank, advance his own evidence and make submissions to the judge and jury. It was necessary for him to do so in order to protect his own interests.

[17] Mr Tu'ivai cannot now complain about the findings of fact which must have been made by the jury to justify the ultimate findings made at the trial in favour of the Bank. Mr Tu'ivai's complaint (embodied in some of the grounds of appeal) that Andrew J proceeded with the trial on 1 December 2008 notwithstanding that an application had been made to the Court of Appeal for a stay, is entirely without merit. In the absence of a stay (or in the absence of a successful application for an adjournment which Mr Tu'ivai never made), Andrew J was under a duty to proceed with the trial which had been fixed several months earlier.

[18] Also, it appears to be suggested in Mr Tu'ivai's grounds of appeal that Andrew J was biased because of what he had done when dealing with Mr Tu'ivai's attempts to obtain leave out of time to appeal against the September 2007 order. Again, this argument is without merit. In November 2008 Andrew J was confronted with a barrage of applications by Mr Tu'ivai concerning the September 2007 order. They were being made on the eve of a trial and many months after the interlocutory order was made. Those applications clearly had the appearance of being a delaying tactic. It may possibly be that his Honour should not have dealt with applications that were apparently filed or sought to be filed in the Court of Appeal rather than the Supreme Court. However we immediately note that s 10(1)(a) of the Court of Appeal Act (Cap 9) empowers a Supreme Court judge to deal with an application for leave to appeal from an interlocutory judgment of that judge which would, if leave was given, be heard by the Court of Appeal. No question of bias arises, in our opinion, from these circumstances in which Andrew J was endeavouring to ensure that, subject to any legitimate application Mr Tu'ivai might have made, the trial fixed for hearing would proceed.

[19] Similarly the complaint in the grounds of appeal that Andrew J allegedly only came to know of the defence and counterclaim on the eve of the trial is without substance in relation to Mr Tu'ivai's challenge to the final orders made on 1 December 2008. If it is true (which we are prepared to assume for present purposes) that Andrew J only came to know of the defence and counterclaim shortly before the trial, it is a fact of no consequence in relation to the final orders. It obviously would have been important for Andrew J to be aware of the defence and counterclaim (and the terms on which they were pleaded) if Mr Tu'ivai had appeared and had pursued his defence and counterclaim by challenging the Bank's evidence, giving his own evidence and making submissions. But that did not happen. The defence and counterclaim became irrelevant because of the non-appearance of Mr Tu'ivai (save to the extent that the defendants' pleadings contained admissions by the defendants which narrowed the scope of what the Bank had to prove to establish its case). A judge is not obliged to consider a defence or counterclaim if the party raising the defence or pursuing the counterclaim does not appear at the trial. The participation of the party at the trial is necessary to give life to the defence or the counterclaim.

[20] For the preceding reasons, leave to appeal out of time against the order of 28 September 2007 should be refused and the appeal should be dismissed with costs.

Tu'ivai v Tonga Development Bank

Court of Appeal, Nuku'alofa
Salmon J
AC 1/2009

14 October 2009

Practice and procedure – application for rehearing – must be finality to litigation – refused

The plaintiff applied for a rehearing of a judgment of the Court of Appeal.

For the judgment of the Court of Appeal, see *Tu'ivai v Tonga Development Bank* [2009] Tonga LR 329

Held:

1. The Court considered the application and was satisfied that, with perhaps two exceptions, the matters raised by the applicant were all carefully considered and addressed in the judgment of the Court of Appeal. However, the exceptions were considered obliquely by the Court and in any case they were issues which could easily have been raised by the applicant when his appeal was heard.
2. There must be finality to litigation. The applicant had ample opportunity to present his case. The application was refused.

Case considered:

Tu'ivai v R [2007] Tonga LR 31 (CA)

The plaintiff appeared in person
Counsel for the defendant : Mrs Vaihu

Judgment

[1] Mr Tu'ivai's application for a rehearing of the above appeals has been referred to me in my capacity as a Judge of the Court of Appeal. I have of course heard and considered along with Justices Burchett and Moore the appeal which Mr Tu'ivai seeks to have reheard. I have read and considered Mr Tu'ivai's application. Having done so I am satisfied that, with perhaps 2 exceptions, the matters raised by Mr Tu'ivai were all carefully considered and addressed in the judgment of the Court of Appeal. The

exceptions are Grounds 7 & 8. In the case of those 2 grounds the issues raised were considered obliquely but in any case they are issues which could easily have been raised by Mr Tu'ivai when his appeal was heard.

[2] The Court of Appeal has said on previous occasions that there must be finality to litigation (see *Tu'ivai v R* [2007] Tonga LR 31 (CA). That is the case with these proceedings. Mr Tu'ivai has had ample opportunity to present and argue his case. It is not appropriate that he be given a further hearing on issues that have been determined. The application is refused.

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Langi v R

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 15/2009

7 July 2009; 10 July 2009

Criminal law – attempted robbery and grievous bodily harm – appeal against conviction and sentence – conviction stands – no probation report – sentence to be reconsidered by Supreme Court

For the Supreme Court sentencing judgment, see *R v Langi* [2009] Tonga LR 342

The appellant and another man were alleged to have decided to rob a store. They parked their car close to a store owned by a Chinese couple. The Crown said they donned red hoods, and took a .22 rifle from the boot of the car. The other man performed the role of lookout while the appellant went to the store, which was protected by a grill, pointed the rifle at the Chinese woman inside and demanded money. She panicked and turned to leave the front of the shop and was shot suffering serious injuries. The accused and his accomplice then ran back to the car and drove away. The appellant was convicted and sentenced to the maximum sentence of 10 years imprisonment on the attempted robbery charge and 8 years imprisonment on the charge of causing grievously bodily harm the sentences to be served consecutively. The appellant appealed against both conviction and sentence.

Held:

1. The Court of Appeal concluded that the appeal against conviction must be dismissed. The evidence of the witness was sufficient to support a conviction even without his statement to the police. He placed the appellant at the scene, in possession of the rifle and wearing a red hood. He gave evidence of hearing the gunshot.
2. The Supreme Court imposed the sentence without first requiring a probation report. A probation report was highly desirable if not essential in cases where the prisoner was a first offender and nothing was known of his personal circumstances. The seriousness of the charges added to the desirability of the report.
3. The appeal against sentence should be allowed and the question of the appropriate sentence remitted to the Supreme Court for fresh consideration by another judge after obtaining a probation report.

Statute considered:
Evidence Act (Cap 15)

Counsel for the appellant	:	Mr Fifita
Counsel for the respondent	:	Mr Kefu and Mr Lutui

Judgment

[1] The Appellant was convicted of attempted armed robbery and of causing grievous bodily harm after a Judge alone trial before Shuster J. He was sentenced by the judge to 18 years imprisonment. The appeal is against both conviction and sentence.

Background

[2] The appellant and another man were alleged to have decided to rob a store. They parked their car close to a store owned by a Chinese couple. The Crown says they donned red hoods, and took a .22 rifle from the boot of the car. The other man performed the role of lookout while the appellant went to the store, which was protected by a grill, pointed the rifle at the Chinese woman inside and demanded money. She panicked and turned to leave the front of the shop and was shot suffering serious injuries. The accused and his accomplice then ran back to the car and drove away.

[3] The principal evidence at the trial was given by a witness who with a friend, was picked up by the appellant while walking along the road. This witness made a statement to the Police in which he said he heard the appellant say he wanted "to rob the Chinese to receive money to pay for the gun" The appellant parked the car near the Chinese store. The witness in his statement to the police then outlined the facts recorded above. He also said in his statement that when the appellant got back into the car he said they didn't receive any money "because the Chinese ran off so I shot the Chinese in the ass" In his evidence at the trial the witness was much less forthcoming. He said that the two men got out of the car with a gun and that the person with the gun was probably the accused. He said the two men walked to the store and he heard a bang from the gun. He said couldn't be certain who was holding the gun. When asked whether he believed his police interview was correct be said "yes from what I can remember". After his statement was read to him he agreed that was the statement he gave to the Police, and that the two men were wearing red hoods but continued to express uncertainty as to who was holding the gun. In cross examination he said the police did not force him to say anything. He also said he knew both the appellant and the other man. The complainant was unable to identify the holder of the gun other then to say he wore a red hood. The appellant denied any involvement in the attempted robbery and did not give evidence.

[4] The judge found the case against both men proved. He did say, incorrectly, that there was only one red hood. One hood was produced in evidence but there was no evidence as to where it was found.

The Appeal

[5] The notice of appeal alleged that the Judge was prejudiced and biased against the appellant and claimed that a refusal of bail and other matters relating to sentencing deprived the appellant of due process of law. The appeal claims that the offence was not proved and the sentences were excessive.

[6] Mr Fifita maintained his allegation of bias in his submissions before us. He submitted that medical evidence was a requirement in a grievous bodily harm case and because none was called the charge should have been dismissed. As to sentencing he noted that the accused was a first offender and that the judge should have called for a probation report. In oral submissions Mr Fifita acknowledged he had no authority to support his contention as to the need for a medical certificate. He also emphasised that the only evidence implicating the appellant was that of the witness referred to above.

[7] Mr Kefu for the Crown pointed out that at the time of the bail application the appellant was already on bail for another criminal offence involving the use of weapons. We agree that in these circumstances the refusal of bail was appropriate. As to a probation report he noted that the judge had a discretion whether to call for one but that it is normal practice to call for one where an accused has not given evidence of his circumstances. Mr Kefu said that counsel for the appellant had the opportunity to make a plea in mitigation but did not do so.

The Conviction Appeal

[8] We have concluded that this appeal must be dismissed. We are satisfied that the evidence of the witness referred to above is sufficient to support a conviction even without his statement to the police. He places the appellant at the scene, in possession of the rifle and wearing a red hood. He gives evidence of hearing the gunshot. We do not consider him to be an accomplice but even if he was, his evidence would be admissible as a result of the provision in s 126 of the Evidence Act which makes admissible evidence corroborated in a material particular. In this case it is corroborated by the complainant who referred to the gun and the hood. We do not accept the appellant's contention that the judge was biased and prejudiced against the appellant. There is nothing in the judgment to support that contention.

The Appeal Against Sentence

[9] We have decided that the sentence appeal should be allowed and the question of the appropriate sentence remitted to the Supreme Court for fresh consideration by another Judge. Shuster J sentenced the appellant to the maximum sentence of 10 years imprisonment on the attempted robbery charge and 8 years imprisonment on the charge of causing grievously bodily harm the sentence to be served consecutively. He did so without first requiring a probation report.

[10] We would emphasise that a probation report is highly desirable if not essential in cases such as this where the prisoner is a first offender and nothing is known of his personal circumstances. The seriousness of the charges adds to the desirability of the

report. It is because we have no report that we have decided the quantum of the appropriate sentence should be reconsidered by the Supreme Court after obtaining a report.

120 [11] We are satisfied however that the sentence imposed by the Judge is manifestly excessive both as to the individual sentences and making them cumulative. We also observe and the Crown conceded that the Judge's comment on sentencing that the gun was used in anger is not supported by the evidence. Having said this we do agree with the Judge that this was a cowardly shooting of a defenceless woman and deserves a substantial sentence. However to impose the maximum or close to maximum sentence on a first offender on the facts of this case is not justified.

Finally we note that the sentences ultimately imposed should run from the 1st April 2008 which we are advised is the date on which the appellant was first placed in custody.

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R v Langi

Supreme Court, Nuku'alofa
Ford CJ
CR 171/2008

18 August 2009; 21 August 2009

Sentencing appeal – grievous bodily harm and attempted robbery – 18 years total imprisonment – revoked and replaced with 8 years imprisonment

For the Court of Appeal judgment, see *Langi v R* [2009] Tonga LR 338

After a judge alone trial in September 2008 the accused was found guilty on one count of grievous bodily harm and one count of attempted robbery. He was sentenced to a total of 18 years imprisonment and appealed to the Court of Appeal against both conviction and sentence. On 10 July 2009 the Court of Appeal dismissed his appeal against conviction but it upheld the appeal against sentence. The Court of Appeal held, first, that the individual sentences of 10 and 8 years were "manifestly excessive". It also held that the judge was wrong in making the sentences consecutive. The Court of Appeal was critical of the fact that the judge had imposed sentence without first requiring a probation report and it stated that a probation report was highly desirable where an accused was a first offender and nothing was known of his personal circumstances. The court decided that the question of the appropriate sentence should be reconsidered by another judge after obtaining a probation report. Finally the court noted that the sentences ultimately imposed should run from 1 April 2008 which was the date on which the accused was first placed in custody.

Held:

1. The probation report noted that the accused had prior convictions and was on bail for another criminal offence. That was one of the reasons why the Court of Appeal stressed the importance of obtaining a probation report prior to sentencing. A probation report would have alerted the sentencing judge to all of the relevant background material.
2. There were two particularly serious aggravating factors. First, the weapon used was a loaded rifle and it was difficult to imagine a more potent or dangerous weapon. The other factor was that at the time of the offending, the accused was on bail for other offences of a like nature.
3. The Court revoked the sentencing orders and imposed the following fresh sentences: six years imprisonment for count 2 (grievous bodily harm) and eight years imprisonment for count 3 (attempted armed robbery). The

sentences were concurrent and were deemed to have commenced on 1 April 2008.

Case considered:
Fifita v R [2000] Tonga LR 289 (CA)

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown	:	Mr Lutui
Counsel for the accused	:	Mr Fifita

Judgment

[1] After a judge alone trial in September 2008 before Shuster J. you were found guilty on one count of grievous bodily harm contrary to section 106(1) of the Criminal Offences Act and one count of attempted robbery, contrary to sections 4(1) & 154(3) of the same Act. You were sentenced to a total of 18 years imprisonment. You then appealed to the Court of Appeal against both your conviction and sentence.

[2] On 10 July 2009 the Court of Appeal dismissed your appeal against conviction but it upheld your appeal against sentence. Shuster J. had sentenced you to 10 years imprisonment on the attempted robbery charge which was the maximum sentence for that offence (i.e. half the maximum sentence (20 years) for actually committing the offence). The maximum sentence for the other charge of causing grievous bodily harm is also 10 years imprisonment and on that count the sentencing judge sentenced you to eight years imprisonment. He then made both sentences consecutive which meant that your total sentence was 18 years imprisonment.

[3] The Court of Appeal held, first, that the individual sentences of 10 and 8 years were "manifestly excessive". It also held that the judge was wrong in making the sentences consecutive. The Court of Appeal was critical of the fact that the judge had imposed sentence without first requiring a probation report and it stated that a probation report is highly desirable, if not essential, in cases such as yours where an accused is a first offender and nothing is known of his personal circumstances. The court decided that the question of the appropriate sentence in your case should be reconsidered by another judge after obtaining a probation report. Finally the court noted that the sentences ultimately imposed should run from 1 April 2008 which was the date on which you were first placed in custody.

[4] I now have the advantage of having before me a helpful probation report referring to your background and your domestic situation. You are 35 years of age, married with two young sons aged seven and three months old respectively. The probation officer describes your wife and children as "a lovely family". Your wife told the probation officer that since your marriage in 2001 you have been a responsible father caring and loving her and your eldest child and that you would go to church every Sunday. She could not understand your criminal offending in 2007 but she put it down to drunkenness and mixing with the wrong acquaintances.

[5] By way of background, the probation officer notes that when you were in class four at primary school your family emigrated to America but then in 1997 when you would have been about 23 years of age you were deported back to Tonga after serving a three-year sentence in the States on a manslaughter charge arising out of a motor vehicle accident.

[6] The probation officer noted that you had prior convictions back in 2000 and 2002. In February 2000 you were given a two-week suspended sentence for theft. Obviously, that must have been a very minor offence. In October 2000 you were fined for being in possession of Indian hemp. Then in January 2002 you received four months imprisonment for housebreaking and six months for theft with both sentences being concurrent.

[7] The first point I note is that it is difficult to reconcile that criminal record with your description by the Court of Appeal as a "first offender". The Court of Appeal decision recorded that defence counsel had described you as a first offender. It can only be assumed that your counsel had no knowledge of the previous convictions and Crown counsel who appeared at the appeal hearing did not have any information to the contrary before him otherwise he would have corrected the submission from your counsel. It could hardly be claimed that the convictions were so minor that they could be put to one side. It is noted, however, that after those convictions you do appear to have kept out of trouble for a period of over five years and that is to your credit.

[8] There is another complication in relation to your background offending. In its decision, the Court of Appeal noted that at the time you committed the offences in question, namely October 2007, you were already on bail for another criminal offence involving the use of weapons which had occurred on 30 May 2007. That offending was the subject of another indictment, CR 267/2007, which was handled by Andrew J. Your trial before Shuster J. took place in September 2008 and you were sentenced on 5 September 2008. Justice Shuster made no reference to you having any prior convictions and he did not appear to know about the other case before Andrew J. which still had to be dealt with. That is one of the reasons, no doubt, why the Court of Appeal stressed the importance of obtaining a probation report prior to sentencing. A probation report would have alerted the sentencing judge to all this relevant background material.

[9] You were arraigned before Andrew J. on the charges arising out of the May 2007 incident on 29 October 2007 and you pleaded not guilty. Your trial was fixed for 29 September 2008. The trial date was then adjourned until 7 November 2008 and on that date, by which time you were already in prison serving out the sentence imposed by Shuster J. two months beforehand, you were re-arraigned and pleaded guilty. Andrew J. obtained a probation report before sentencing you on 16 December 2008. You were then sentenced as follows: Count 1 (unlawful imprisonment, i.e. detention of another person) fined $500; Count 2 (discharge of a firearm with intent to intimidate) three years imprisonment; Count 3 (abetment to armed robbery) nine years imprisonment. The sentences were made concurrent making nine years imprisonment in total and that sentence was made concurrent with the 18 year sentence Justice Shuster had imposed.

[10] It is unfortunate that the Court of Appeal do not appear to have been given any information regarding CR 267/2007. It is noted, however, and this could well be the explanation, that before Andrew J. you were represented by Mr George Fifita whereas before Shuster J. and in the Court of Appeal you were represented by Mr Teisina Fifita. Andrew J. in his sentencing remarks referred to the 18 year sentence that you were then serving, properly noting that your offending in that case had taken place after the offending His Honour was then sentencing you on but he observed that your sentencing on the respective cases could not have been dealt with together because you had not changed your plea to guilty until after you had been sentenced by Shuster J.. It is not clear whether the sentence imposed by Justice Andrew was influenced in any way by the 18 year sentence you were then serving.

[11] Had Justice Shuster known about the other case that was then pending before Andrew J. he most likely would have adjourned sentencing so that, in the event of a conviction in the latter case, sentencing in both matters could be dealt with together. That did not happen, however, and there has been no appeal against the decision of Andrew J.. Whatever sentence I impose this morning, therefore, will have no bearing on the nine-year sentence imposed by Justice Andrew in CR.267/2007.

[12] I now turn to my reconsideration of the 18 year sentence that has been referred back to this court by the Court of Appeal. In doing so I take into account the observations made by the Court of Appeal and the helpful background information disclosed in the probation report.

[13] A relevant authority which this court is bound by is the Court of Appeal decision in *Fifita v R* [2000] Tonga LR 289 where the accused had applied for leave to appeal against sentence on two counts of armed robbery and one count of robbery. On each count of armed robbery the sentence imposed had been imprisonment for four years and on the robbery count the sentence had been imprisonment for three years, all to be served concurrently. The convictions also triggered the operation of a previously imposed suspended sentence of one year's imprisonment for housebreaking making a total sentence of 5 years' imprisonment.

[14] In *Fifita*, the accused was a young man 20 years of age. On the night of the first offence he had been drinking with another young man, they came upon a shop, they went in and hit the person in the shop with a piece of rock knocking him to the floor and the accused's companion threatened him with a knife. The accused then took $180 in cash and tried to hit the complainant with a bottle but missed. On the day of the second lot of offending, the accused took a small machete from a storekeeper and went to another store where he threatened the person minding the shop with a machete and took $200. On the third occasion the accused entered a shop minded by a woman where he took $10 and pushed her to the floor injuring her arm. The earlier matter in which the accused had been given a suspended sentence involved a break-in to the Yacht Club where he took items totalling almost $3500 in value.

[15] The Court of Appeal made specific reference to the amendment to the Criminal Offences Act in 1999 which increased the maximum sentence for armed robbery to 20 years and it noted:

> "Plainly, the legislature regarded this offence very seriously. And it is to be remembered it is an offence which inevitably involves a severe danger that a robber armed with an offensive weapon may cause death or serious injury to an innocent person. Such an offence cannot be treated lightly.
>
> "The purposes of a sentence imposed on an offender are to punish so far as it is just and fitting in the circumstances; the deterrence of criminal behaviour by the offender and others; the rehabilitation of the offender to fulfil a useful role in society; the vindication of society's standards; and the protection of law-abiding members of the community."

The court added that rehabilitation was of particular importance in the case of a young man.

[16] The Court of Appeal concluded that there was no ground to interfere with the sentences that had been imposed and the application for leave to appeal was dismissed.

[17] The charges you faced before Andrew J. under indictment 267/2007 were committed with a co-accused. On 29 May 2007 you both stopped a taxi and unlawfully detained the taxi driver by tying him up and putting him in the back of a car. You had a rifle which you discharged out the window of the vehicle to intimidate the taxi driver. Next morning you both tied the taxi driver to a tree and used his vehicle to drive to the Money Gram Office at Lapaha where your co-accused fired one shot at the office window and stole a handbag containing $20,000. You waited in the getaway car and you both drove off together. You were convicted of abetment to armed robbery. As the robbery was carried out, the punishment for abetment is the same as if you had actually committed armed robbery and the maximum sentence for that offence is 20 years imprisonment.

[18] The charges you faced in the case before Shuster J. under indictment CR 171/2008 related to an incident on 26 October 2007. The facts were described by the Court of Appeal as follows:

> "The appellant and another man were alleged to have decided to rob the store. They parked their car close to a store owned by a Chinese couple. The Crown says they donned red hoods, and took a .22 rifle from the boot of the car. The other man performed the role of the lookout while the appellant went to the store, which was protected by a grill, pointed the rifle at the Chinese women inside and demanded money. She panicked and turned to leave the front of the shop and was shot suffering serious injuries. The accused and his accomplice then ran back to the car and drove away."

[19] Although, as noted, the Court of Appeal held that the individual sentences imposed of 10 years and 8 years imprisonment were "manifestly excessive" it commented:

> "... we do agree with the judge that this was a cowardly shooting of a defenceless woman and deserves a substantial sentence."

[20] There are two particularly serious aggravating factors in your case. First, the weapon used was a loaded rifle and it goes without saying that it is difficult to imagine a more potent or dangerous weapon. The other factor is that at the time of your offending, you were on bail for other offences of a like nature.

[21] The probation officer reports that you dropped out of High School in Form 2 and you became a carpenter working in your uncle's construction company. You and your wife are of the catholic faith and the probation officer states that you both come from a very strong catholic background. The probation officer speculated that there was someone else behind the crimes you committed but you had to provide the rifle. However, there is no other evidence on this matter before the court and although your counsel referred to it the other day, the proposition was specifically rejected by Crown counsel and so I put it to one side.

[22] It is clear from the probation report that you are finding the experience at Huatolitoli prison much more difficult and challenging than your experience with the prison system in the United States. You explained to the court that you were not required to serve hard labour in the States but at Huatolitoli you are subjected to hard labour six days a week. What you told the Court has been noted but such matters are not really relevant when it comes to sentencing.

[23] Your lawyer has stressed that you are truly remorseful and that you have resolved that upon your release from prison you will concentrate on your family and upon living a law-abiding life. Counsel also stressed the fact that no money was taken in the attempted robbery. I am prepared to accept those submissions.

[24] For the reasons mentioned, I have not found this an easy case to deal with. It has not turned out to be as straightforward as I suspect the Court of Appeal assumed might have been the case.

[25] Having acted as best as I can on the directions given by the Court of Appeal to reconsider the sentences imposed and having taken into account everything that I have touched upon above and the other submissions made by your counsel, I now revoke the sentencing orders made by this court on 5 September 2008 and impose following fresh sentences:

> Count 2 (grievous bodily harm) -- 6 years imprisonment.
> Count 3 (attempted armed robbery) -- 8 years imprisonment.

[26] The sentences are concurrent making a total sentence of 8 years imprisonment. That sentence, in turn, is to be concurrent with the sentence imposed by Justice Andrew in CR267/2007. In accordance with the directions of the Court of Appeal, the 8 year term is deemed to have commenced on 1 April 2008.

Pohiva v R

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 15/2008

3 July 2009; 10 July 2009

Defamation – appeal – statutory offence required mens rea – no mens rea – conviction quashed

For the facts and the Supreme Court judgment, see *R v Pohiva* [2008] Tonga LR 260.

Held:

1. Section 3 of the Defamation Act created a statutory offence of defaming the sovereign. Because the offence was a statutory offence, it was necessary to apply appropriate legal principles in determining the content of the offence. The presumption of law that mens rea was required before a person could be held guilty of a criminal offence applied to statutory offences and could be displaced only if this was clearly or by necessary implication the effect of the statute. It was clear that neither expressly nor by necessary implication was mens rea excluded as an element of the offence.
2. Accordingly it was necessary for the prosecution to prove that an accused intended to speak, write, print or otherwise put into visible form (to adapt the language of section 2) any matter damaging the reputation of His Majesty the King before the accused could be convicted. The accused was unaware that the article critical of His Majesty was going to be published in the newspaper at the time it was published. It was not possible to conclude that the accused had the requisite criminal intention in order to satisfy the mens rea element of the offence.
3. The appeal was allowed and the conviction was quashed.

Cases considered:

Gammon (Hong Kong) Ltd v A-G [1984] 2 All ER 503
Pulu v R [2000] Tonga LR 293
R v Muhaamad [2003] QB 1031
R v Taungahihifo [2007] Tonga LR 247
The Queen v Holbrook (1878) 4 QBD 42

Statute considered:
Defamation Act (Cap 33)

Counsel for the appellant	:	Mr Tu'utafaiva
Counsel for the respondent	:	Mr Kefu

Judgment

[1] This is an appeal from the conviction of the appellant, Mr Siosiua Po'oi Pohiva, of defaming His Majesty the King. Shuster J found Mr Pohiva guilty. His Honour was in error in doing so and the appeal should be allowed.

[2] In explaining why we have reached this conclusion, it is necessary to refer to the evidence and findings of fact of Shuster J. It is also necessary to refer to the provisions of the Defamation Act (Cap 33) ("the Act") which creates the criminal offence with which Mr Pohiva was charged.

[3] The evidence was straightforward. Mr Pohiva represented himself at the trial. It was not in issue that on 6 December 2006 an article in the form of a letter to the editor appeared in that day's edition of the Kele'a newspaper. The letter was highly critical of His Majesty. The police arrested Mr Pohiva on 26 March 2007. They conducted a record of interview. The record of interview became an exhibit which Shuster J said was admitted by consent though Mr Pohiva did not expressly consent and claimed that the statements in the record of interview were not made voluntarily. The record of interview was tendered through a police Constable who gave evidence and who had been involved in interviewing Mr Pohiva. In the record of interview, Mr Pohiva admitted he was the publisher of the Kele'a newspaper and had been for three years. He said that the content of the newspaper was up to the editor and that he had no involvement in it. He said that the newspaper was published in New Zealand. He said that he was involved in the newspaper by distributing the newspaper after it had arrived from New Zealand. He accepted that he had some knowledge about information published in the newspaper before it was published but believed it was up to the editor to edit the information. Importantly, Mr Pohiva said he knew about the statement published on 6 December 2006 when he came back from the United States in February. This is plainly a reference to February 2007. It is appropriate to set out precisely what he said:

> *"Q: When was it then you knew about the statement as it appears in the Summons 804/2007 [the article the subject of the charge]?*
> *A: I just knew when I came back from the United States in February of this year and read the newspaper Kele'a in December."*

[4] In addition to the police Constable, the prosecution called four other witnesses. Each read, at some stage, the article. The transcript is incomplete in relation to the first witness though one question recorded in the transcript suggests the witness gave evidence that he did not read the article in 2006 or 2007. The second witness said that he bought the newspaper containing the article from the store. His evidence was that when he first read the article he was not concerned but when the police came to him

and asked a few questions he was concerned. He thought the article indicated, as to the King's reputation, that the King was stupid. The witness thought that was not a good thing. When asked whether it changed the King's reputation, the witness indicated that from reading the material it was not "really good to me". The third witness also only read the article after it was shown to him by the police. His evidence was that the article hit the King's reputation and had the effect that royalty would not be trusted. He also thought that the article expose the King to hatred. The fourth witness read the article in 2006. He then thought the article was alright for him. He said "but I felt that since now its bad because I am here". Probably this meant that he initially thought the article was unexceptionable but having been contacted by the police and asked to give evidence, his view had changed. He thought that the article had a bad effect on the King's reputation though he did not accept that it exposed the King to hatred ridicule and contempt. He accepted in cross-examination that he thought the article was bad only when the police showed it to him. None of the witnesses gave evidence which indicated, clearly, that for them the article had diminished the standing or otherwise damaged the reputation of the King.

[5] In his reasons for judgment, Shuster J made a number of findings. As to the knowledge of Mr Pohiva about the publication of the article (reflected in the question and answer quoted earlier), his Honour said:

> *"He accepted - the first he knew about what appeared in summons 804 - 07 - was (1) when he came back from the United States - and that was in February 2007 and (2) when he read the letter in the Kele'a Newspaper - in December."*

[6] It is not clear what his Honour meant in this passage. On one view, his Honour appears to be saying that Mr Pohiva said he first knew of something (the publication of the article and its contents) at two points in time, one following some time after the other. If this is what his Honour meant, it is a conclusion which is very difficult to sustain as a matter of logic. Ordinarily a person first knows of something only once. Obviously there will be exceptions to this general proposition involving issues of memory loss and the like but there is nothing to suggest in this case that we are in the realm of these exceptions.

[7] Later in his reasons, his Honour addressed this question again by saying:

> *"The defendant infers he was out of the country on the 6th December 2006 but he admitted to reading the article in December 2006."*

[8] It is true that the clear implication of Mr Pohiva's answer quoted earlier, is that Mr Pohiva was out of Tonga in December 2006 and only returned to Tonga from the United States in February 2007. But in any event, it is plainly wrong to find to the criminal standard (beyond reasonable doubt), having regard to what Mr Pohiva actually said, that Mr Pohiva admitted to reading the article in December 2006. Even without applying the high criminal standard, it is more likely, having regard to the words used, that Mr Pohiva was saying in the answer that he first came to know of the article and its contents when he returned from the United States in February 2007 and the words "in December" are intended to identify the date of publication of the edition

of the newspaper he read in February 2007. That is, the clear import of his answer is that he first read the December edition containing the article in February 2007.

[9] This is important. In order to explain why, it is necessary to refer to some of the provisions of the Act. Section 2 defines defamation and provides:

> "(1) Defamation of character consists in speaking or in writing, printing or otherwise putting into visible form any matter damaging the reputation of another or exposing another to hatred, contempt or ridicule or causing him to be shunned.
> (2) The repetition by any person of defamatory matter concerning another also constitutes defamation of character."

[10] Section 3 deals with defamation of the sovereign and provides:

> "Every person who shall defame the character of His Majesty the King or Her Majesty the Queen shall on conviction thereof be liable to a fine not exceeding $2000 and in default of payment to imprisonment for any term not exceeding two years."

[11] It is clear from section 8 (which speaks of "criminal proceedings for violation of sections 3, 4, 5 or 6") and from the judgment of the Court of Appeal in *Pulu v R* [2000] Tonga LR 293 that section 3 creates a statutory offence of defaming the sovereign (as the heading to the section describes it). The Court of Appeal said (at 298):

> *"In Tonga the King is the embodiment of the state. By ridiculing and damaging the reputation of the King, the appellant was ridiculing and damaging the reputation of Tonga itself. The seriousness of the offence of defaming the King or the Queen is reflected in Parliament making such an action a separate and distinct offence."*

[12] Because the offence is a statutory offence, it is necessary to apply appropriate legal principles in determining the content of the offence. One principle is that there is a presumption that mens rea is required before a person can be held guilty of a criminal offence. This and related principles were helpfully discussed by the Chief Justice in *R v Taungahihifo* [2007] Tonga LR 247. The Chief Justice referred to the judgment of the Privy Council in *Gammon (Hong Kong) Ltd v A-G* [1984] 2 All ER 503. The Privy Council set out (at 508) five propositions concerning mens rea. The second proposition was to the following effect. The presumption of law that mens rea is required before a person can be held guilty of a criminal offence applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute. The Chief Justice also referred to a later judgment of the English Court of Appeal in *R v Muhaamad* [2003] QB 1031 which held that the question of whether the presumption applies will be influenced by the seriousness of the offence. While, in the present case, the maximum fine for defaming royalty is comparatively modest at $2000, it is nonetheless probably fair to

characterise the offence as a serious one (as the Court of Appeal did in *Pulu v R*) because of the broader social context in which the offence might be committed and the implications of committing it. In any event it is clear that neither expressly nor by necessary implication is mens rea excluded as an element of the offence. This was conceded by the Crown in this appeal.

[13] Accordingly it is necessary for the prosecution to prove that an accused intended to speak, write, print or otherwise put into visible form (to adapt the language of section 2) any matter damaging the reputation of His Majesty the King before the accused can be convicted. In the present case, Mr Pohiva was unaware that the article critical of His Majesty was going to be published in the newspaper at the time it was published. In our opinion, it is not possible to conclude that Mr Pohiva had the requisite criminal intention in order to satisfy the mens rea element of the offence. The Crown accepted that it could not point to any evidence that would justify a finding that Mr Pohiva did. Mr Pohiva should have been acquitted.

[14] It is true that almost two centuries ago, the publisher of a publication could be liable for criminal libel at common law even if the publisher was unaware that the libellous content was in fact being published. The common law concerning a publisher's liability was discussed in *The Queen v Holbrook* (1878) 4 QBD 42 at 46-49 per Lush J. However in England the effect of the common law was ameliorated by legislation commencing with the Libel Act 1843. Ultimately, the legal question we must decide is one of statutory construction.

[15] The appeal should be allowed and the conviction quashed.

Hottsie Anne Co Ltd v Australia and New Zealand Banking Group

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 22/2009

6 and 7 July 2009; 10 July 2009

Practice and procedure – leave to appeal against interlocutory order – discretionary interlocutory application – leave refused

On 12 and 13 May 2009 the Supreme Court ordered that Hottsie Anne Company Limited ("the Company") be placed into liquidation. This was pursuant to an application by the ANZ Banking Group Limited ("Respondent") after a Statutory Demand under the Companies Act 1995 was served on the Company and went unanswered. The debt claimed by the Respondent was for the sum of $1,215,000 and arose through various loan advances made to the Company. The Chief Justice then made an order appointing a liquidator. Later the same day the Company filed an application in the Supreme Court for an order setting aside the order appointing a liquidator. The Company applied for leave to appeal against an interlocutory order that dismissed an application to stay an application for the appointment of a liquidator to the Company.

Held:

1. The Company had an application to set aside the order appointing the liquidator which had not yet been heard and determined. The issues the Court identified could be ventilated fully in the hearing of that application. [This was heard in *Kava v Australia and New Zealand Banking Group Limited* [2009] Tonga LR 420]
2. The Court did not consider that the grant of leave was warranted given that the dismissal of the Company's stay application was a discretionary interlocutory judgment concerning a matter of practice and procedure. Accordingly leave was refused.

Case considered:

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc [1981] HCA 39; (1981) 148 CLR 170

Statute considered:
Companies Act 1995

Counsel for the appellant	:	Mr Tu'utafaiva
Counsel for the respondent	:	Mr Stephenson

Judgment

[1] This is an application for leave to appeal by Hottsie Anne Co Ltd ("the Company") against an interlocutory order dismissing an application to stay an application for the appointment of a liquidator to the Company. For reasons that will be apparent from this judgment it has been necessary to decide this matter with some urgency.

[2] It is desirable first to set out some of the background which is mostly uncontentious. The Company was incorporated in 2002. Shortly after its incorporation, it borrowed $155,000 from the Australia and New Zealand Banking Group Ltd ("the Bank"). Further amounts were lent to the Company (though there is an issue about whether the person who obtained these loans had authority to do so - a matter discussed shortly) by a variety of means (loans and other facilities) in April 2004, August 2007, March 2008 and August 2008. By August 2008 its apparent indebtedness exceeded $1 million. It appears the Company failed to repay amounts due under the loans and other facilities and the Bank asserted a right to demand payment of all amounts outstanding. The demand was not met and the Bank served a statutory demand for the amount outstanding on or about 24 March 2009. The statutory demand was made pursuant to section 298 of the Companies Act 1995 ("the Act"). The demand was not complied with within the date specified in the notice, namely by 15 April 2009.

[3] On 4 May 2009 the Bank filed an application in the Supreme Court pursuant to section 250 of the Act seeking the appointment of a liquidator ("the Bank's liquidation application"). On or about 6 May 2009 the Company filed an application in the Supreme Court pursuant to section 256 of the Act seeking an order staying the Bank's liquidation application ("the Company's stay application"). On or about 8 May 2009 the Company filed an application in the Supreme Court to set aside the statutory demand. Having regard to the terms of section 298 of the Act, that application was plainly incompetent as it was made more than 10 working days after the date of the service of the demand. Both the Bank's liquidation application and the Company's stay application were listed before Ford CJ on 12 May 2009. The Bank appeared but the Company did not. The Chief Justice then made an order appointing a liquidator. Later the same day the Company filed an application in the Supreme Court for an order setting aside the order appointing a liquidator.

[4] On 13 May 2009 the Chief Justice heard the matter and made an order dismissing the Company's stay application and stood over for further hearing (to 19 June 2009 though it has been further adjourned sine die) the Company's application to set aside the order appointing a liquidator. In considering this matter, we assume that the Chief Justice was, understandably (because the order appointing a liquidator had been made

ex parte and the Company proffered an explanation for its non-appearance), proceeding on the basis that if he had been persuaded that the Company's stay application should succeed he would have either stayed or set aside pro tem the order he had made the previous day appointing the liquidator and stayed the Bank's liquidation application at least until the Company had fully prosecuted its application for the termination of the liquidation. On that basis (and on that assumption) the Court could have later decided finally whether the Company should be put into liquidation or not in the Company's application to set aside the order appointing a liquidator.

[5] It is necessary to refer to the background from a slightly different perspective, namely events concerning the administration of the company since its incorporation. In evidence before the Chief Justice on 12 May 2009 was an affidavit of Francis Kolo who, at the time of swearing the affidavit, was a director of the Company, its Secretary and its Treasurer. Four things of significance emerge from that affidavit. The first, and most significant, is that when the Company was initially incorporated, it had as a director Mr Kitekei'aho who, on behalf of the Company, secured the original loan in 2002 from the Bank. However the evidence about how this occurred is important. In a letter dated 30 December 2002, Ms Kava (describing herself as the proprietor of the Company – she then held and presently holds 70% of the shares) wrote to the Bank indicating that Mr Kitekei'aho had been given a Power of Attorney to sign papers to secure a loan for the Company of $170,000. The loan was to assist with the purchase of Davinas Bar and Restaurant which from that time to the present, was the essence of the company's business (though the premises at which the business was conducted were, we apprehend, extensively renovated recently using, it appears, funds provided by the Bank).

[6] The second thing to be gleaned from the affidavit is that in Mr Kolo's opinion the company was solvent (at least in accounting terms) in the short term but not in the long-term taking into account the Company's liability to the Bank and its obligation to service the debt. Mr Kolo has accounting qualifications and his views and the case against the Bank was supported by a report from an Australian accountant annexed to the Company's stay application filed on 6 May 2009. In the period 1 July 2008 to 30 April 2009 the Company (apart from abnormals involving the write off of old buildings) was operating at essentially break even (its operating loss was approximately $20,000 on a turnover of over $150,000). The third thing is that of the funds borrowed from the Bank in 2008 a significant portion (approximately $850,000) was transferred overseas and not used for the Company's purposes. The fourth is that Mr Kitekei'aho was removed as a director in November 2008, and replaced by Mr Kolo. This affidavit, we were informed, was not tested at the hearing on 13 May 2009 as Mr Kolo did not make himself available for cross-examination.

[7] Section 189 of the Act deals with the question of who has authority to bind a company. If, by law, the obligations being assumed by the company have to be by deed, then section 189(1) identifies who may sign the deed. That subsection does not authorise a director alone to sign the document unless they have a power of attorney as provided by section 190. In that case the director would be a person authorised to sign by virtue of section 189(1)(a)(iv). In these proceedings we are not in a position to express a view about whether any or all the instruments signed by Mr Kitekei'aho had

to be by way of deed, though we note that in fact at least one of the recent security documents signed by Mr Kitekei'aho on behalf of the Company, was a deed. We note (as mentioned earlier) that the evidence, as it presently stands, indicates that the initial loan in 2002 was obtained in circumstances where Mr Kitekei'aho had a power of attorney. While that evidence may not be conclusive, it may sustain an inference that without a power of attorney, Mr Kitekei'aho otherwise did not have authority to sign the loan documentation (to the extent that it had to be by deed) including the mortgage documents in the subsequent dealings between the Bank and the Company.

[8] It is true that section 189 also authorises a person who has express or implied authority to assume in writing, obligations required by law to be in writing and assume either in writing or orally other obligations. However the expression "under the company's express or implied authority" in section 189(1)(b) and (c) may operate in circumstances where the person apparently acting on behalf of the company has (apart from circumstances of express authority) implied authority but not in circumstances where the person only has apparent or ostensible authority. They are conceptually different. A managing director (which appears to be the position of Mr Kitekei'aho (or a position akin to his position)) can pledge the company's credit and give security over the company's property in the course of normal trading activities but he cannot secure finance outside the ordinary course of conducting the company's day to day business: see generally Ford, Austin and Ramsay: Principles of Corporations Law, 10th edition at 13.070. At 13.120 the learned authors discuss how actual authority can be implied from acquiescence. We are not in a position to express a view about whether Mr Kitekei'aho had implied authority to enter the loan arrangements beyond those entered into in 2002. But having regard to the significant increases in the loans in the last 12 months or so and the fact that, at least on the evidence of Mr Kolo, significant amounts of the loan funds may have been misappropriated, there may be an argument that Mr Kitekei'aho had no implied authority.

[9] If that were so, it might be necessary then to consider, in relation to the Bank's entitlement to enforce the loans, the operation of section 22 of the Act. Somewhat simplified, that section prevents a company from asserting against a third party that an act was not done on behalf of the company because of matters internal to the company. However this protection for third parties is subject to an important qualification. Section 22(1) contains a proviso to the effect, possibly relevant to the present case, that the protection otherwise afforded by the section is lost if the third party knew or ought to have known because of the relationship to the company, knowledge of the relevant matter internal to the company. It is unnecessary, in this matter, to consider in detail the scope and operation of this section. It is sufficient to note that if it might otherwise operate to the benefit of the Bank in the present proceedings, then a real issue may arise about whether the proviso operates to prevent reliance by the Bank on the signature of Mr Kitekei'aho because of the letter of 30 December 2002 to the Bank referred to earlier (at [5] above) and the inference that might be drawn from it.

[10] These matters appear not to have been given detailed consideration by the Chief Justice when dismissing the Company's stay application. His Honour was able to draw upon knowledge gained from other proceedings to conclude (in reasons

published on 8 June 2009) that Mr Kitekei'aho was the eyes and ears of the Company and effectively was the Company in Tonga. While this may well be true, reliance on experience from another proceeding may not have been appropriate but, more importantly, may have distracted attention from some of these legal issues sought to be raised by the Company. Indeed there were other legal issues concerning the internal management of the Company (referable to section 128) possibly relevant to the question of whether the Company was liable to the Bank for the full amount claimed. It may also well be true, as his Honour observed, that the Company was hopelessly insolvent though that conclusion may have involved an assumption (which may prove to be correct but it may not) that the Company was liable to the Bank for the full amount claimed. However if it is not, then the question of solvency is likely to take on an entirely different complexion. Because of the opening words of section 296 of the Act it appears to be open to an allegedly insolvent company in an application to have a liquidator appointed, to prove that it is able to pay its debts and challenge contestable debts notwithstanding its failure to comply with a statutory demand. Again, this is a matter about which we do not have to express a concluded view.

[11] It is unnecessary to express a concluded view about the issue discussed in the preceding paragraph and other legal issues discussed earlier because ultimately the refusal of the stay order was a matter of practice and procedure involving the exercise of a discretion. Appeal courts have traditionally been very reluctant to grant leave to appeal against discretionary interlocutory rulings or judgements which concern matters of practice and procedure : see, for example, *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; (1981) 148 CLR 170 at 177. In the present case, the Company has an application to set aside the order appointing the liquidator which has not yet been heard and determined. We assume it will be heard shortly and indeed it is highly desirable that this be so. The issues we have touched upon can be ventilated fully in the hearing of that application. However we do not think this is a case warranting the grant of leave given that the dismissal of the Company's stay application was a discretionary interlocutory judgment concerning a matter of practice and procedure. Accordingly leave is refused.

The costs of the application for leave should be costs in the application to set aside the appointment of the liquidator.

Hoar anor v Du Bois anor

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 23/2009

6 July 2009; 10 July 2009

Practice and procedure – application for leave to appeal – against orders setting aside default judgment – judgment should not have been granted – application refused

The proceedings related to a resort known as the Royal Sunset Island Resort situated on a small island close to Tongatapu. The resort was held under a lease to the second appellant (PIR). In 2006, the then shareholders of PIR agreed to sell their shares to a company controlled by the 1st appellant (Mr Hoar) called Banjo Becc Pty Ltd. Final settlement was not effected until June 2007 although Mr Hoar's group ran it from October 2006. Because of a dispute between vendors and purchasers the second respondent (IPR) was formed to enable a bank trading account to be operated. The shareholders in IPR were Mr Hoar, the 1st respondents and other investors. Mr Hoar acknowledged that his purchase of the resort was on behalf of a group of investors including the 1st respondents. In November 2007, Mr Hoar issued proceedings CV 1034/07 in the Supreme Court. The defendants in those proceedings were PIR, the respondents in this appeal and the ANZ Bank. At this stage Caroline du Bois was the manager of the resort. The Statement of Claim pleaded difficulties that had arisen between Mr Hoar and Mrs du Bois and sought a declaration that Mr Hoar was the majority shareholder in, and was entitled to be appointed as, a director of PIR. The proceedings also sought an order seeking the release of information and damages. Ultimately the Supreme Court referred these proceedings to mediation. The mediation resulted in an agreement signed by all the interested parties. The ANZ Bank, although a party to the proceedings, decided it had no interest to protect and took no part in the mediation proceedings. For that reason it did not sign the agreement. Clause 10.1 of the agreement provided for the discontinuance of CV 1034/07. Pursuant to that agreement the proceedings were struck out by Ford CJ on 17 April 2008. The next event was the commencement of proceedings under CV 159/08 by Mrs Du Bois and IPR against Mr Hoar and PIR alleging breaches of the agreement and seeking compliance and restraining orders. The defendants filed a statement of defence and counterclaim which was intituled only "Statement of Defence". Counsel for the Plaintiff in that proceeding did not file a defence to the counterclaim within the prescribed and an extended time and claimed pressure of work and the inadequate

intituling as reasons for not doing so. The counterclaim alleged breaches of the mediation agreement by the plaintiffs (ie. Mrs Du Bois and IPR) and sought an order that the mediation agreement was null and void for breach, and the relief sought in CV 1034/2007. Counsel for the plaintiffs obtained an extension of time for filing a Statement of Defence to the 23rd March 2009. On the 17th April no defence still having been filed, Shuster J entered judgment for the defendants on the Counterclaim in terms of the prayer for relief. On the 29th May after considering an application made by the Plaintiffs with an affidavit in support from counsel and a draft Statement of Defence, Shuster J set aside the default judgment and ordered a Statement of Defence to the Counterclaim to be filed within 2 days. It was against that order that this appeal was lodged. The appellants applied for leave to appeal against orders made by the Supreme Court setting aside a default judgment.

Held:

1. The judgment by default should never have been entered in the first place. It sought remedies which were not able to be given. The Counterclaim pleaded that obligations set out in the mediation agreement had not been complied with. On this basis it sought that the agreement be declared null and void. Such a remedy was not available for breaches of the agreement. A contract can only be declared void for specific reasons such as illegality and may be voidable for reasons of duress, misrepresentation, minority etc. None of the grounds for declaring a contract void were pleaded. Additionally it was pleaded that because the agreement was void, CV 1034/2008 remained operative, and the relief sought by those proceedings was claimed. However these proceedings were struck out and could not be brought to life again in the manner pleaded.
2. Leave to appeal was refused. The Respondents were entitled to costs. The mediation agreement remained in force and CV159/08 should be disposed of by hearing or otherwise. There was no need for a further mediation.

Cases considered:

Evans v Bartlam [1937] AC 473, [1937] 2 All ER 646

Fonua v TCC Ltd AC 11 A/2004

Counsel for the appellant : Mr Garrett

Counsel for the respondent : Mr Tu'utafaiva

Judgment

[1] This is an application for leave to appeal against orders made by Shuster J on 29/5/08. His Honour made the following orders:

> *"1. The Judgment in default dated 17 April 2009 is set aside, along with any other prior Court Orders in respect of this file.*
> *2. Leave is granted extending time for the Plaintiffs to file and serve a statement of defence to the Defendants' counterclaim within 2 days from the date of this Order.*

3. *Costs of the application and this Order shall be in the course. (sic)*
4. *A mediation hearing is fixed for 10th June 2009 at 09:30am before the A/Registrar and the Australian Mediator."*

The appellant seeks the following orders:

"1. The Orders made by Mr. Justice Shuster on 29 May 2009 be quashed;
2. *The Resort known as Royal Sunset Island Resort situated on Atata Island with all its assets; chattels, buildings, boats, outboards and anything belonging to the said resort wherever they may be, (the Resort) be declared the property of the Second Appellant;*
3. *The First Appellant on behalf of the Group of Investors he represents have full authority, control and ownership of the Second Appellant as the sole director and shareholder thereof, and that he be granted the right to take possession and occupy the Resort and declare any person attempting to enter the Resort a trespasser.*
4. *The Commander of the Tonga Police shall assign such officers and other resources as he deems necessary to prevent any breach of the peace that may be occasioned as a result of the Appellants enforcing these Orders, and remove such persons from the Resort that the first Appellant identifies as trespassers.*
5. *Costs of the Defendants in the matters of CV1034/07, CV159/08 from inception to date of both matters and costs of this Appeal are awarded to the appellants."*

Background

[2] These proceedings relate to a resort known as the Royal Sunset Island Resort situated on a small island close to Tongatapu. The resort is held under a lease to the second appellant (PIR). In 2006, the then shareholders of PIR agreed to sell their shares to a company controlled by the 1st appellant (Mr Hoar) called Banjo Becc Pty Ltd. Final settlement was not effected until June 2007 although Mr Hoar's group ran it from October 2006.

[3] Because of a dispute between vendors and purchasers the second respondent (IPR) was formed to enable a bank trading account to be operated. The shareholders in IPR were Mr Hoar, the 1st respondents and other investors. Mr Hoar has always acknowledged that his purchase of the resort was on behalf of a group of investors including the 1st respondents.

[4] In November 2007, Mr Hoar issued proceedings CV 1037/07 in the Supreme Court. The defendants in those proceedings were PIR, the respondents in this appeal and the ANZ Bank. At this stage Caroline du Bois was the manager of the resort. The Statement of Claim pleaded difficulties that had arisen between Mr Hoar and Mrs du

Bois and sought a declaration that Mr Hoar was the majority shareholder in, and was entitled to be appointed as, a director of PIR. The proceedings also sought an order seeking the release of information and damages.

[5] Ultimately the Supreme Court referred these proceedings to mediation. The mediation resulted in an agreement signed by all the interested parties. The ANZ Bank although a party to the proceedings decided it had no interest to protect and took no part in the mediation proceedings. For that reason it did not sign the agreement. Clause 10.1 of the agreement provided for the discontinuance of CV 1034/07. Pursuant to that agreement the proceedings were struck out by Ford CJ on 17 April 2008.

[6] The next event was the commencement of proceedings under CV 159/08 by Mrs Du Bois and IPR against Mr Hoar and PIR alleging breaches of the agreement and seeking compliance and restraining orders. The defendants filed a statement of defence and counterclaim which was intituled only "Statement of Defence". Counsel for the Plaintiff in that proceeding did not file a defence to the counterclaim within the prescribed and an extended time and claimed pressure of work and the inadequate intituling as reasons for not doing so. The counterclaim alleged breaches of the mediation agreement by the plaintiffs (ie. Mrs Du Bois and IPR) and sought an order that the mediation agreement was null and void for breach, and the relief sought in CV 1034/2007. Counsel for the plaintiffs obtained an extension of time for filing a Statement of Defence to the 23rd March 2009. On the 17th April no defence still having been filed, Shuster J entered judgment for the defendants on the Counterclaim in terms of the prayer for relief. On the 29th May after considering an application made by the Plaintiffs with an affidavit in support from counsel and a draft Statement of Defence, Shuster J set aside the default judgment and ordered a Statement of Defence to the Counterclaim to be filed within 2 days. It is against that order that this appeal was lodged.

[7] To complete the narrative the Statement of Defence was filed within the time allowed. It pleads that the mediation agreement is lawful and binding, that it could not be declared null and void as a result of failure to comply with obligations under it, and that there were other parties to the action who had not been joined in the proceedings. It also noted the discontinuance and striking out of CV 1034/07 by the Chief Justice.

The Arguments in this Court

[8] Mr Garrett for the Appellants argued that there were no legal grounds for setting aside the default judgment. He submitted that any justifiable reason for setting aside the judgment expired on the 23rd March at the expiration of the extension of time. However this ignores Order 14 Rule 4 which enables an application to be made setting aside a judgment by default which is what happened. Mr Garrett further submits that the requirements of that Rule as to when an order setting aside may be made have not been met. Those requirements are:

> *"(a) there was good reason for the failure to file a defence in time;*
> *(b) there is an arguable defence; and*

(c) the plaintiff will not suffer irreparable injury if the judgment is set aside."

[9] Mr Garrett referred to a number of decisions to support his contention that an affidavit as to the merits of the defence was necessary and none had been filed in this case.

[10] Mr Garrett also submitted that urgent orders should be made by this Court giving Mr Hoar control over the resort. This Court is not in a position to make such orders. We do not have the information before us that would enable us to rule on the opposing contentions of the parties.

[11] For the respondents Mr Tu'utafaiva noted that a draft statement of defence was filed with the application to set aside the default judgment which set out the grounds of defence. We accept that this was so and that those grounds are not such as to need to be established by affidavit.

Consideration

[12] The cases referred to by Mr Garrett far from supporting his case tend rather to support that of the respondent. They are illustrations of the principle enunciated by Lord Atkin in *Evans v Bartlam* [1937] AC 473, [1937] 2 All ER 646 that if an applicant can show merits to which the Court should pay heed, the Court would not want to uphold a judgment on which there had been no proper adjudication such as a default judgment. The important issue is to prevent an injustice being done. In this case Mr Tu'utafaiva accepted total responsibility for the failure to file a Statement of Defence and as this Court said in *Fonua v TCC Ltd* AC 11 A/2004 at p.7 ". . . the failure of a legal adviser to take proper steps can be regarded as establishing sufficient cause to extend time...". In this case we consider that Order 14 Rule 4 has been complied with. Mr Tu'utafaiva's acknowledgment provides a reason for the failure to file the Statement of Defence. That statement sets out an arguable defence and we are satisfied that the respondents will not suffer irreparable injury within the meaning of the rule if the judgment is set aside.

[13] But there are other compelling reasons why this appeal must fail. The judgment by default should never have been entered in the first place. It sought remedies which were not able to be given. The Counterclaim pleaded that obligations set out in the mediation agreement had not been complied with. On this basis it sought that the agreement be declared null and void. Such a remedy is not available for breaches of the agreement. A contract can only be declared void for specific reasons such as illegality (see Chitty on Contracts 29th Ed Vol 1 para 1-070) and may be voidable for reasons of duress, misrepresentation, minority etc. (Chitty para 1-072) None of the grounds for declaring a contract void have been pleaded in this case. Additionally it is pleaded that because the agreement is void CV 1034/2008 remains operative, and the relief sought by those proceedings is claimed. However as earlier mentioned these proceedings were struck out by Ford CJ. They cannot be brought to life again in the manner pleaded.

210 **Conclusion**

[14] Leave to appeal is refused. The Respondents are entitled to costs. The mediation agreement remains in force and CV159/08 should be disposed of by hearing or otherwise. There is no need for a further mediation as proposed by Shuster J in his order of 29th May.

Pouvalu v R

Court of Appeal, Nuku'alofa
Ford P, Burchett and Moore JJ
AC 04/2009

6 July 2009; 10 July 2009

Criminal law – appeal against sentence – originally no enquiry as to means of appellant – appeal allowed and compensation reduced

On 29 July 2008 the appellant was found guilty on one count of fraudulent conversion of property and one count of interference with the course of justice. The case related to the unlawful conversion of a motor vehicle. The appellant was sentenced on 16 December 2008. The sentencing order stated that the accused was to pay 1,000 pa'anga into court as compensation within seven days then a further 3,000 pa'anga by 27 July 2009. The appellant appealed against sentence only. He paid the initial $1000 but he claimed that the total compensation award of $4000 was excessive and had no foundation at law.

Held:

1. Any order for compensation must be related to the injury or loss suffered by the victim of the crime. The criminal courts were not to be used as a venue for the resolution of what were, in essence, civil disputes, and victims were not entitled to windfall payments in the guise of compensation orders. The aim of compensation orders was to compensate for actual loss, not to punish the offender - the objective of punishment was to be met by imprisonment, fines and the like.
2. The other aspect of a compensation order was the requirement for the sentencing judge to make appropriate inquiries as to the means of the offender. It was important that a sentencing judge keep in mind the real value of money in the Kingdom and the reality that the majority of offenders appearing before the court have no significant assets and meagre means of support. Compensation orders, therefore, should be made only in those rare cases when the judge was satisfied that the offender had the means to meet the same.
3. The compensation order in the present case was not based on recognised sound legal principles. The appeal was allowed. The sentence passed at trial was quashed and in substitution therefore the compensation order was reduced to the $1000 already paid by the appellant.

Case considered:
R v Oddy [1974] 2 All ER 666

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the appellant : Mr Fifita
Counsel for the respondent : Mr Kefu

Judgment

Introduction

[1] On 29 July 2008, after a judge alone trial, Schuster J. found the appellant guilty on one count of fraudulent conversion of property and one count of interference with the course of justice. The case related to the unlawful conversion of a motor vehicle. The appellant was sentenced on 16 December 2008. The sentencing order stated:

> *"1. The accused is to pay 1,000 pa'anga into court as compensation within seven days from today, then a further 3,000 pa'anga by 27 July 2009.*
> *2. The accused is to bound over to come up for judgment on 27 July 2009 in the sum of 1,000 pa'anga. If he does not pay the full amount of 4,000 pa'anga by 27 July, 2009."*

[2] The appellant has appealed against sentence only. He managed to pay the initial $1000 but he claims that the total compensation award of $4000 was excessive and had no foundation at law.

The Facts

[3] The appellant is an engineer by trade and carries out vehicle repairs from his residence. The motor vehicle in question was a van belonging to Kimipu 'Inoke. The primary judge cited in full the following voluntary statement which the appellant made to the police:

> *"I state, in the month of August or September 2006 the van of Kimpu 'Inoke of Tofoa was given to me to repair. Before the van was given to me it was with Uate Vea whom is a fellow engineer. I talked with Kimpu and said I could repair the van. The van of Kimpu was towed to my residence. After two days Kimpu arrived and said he wanted the engine to be replaced. I told him to go and get a battery to start the van, he went and got a battery. It turns out it had no starter and Kimpu knew this. We then did his wishes and went and got $500 the value of the engine it was bought from Patangata from Kotini. I replaced that engine into the van but still had other parts to complete because the parts of the engine that were bought was only the head and bolt. That's why it was cheap. Up to*

this day I have not taken it to Kimpu. Right now it's with Mone from Ha'amoko. I took it to him. Kimpu did not know about this because he came and we talked. I told him there is an auction of the Red Cross they have a red van like his. We went and saw the van and he told me I can have his whilst I gave him this one. Then the individual Mone came and his van was almost the same as Kimpu's so I told him to go with Kimpu's van whilst he brings his in replacement. I'll bring the van of the Red Cross for Kimpu. One went with Kimpu's van and towed his van to my place. After three weeks Kimpu came and asked me about his van. I told him everything and we went and saw the van. Kimpu then returned with his wife Kataline and they asked where the van is? We went to Mone and we talked and came to the agreement that Mone will finish repairing it, we all agreed to this. I told Kimpu not to pay me but give the money to Mone. Hence I wish to go and give Kimpu his van because I don't want to go to court with him because his wife is my 'eiki maama (high-ranking).

[4] We were told from the Bar that the appellant had paid $500 for the replacement engine but Kimpu had reimbursed him for that amount. The appellant claims that he has never been paid for his costs and expenses in obtaining and installing the replacement engine. Subsequently, the appellant exchanged the vehicle with Mone for another vehicle. Once Kimpu became aware of the exchange he approached Mone and Mone offered him $500 for his (Kimpu's) vehicle which Kimpu accepted The van was sold to Mone and Mone paid Kimpu $500 for the purchase of the van. Counsel were in agreement on these matters.

Discussion

[5] The thrust of the appellant's submissions before us was that the trial judge erred in law in making a compensation order for $4000 when that figure bore no relationship to any figures given in evidence or otherwise mentioned in the course of the trial. He also contends that the judge should have made some inquiries about the appellant's means before making a compensation order.

[6] A compensation order is provided for in section 25 of the Criminal Offences Act (Cap 18). The relevant provisions are as follows:

"25. (1) Any person who is tried and convicted in the Supreme Court of an offence may be adjudged by the Court to make compensation to any person injured or suffering loss by his offence.

(2) . . . . .

(3) Any such compensation may be either in addition to or in substitution for any other punishment and in default of payment thereof the convicted person is liable to imprisonment for any period not exceeding 12 months."

[7] Counsel for the respondent conceded that the only evidence in the case touching upon the valuation of the van in question came in the form of a question from the police interviewing officer at the end of his interview with the appellant. The question was:

> *"42. Kimpu's van is a minibus van grey coloured with the licensed plate L5393 when it was given to you its value was between $2000 -- $3000. When you gave it to Mone did you replace anything?*
>
> *A) No, I did not replace anything other than installing a new engine."*

[8] Prior to the hearing we sought affidavit evidence from the appellant as to his means. In his affidavit filed on 11 June 2009 the appellant said that he and his wife have four children including a foster child. He explained that with the downturn in the economy he is struggling to maintain his family and pay a loan which they have with the Tongan Development Bank. He now earns an average of $200 a week and his wife who is also employed earns $400 per fortnight.

[9] It is clear from the wording of section 25 that any order for compensation must be related to the injury or loss suffered by the victim of the crime. The sentencing judge cannot simply just "pluck a figure out of the air" as the appellant claims he did in the present case. The figures mentioned by the police officer of $2000 - $3000 were not responded to by the appellant presumably because they were not presented to him in the form of a question but they can hardly be described as reliable evidence of the value of the vehicle. The evidence is silent as to why it was that Kimpu accepted a figure of only $500 for the van from Mone. If the complainant was willing to accept $500, this strongly suggests that the market value (and thus the sum recoverable in a civil claim) for the vehicle was in the area of $500 (or at least should have put the judge on notice that this might be the case).

[10] Even if reliance could be placed on the police officer's figures, the $500 Kimpu received from Mone and the $1000 compensation he received from the appellant coupled with the fact that Kimpu had never paid the appellant for acquiring and installing the new motor all adds up to an amount close to the bottom range figure mentioned by the police officer.

[11] The criminal courts are not to be used as a venue for the resolution of what are, in essence, civil disputes, and victims are not entitled to windfall payments in the guise of compensation orders. The aim of compensation orders is to compensate for actual loss, not to punish the offender - the objective of punishment is to be met by imprisonment, fines and the like.

[12] The current English position in relation to compensation orders is summarised in the latest edition of Archbold Criminal Pleading Evidence & Practice (2009 Ed):

> *"Determination of Amount of Loss*
> 5-418
> *In* R. v. Vivian, *68 Cr.App.R.53, the Court of Appeal stated that "no order for compensation should be made unless the sum claimed by way of*

> *compensation is either agreed or proved." . . . In* R. v. Horsham JJ., ex p. Richards, *82 CrApp 254, DC, Neill L.J. said that the court had no jurisdiction to make a compensation order without receiving any evidence where there were real issues raised as to whether the claimants had suffered any, and if so what, loss. . . Where there were plain issues as to liability, it was for the prosecution to place evidence before the court. Plainly, any award should not exceed the sum that would be awarded by a court in a civil proceedings:* R v Flinton *[2008] 1 Cr App R (S) 96, CA. The principle that a compensation order should not be made unless the fact that a loss has been incurred, and the extent of the loss, are either proved or admitted, was applied in* R v Watson, *12 Cr App R (S) 508, CA; and* R v Clelland, *ibid., at 697, CA."*
>
> 5-419
> *"Although it is open to the court to hear evidence in order to determine questions as to the fact or the amount of loss, the Court of Appeal has discouraged criminal courts from embarking on complicated investigations: see* R v Kneeshaw, *58 Cr App R 439"*

[13] The other aspect of a compensation order is the requirement for the sentencing judge to make appropriate inquiries as to the means of the offender. In *R v Oddy* [1974] 2 All ER 666, 670, Lawton LJ delivering the judgment of the English Court of Appeal, Criminal Division, said:

> *"The means of the accused are relevant for a number of reasons. The courts have got to be realistic. It is no good courts making compensation orders which could never be discharged by an accused person, and equally it is no good making compensation orders which, to use counsel's phrase, are likely to be counter-productive in the sense that they may result in the accused committing further offences to discharge an order."*

[14] That principle is reaffirmed in the latest edition of Archibald, 5-423:

> *"A compensation order should not be made unless it is "realistic" in the sense that the court is satisfied that the offender either has the means available, or will have the means to pay the compensation within a reasonable time. . . . Compensation orders have frequently been set aside for lack of sufficient inquiry as to means: see* R v Phillips, *10 Cr App R (S) 419, CA, in which it was said that problems could be avoided if the sentencing judge indicated a provisional amount by way of compensation: he was then fully entitled to turn to defence counsel to ask him to provide information about the means of the defendant. If the defendant was obdurate and insisted on keeping silent, that might in some cases afford a basis for the court to draw inferences as to his financial position. Where there is material before the court*

> *which suggests that the offender is in possession of substantial resources, a compensation order may properly be made even though no precise evidence of the offender's means is available to the court: see* R v Bolden, *9 Cr App R (S) 83, CA, and* R v Owen, *12 Cr.App.R(S.) 561, CA."*

[15] Although these principles were stated in terms of the English legislation relating to compensation orders, we think that they are sound and are equally applicable to the law in Tonga. It is important, however, that a sentencing judge should keep in mind the real value of money in the Kingdom and the reality which is that the majority of offenders appearing before the court have no significant assets and meagre means of support. Compensation orders, therefore, should be made only in those rare cases when the judge is satisfied that the offender has the means to meet the same.

Conclusion

[16] For the reasons stated, we agree with the appellant that the compensation order in the present case was not based on recognised sound legal principles. The appeal is allowed. The sentence passed at trial is quashed and in substitution therefore the compensation order is reduced to the $1000 already paid by the appellant.

Kami v R

Court of Appeal, Nuku'alofa
Ford P, Burchett and Salmon JJ
AC 19/2009

7 July 2009; 10 July 2009

Criminal appeal – misdirection of jury – obtaining goods by false pretences – miscarriage of justice – conviction quashed

In November 2006 the appellant obtained goods from an employee of TCF Store and told him that he intended to run a restaurant and would repay him fortnightly. The goods were 149 cartons of mutton and 107 cartons of chicken. The appellant did not make any payments and did not deny that he owed the money. He was charged with a criminal offence of obtaining goods by false pretences and, in January 2009, was convicted on one count of obtaining goods by false pretences contrary to the Criminal Offences Act (Cap 18). On 15 April 2009 he was sentenced to 3 years imprisonment with the last 6 months suspended (indefinitely). He was also ordered to repay $24,929.17 within 12 months by way of compensation or serve another 12 months in addition to the 2 1/2 year sentence. He appealed against both his conviction and sentence. The principal ground of appeal was that the trial judge misdirected the jury on the law applicable to obtaining by false pretences in that he had failed to put to the jury the defence which was that the complainant and the appellant had been in a business relationship of wholesaler and retailer "over a long period of time where credit was allowed." The appellant also claimed that the judge erred in law in admitting "hearsay evidence" given by Police Officer Vi; in failing to allow appellant's counsel the opportunity to make submissions in support of his no case application at the end of the Crown case and in questioning the appellant in the presence of the jury about his decision not to give evidence.

Held:

1. What the appellant said in his Voluntary Statement could not be described as cogent and satisfactory evidence of an admission that he obtained the goods by means of a false pretence. He did not admit to making a false representation to the complainant. But the proposition the judge put to the jury in his summing up was that all the jury had to conclude in order to justify a conviction was that what the appellant had said in his Voluntary Statement was "reliable and true". The judge's direction to the jury was a

misdirection because it misrepresented what the appellant had actually said in his Voluntary Statement.

2. The Court reached the conclusion that the appeal must succeed on all grounds. The jury's verdict was unsafe and was set aside.
3. The Court considered whether it should direct a verdict of acquittal to be entered or order a new trial. If the Court were to order a new trial, it was difficult to see how the prosecution could present a stronger case. It would still be bound by the very significant admission the complainant made in his examination in chief that the information he had been given by the appellant in relation to his restaurant operation was true. Against such an admission, any prosecution that sought to establish that the appellant had made a false representation in what he told the complainant about the running of his restaurant would be doomed to fail.
4. A substantial miscarriage of justice had occurred. The appellant's conviction was quashed and a verdict of acquittal was entered accordingly.

Cases considered:

R v Davison [1972] 3 All ER 1121
R v Fa'aoso [1996] TOSC 3; [1996] Tonga LR 36
R v Mutch [1973] 1 All ER 178
Waugh v R [1950] AC 203

Statutes considered:

Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)
Supreme Court Act (Cap 10)

Counsel for the appellant : Mr Edwards and Mr Paasi
Counsel for the respondent : Ms Mafi and Ms Finau

Judgment

Introduction

[1] After a three-day jury trial in January 2009, the appellant was convicted on one count of obtaining goods by false pretences contrary to section 164 of the Criminal Offences Act (Cap 18). On 15 April 2009 he was sentenced by Shuster J. to 3 years imprisonment with the last 6 months suspended (indefinitely). He was also ordered to repay $24,929.17 within 12 months by way of compensation or serve another 12 months in addition to the 2 1/2 year sentence. He has appealed against both his conviction and sentence.

[2] The particulars in the indictment alleged:

> *"In November 2006 at Ma'ufanga you obtained for yourself goods by false pretence from TCF Store when you obtained from Maka Taulango, an employee of TCF, the following goods, telling him that you intended to run a restaurant and*

that you would repay him fortnightly, - 149 cartons of mutton -- valued at $18,476.17 - 107 cartons of chicken - valued at $6,453.00."

[3] The appellant does not deny that he obtained the goods in question and that he has still not paid for them. He claims that the reason he was unable to pay for the goods was because of the riots that occurred in Nuku'alofa on 16 November 2006. He acknowledges that he still owes the money and that he would be liable for the debt in a civil court. He denies, however, that he committed any criminal act. In particular, he denies the allegation in the indictment that he had obtained the goods from the complainant, Maka, by falsely representing that he intended to run a restaurant. The defence case was that the appellant had acquired the goods pursuant to a credit purchase arrangement he had entered into with Maka which they had been operating under for some time.

The facts

[4] Maka worked as a delivery truck driver for the TCF Store. He said in evidence that between 3 - 9 November 2006 the appellant "took goods". He elaborated by saying that on 3 November 2006 he took a total of 149 cartons of mutton and 95 cartons of chicken. The indictment talks about "107 cartons of chicken". It is not clear from the transcript when the remaining 12 cartons were taken by the appellant but presumably it was on or prior to 9 November 2006. Maka said that the total value of the goods supplied came to $24,929.17. At the beginning of his evidence Maka said that the goods were "taken from his delivery truck" but later he said that they were "taken mainly from the TCF warehouse." In his examination in chief, the witness was asked by the prosecutor: "What was the main reason you gave these goods to Saia (the appellant) on credit?" Maka answered: "It was like this, we made (sic) arrangement with Saia and expected him to pay back within two weeks, for this was not the first time I have done this with Saia."

[5] The transcript of evidence then records the following exchange between Crown counsel and the witness:

"Pros: What was Saia's intentions to these goods?

1st Wit: The information he gave me was he was opening a restaurant with a shop they had at the airport with one Sione Faupula. There was also another restaurant operated in 'Eua. That was the information Saia gave me.

Pros: Was the information given true?

*1st Wit: **'Yes'.***

Pros: Maka you mentioned earlier that you had worked previously with Saia on credit transactions.

1st Wit: Yes.

Pros: How long were you having working relations with Saia before this incident?

1st Wit: More than six months.

Pros: And what was the value of the goods taken previously prior to this incident?

1st Wit: It had exceeded $10,000.

Pros: And was he able to pay for those goods?

1st Wit: Yes."
[emphasis added]

[6] Maka explained that he had not been permitted by TCF to "carry out this purchase credit" transaction with the appellant and he had been dismissed by TCF when the goods were not paid for. It was Maka who made the complaint to the police, without the knowledge of TCF, and so throughout this judgment he shall be referred to either by his name or as "the complainant".

[7] Maka was more than a delivery driver. In cross-examination he explained that his job was to sell TCF goods and the profit would go to the company. His salary would depend upon the profit made. He agreed that over the 6 months prior to this particular transaction the appellant had been buying goods on credit from him and they had all been paid for. He said that he had trusted the appellant because he had previously worked with him and he had paid off his debts. He also agreed that the explanation the appellant had given for not being able to pay off the goods on the occasion in question was that the riots in Nuku'alofa on 16 November 2006 had resulted in the destruction and damage of many buildings and businesses. The witness acknowledged in evidence that he was aware the appellant had been operating a restaurant at Fua'amotu Airport at the time. In re-examination Maka also acknowledged that the appellant's father and grandfather had had "working relations" with TCF in the past.

The police evidence

[8] The prosecution called no other witness to speak about the business relationship between Maka and the appellant but evidence was given by Detective Sergeant Vi of the Nuku'alofa Police Station who was the police investigating officer. He produced the "Record of Interview" which recorded the statement taken by the police from the appellant, the "Written Statement of Charges" form and a "Voluntary Statement".

[9] In his record of interview dated 2 February 2007 (Exhibit 3), the 26 year old appellant explained that he was a reporter for a newspaper and he also looked after a family restaurant and shop business situated at Fua'amotu Airport. He said that he held a diploma in business management. The restaurant was registered under the appellant's father's name but he (the appellant) had looked after it in 2006 because the father was in Australia. The appellant said that he had used the same method of obtaining TCF goods on credit "for many years" and this was the first time that he had not been able to pay the debt on time. He explained that the arrangement he had with Maka was that he would be given the goods on credit and he would pay for them on the Thursday of the second week after delivery. The appellant said in his statement that as the first delivery had been on 3 November, "payment should have been made

on Thursday 16 November but because of the events of the day I ceased making the payments."

[10] The officer also asked the appellant whether it was because of the plans he had talked to Maka about in relation to his restaurant business that Maka had entrusted the goods to him. The appellant answered, "No, I had worked with Maka for a long time and he and the company trusted me, regardless of what the goods would amount to and it had gotten to that situation before and the amount was paid off." He then went on to explain how some of the TCF mutton and chicken deliveries were for his restaurant and some had been sold "to various businesses that had asked me for these goods and they would pay me later." After the events of the 16/11 he had only been able to pay off $500 of the debt.

[11] In the Written Statement of Charges form (Exhibit 4), in answer to the charge of obtaining goods under false pretences, the appellant had written: "Yes, the above statement is true and it all arises from my problem of not paying off my debt." In the Voluntary Statement (Exhibit 5) the appellant had written:

> *"Yes, all the statements about the goods I took are correct. The problem arose out of my not making payments on time. But the arrangement I had with Maka, I did not anticipate any problems in my making my payment. It is my wish that Maka's job is reinstated and that I pay off all my debt."*

Grounds of appeal

[12] The principal ground of appeal is that the trial judge misdirected the jury on the law applicable to obtaining by false pretences in that he had failed to put to the jury the defence which was that the complainant and the appellant had been in a business relationship of wholesaler and retailer "over a long period of time where credit was allowed."

[13] The appellant also claims that the judge erred in law in admitting "hearsay evidence" given by Police Officer Vi; in failing to allow appellant's counsel the opportunity to make submissions in support of his no case application at the end of the Crown case and in questioning the appellant in the presence of the jury about his decision not to give evidence.

Principal ground of appeal

[14] The appellant alleges that the trial Judge misdirected the jury on the law applicable to obtaining by false pretences. A "false pretence" is not defined in the Criminal Offences Act but it is a representation, either by words or otherwise, which is false. The appellant was charged under section 164 of the Criminal Offences Act which relates to obtaining money, valuable security or other thing by false pretence. That is to be distinguished from section 166 which creates the offence of incurring any debt or liability or obtaining credit by means of false pretence or fraud.

[15] The appellant did not give or call evidence but, as noted, the essence of his defence was that the transaction in question was not a crime but simply part of an

ongoing business relationship between himself and the complainant whereby he had been able to obtain goods on credit. In the past he had always been able to pay for the goods on time but, on this occasion, because of the 16/11 riots, he had not been able to pay. The appellant submitted that nowhere in his summing up did the trial judge put this defence to the jury.

[16] There appeared to be ample evidence to support the defence the appellant sought to rely upon and, in this regard, we refer to the evidence of the complainant in [4] and [5] above. Before us, counsel for the appellant submitted that the passage we have cited in [5] "goes to the heart of the case" because there Maka confirmed that the information the appellant had given him was true whereas in order to make out a charge of false pretences, the prosecution had to establish that the representation made by the appellant to Maka was false.

[17] There are only two occasions in the summing up where the judge made reference to the defence case. In the first, he said:

> *"The defendant's case. The defendant elected to remain silent and of course is (sic) his legal right. By his counsel's closing submissions had (sic) stated that he was not fraudulent. However contained in the evidence before you is firstly his record of interview, his reply to charge and his confession statement. He said he made a business transaction with PW1 but the events of 16/11 interceded and he was unable to pay back his debt. He said he wanted to do so. And in his confession he felt sorry for the victim PW1. However, defence counsel told you that PW1 deserve (sic) to lose his job. Now members of the jury it is a matter for you to who (sic) you believe."*

[18] In another passage, the judge said:

> *"On the other hand, the defence ask you to give the defendant the benefit of the doubt and to acquit him. Now court (sic) is not entitled to speculate but it may draw inferences. I have addressed you on the law and on certain aspects of the evidence. Further this has been a very short trial with few issues. Members of the jury there may be evidence in which a court may say when taken together will lead you to the sure conclusion it was a defendant who committed the crime. But the defendant maintained his silence and that cannot be subject of any criticism because that is the defendant's legal right. Contrary to what defence counsel told you in his closing submissions, my duty to remind you that the law says that it is immaterial that the accused personally intended to repay the money and he bona fide and reasonably believed that he would be able to repay it."*

[19] Nowhere in the summing up is any reference made to the previous credit purchase dealings between the appellant and the complainant which preceded the

November 2006 transaction. The requirement in section 13(3) of the Supreme Court Act (Cap 10) for the judge to sum up the evidence and explain to the jury the law that bears upon the case requires a fair summation of the case presented by both sides. The charge in the indictment was that the appellant obtained the goods by falsely representing to Maka that he "intended to run a restaurant" and that he would repay him fortnightly. The defence was that he obtained the goods not by making any representation to Maka about his restaurant business but simply on credit because that had been the business arrangement they have been operating under for more than six months.

[20] There is a particular passage in the summing up which, if correctly transcribed, is confusing and is likely to have misled the jury. The judge referred to the appellant's written statements to the police and, in relation to the Voluntary Statement (Exhibit 5) which he incorrectly described as a "confession". He said this:

> *"If for whatever reason you are not sure whether the confession was made or not sure whether it was true then you must disregard it. If on the other hand you are sure both (sic) was true then you may rely upon it even if it was or may have been made by oppression or by improper circumstances. In this particular case the evidence reveals that the defendant wrote in his own handwriting all the answers to the police questions which totalled 28 questions in all. And he handed over his reply to the charges as he did in his confession. In a Tongan case it was held a confession alone can be sufficient to justify conviction where the jury is satisfied that the confession is reliable and true."*

[21] Not only does that statement offend against section 21 of the Evidence Act (Cap 15) which provides that a confession is not admissible in evidence unless it is given voluntarily, but it presupposes that the Voluntary Statement in question (see [11]) above was, in fact, a "confession" i.e. a confession to the commission of the crime of obtaining by false pretences under section 164 of the Criminal Offences Act. On the face of it, however, all the appellant had admitted to was that he took the goods in question and that he had not anticipated any problems in making payment for them in terms of the arrangement he had with Maka, but problems did arise (the 16/11 riots) and he was not able to make payment on time. ". There was no admission made by the appellant in his Voluntary Statement that he obtained the goods by making a representation to the complainant that he knew was false. That is the essential element of the offence which the Crown had to prove beyond reasonable doubt in order to obtain a conviction.

[22] So, what the judge directed the jury in relation to the Voluntary Statement was that it was a "confession" and that in Tongan law "a confession alone can be sufficient to justify a conviction where the jury is satisfied that the confession is reliable and true". The "Tongan case" the judge was referring to was no doubt *R v Fa'aoso* [1996] TOSC 3; [1996] Tonga LR 36, 39 where Hampton C.J. in a rape case in which the complainant did not give evidence held that a confession in itself may be sufficient evidence to justify a conviction provided that the court applies the

"stringent test" which is, "that where effectively, the only evidence is of something the accused has said, that something must be convincingly proved and in itself must be cogent and satisfactory evidence."

[23] In the present case, what the appellant said in his Voluntary Statement cannot be described as cogent and satisfactory evidence of an admission that he obtained the goods by means of a false pretence. He did not admit to making a false representation to the complainant. But the proposition the judge put to the jury in his summing up was that all the jury had to conclude in order to justify a conviction was that what the appellant had said in his Voluntary Statement was "reliable and true". Even the appellant would no doubt have accepted that what he had said in his Voluntary Statement was "reliable and true" but the point is that nowhere in his statement did he make any admission of having acquired the goods by making a false representation. In other words, the judge's direction to the jury was a misdirection because it misrepresented what the appellant had actually said in his Voluntary Statement.

Other grounds of appeal

[24] In the view that we have taken of the appellant's first ground of appeal, it is unnecessary for us to deal at any length with the other grounds relied upon. Suffice it to say that in relation to the second ground of appeal Crown counsel conceded, quite properly in our view, that the judge had wrongly allowed Police Officer Vi to give certain hearsay evidence which was material to the issue of whether or not the appellant had made a false representation.

[25] Crown counsel, again quite properly, conceded that the appellant must succeed on his third ground of appeal. That related to a submission of no case to answer which the appellant's counsel endeavoured to make at the end of the Crown case. We were told from the Bar that counsel was not given the opportunity to present any submissions in support of his no case application but the judge summarily dismissed his application with the comment that there was indeed a case to answer.

[26] The fourth ground of appeal related to comments made by the trial judge on the failure of the accused to give evidence and we wish to say something more about this. Before us, counsel for both parties agreed that at the end of the prosecution evidence in the court below, Mr Paasi informed the trial judge that the defence would not be calling evidence and he then asked for a ten-minute break before making his final address to the jury. The transcript records the following exchange that then took place between defence counsel, the court and the accused:

> *"D/C: "Yes, I'm asking for a brief adjournment of 10 minutes before I make submissions.*
> *Ct: Well no I have to explain to the accused his rights especially if you're making submissions of no case to answer. I'll explain the rights, so come here and stand up please, the accused."*
> *(Counsel were in agreement that at that point, in the presence of the jury, the appellant was required to enter the witness box). The transcript continues:*
> *"D/C: Can I have 10 minutes please?*

Ct: I have to explain his rights Mr Paasi under the law. He has certain rights under the law and I have to explain that to him. And these are your rights. You can go into the witness box and give evidence as the other witnesses have done. If you do that you will be led in evidence by your lawyer, the prosecution may ask you questions and so can I. Do you understand that right as I have explained it to you?
Acc: Yes.
Ct: You have a right to remain silent because the prosecution bring this case and they must prove it beyond reasonable doubt so that the court is sure you committed that offence. Do you understand that right to remain silent?
Acc: Yes.
Ct: You have a right to give a statement from the well of the court and not on oath. If you do that nobody can ask you any questions on that. Do you understand that right as I have explained it to you?
Acc: Yes.
Ct: You also have a right to call any witnesses in your defence though the court does not have to adjourn for you to bring them if they are not here today, do you understand that right?
Acc: Yes.
Ct: Now those are your rights as I have explained them to you. You are entitled to consult with your solicitor and I will give you 10 minutes to do that but it is your election at the end and not the election of the lawyer. Do you understand that?
Acc: Yes Sir.
Ct: Thank you I'll be back at half past 10. May the jury retire. Thank you."
(The court then adjourned and when it resumed 10 minutes later the exchange continued)
Ct: Witness box (sic) to give evidence or do you wish to remain silent? Have you any witnesses to bring and what is your view today?
Acc: I wish to remain silent.
Ct: And you have no witnesses to bring in your defence?
Acc: No.
Ct: Okay, would you go back and sit in the back please? Do the party need time to prepare closing submissions?
P/C: Your Honour I'm ready.
Ct: You're ready Mr Paasi, what about (TAPE ENDS)."

[27] In his grounds of appeal under this head, the appellant alleges that the judge's action in calling him to the witness stand and questioning him in the presence of the jury about his decision not to give evidence, after his counsel had specifically told the court that the defence would not be calling any evidence, adversely affected the credibility of the accused himself and his counsel.

[28] As was stated by Lawton LJ in *R v Mutch* [1973] 1 All ER 178, 181:

Judges who are minded to comment on an accused's absence from the witness box should remember, first, Lord Oaksey's comment in *Waugh v R* [1950] AC 203 at 211:

> *"It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment" and, secondly, that in nearly all cases in which a comment is thought necessary the form of comment should be that which Lord Parker C.J. described in* R v Bathurst *[1968] I All ER 1175 at 1178, as the accepted form, namely, that --*
>
> *"the accused is not bound to give evidence, that he can sit back and see if the prosecution had proved the case, and that, while the jury had been deprived of the opportunity of hearing his story tested in cross-examination, the one thing that they must not do is to assume that he is guilty because he has not gone into the witness box."*

[29] In *R v Davison* [1972] 3 All ER 1121, 1126, Browne J., delivering the judgment of the court, said:

> *"We do not in this case propose to lay down any general principle of hard and fast rule as to what can and cannot be said, but in our view, one vital distinction between what can and cannot be said is whether or not it was made clear to the jury, in the course of making the comment on failure to give evidence, that the duty to prove the case was still on the prosecution and that the defendant was not bound to give evidence."*

[30] The transcript reveals that in the course of his relatively brief summing up the judge referred on three occasions to the failure of the appellant to give evidence. His comments are recorded as follows:

> *"The defendant has chosen not to give evidence or to call witnesses that is his legal right and you must not hold that against him.*
>
> . . . .
>
> *The defendant's case. The defendant elected to remain silent and of course (this) is his legal right.*
>
> . . . .
>
> *But the defendant maintained his silence and that cannot be subject of any criticism because that is the defendant's legal right."*

[31] Crown counsel accepted that the action of the trial judge in requiring the appellant to go into the witness box while he (the judge) explained his rights was "not the usual practice" in relation to criminal cases in the Kingdom. We agree with that observation and the practice should not be followed in future where an accused is

represented by counsel. The directions given by the judge were unnecessary in this case as the accused was legally represented and counsel had already conveyed to the court his client's election not to call evidence. We accept the submission that the exchange recorded in [26] above was likely to have undermined counsel's credibility in the eyes of the jury.

[32] The other point of concern is that on none of the three occasions referred to in [30] where the judge referred in the course of his summing up to the appellant's decision not to give evidence, were the jury reminded of the requirement in *Mutch* and *Davison* (supra) that the duty was still on the prosecution to prove the case and that they must not assume that the appellant was guilty because he had not gone into the witness box.

Conclusions

[33] For the reasons stated, we have reached the conclusion that the appeal must succeed on all grounds. The jury's verdict, which we were told was delivered after a retirement of less than two minutes, was unsafe and must be set aside.

[34] We have given careful consideration as to whether we should direct a verdict of acquittal to be entered or order a new trial. If we were to order a new trial, it is difficult to see how the prosecution could present a stronger case. At the end of the day it would still be bound by the very significant admission the complainant made in his examination in chief, namely, that the information he had been given by the appellant in relation to his restaurant operation was true. Against such an admission, we think any prosecution seeking to establish that the appellant had made a false representation in what he told the complainant about the running of his restaurant would be doomed to fail.

[35] We are satisfied that a substantial miscarriage of justice has occurred. The appellant's conviction is quashed and a verdict of acquittal is entered accordingly.

Fusitu'a v Honourable Tuita

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 21/2009

8 July 2009; 10 July 2009

Practice and procedure – parties reached agreement – orders made

Argument in the appeal proceeded a short distance and counsel for the parties announced that they had reached an agreement as to the disposition of the appeal.

Held:

1. The parties reached agreement as to the disposition of the appeal. The Court made orders pursuant to that agreement.

Counsel for the appellant	:	Mrs Tupou
Counsel for the respondent	:	Mr Stanton

Memorandum of Orders of the Court

After argument in this appeal had proceeded a short distance, and following an adjournment, counsel for the parties announced that they had reached an agreement as to the disposition of the appeal. Pursuant to that agreement, by consent the Court orders that:

[1] The interim custody order the subject of the appeal be varied to the extent necessary to enable the appellant's application in respect of custody orders before the Supreme Court to be the subject of a mediation to commence on or as near as practicable to 21 August 2009 and (if not settled) to be brought before the Supreme Court for hearing on or as near as practicable to 19 October 2009;

[2] The parties seek an urgent directions hearing before the Chief Justice to confirm the precise dates and necessary time–tabling and other interlocutory orders to ensure the matter is dealt with as proposed;

[3] There be no order as to the costs of the appeal of either party.

Moehau anors v Pacific Stores Limited

Court of Appeal, Nuku'alofa
Ford P, Burchett and Moore JJ
AC 24/2009

8 July 2009; 10 July 2009

Practice and procedure – appeal against refusal to set aside default judgment – judge did not consider merit of defence pleaded – appeal allowed and default judgment was set aside

An application for judgment by default was made by the respondent (plaintiff) without any further warning after the service of the statement of claim that the time for filing a statement of defence would be insisted upon to the day, although the respondent's solicitor had been informed by the appellant (defendant), that the appellants denied liability on the ground that a particular fellow defendant in the proceeding had had no authority, actual or ostensible, to bind them. The default judgment was granted and the Supreme Court refused to set it aside. The appellant appealed against the refusal to set aside the default judgment.

Held:

1. There was authority that there was an inherent power in the Court to prevent an abuse of its proceedings and a judgment, although the application was out of time, would be set aside if circumstances required it.
2. The defence must establish with potentially credible evidence on affidavit that there was a real likelihood that the defendant would succeed on the facts. The merits of the case was the most important consideration in all such cases and where there was a real possibility of success the defendant should not be denied his day in Court.
3. The Supreme Court rejected the application to set aside the judgment upon a basis that took no account of what was a defence on the merits. Although counsel for the Respondent had submitted that defence was not "an arguable defence", we consider it clearly was arguable, and counsel at the hearing of the appeal conceded it was.
4. The orders made below should be set aside; and in lieu of those orders, the default judgment entered against the appellants should be set aside.

Cases considered:

Coles and Ravenshear, Re [1907] 1 KB 1
Jess v Scott (1986) 12 FCR 187
Jewett Cameron South Pacific Ltd v Tu'uholoaki [1999] Tonga LR 51

Rules considered:

Supreme Court Rules 2007

Counsel for the appellant	:	Mr Stanton
Counsel for the respondent	:	Mr Stephenson

Judgment

[1] This is an appeal against a refusal by Shuster J to set aside a default judgment for which the Respondent (the plaintiff) had applied, its counsel conceded, within one day of the expiry of the time for the filing of a Statement of Defence, the judgment being entered within one week after that expiry. The application for judgment in default was made without any further warning after the service of the statement of claim that the time for filing a statement of defence would be insisted upon to the day, although the Plaintiff's solicitor had been informed by Mr Moehau, as had his client previously, that the Appellants denied liability on the ground that a particular fellow defendant in the proceeding had had no authority, actual or ostensible, to bind them.

[2] It is unnecessary now to go into the details of the Appellants' proposed grounds of defence because a concession was made at the hearing of the appeal that the Appellants had raised an arguable defence. But it should be noted that a defence – as this is – denying the authority on any basis of a fellow committee member of an unincorporated club to bind the other members to a contract is one that is likely to raise questions involving, as any lawyer would appreciate, complexities both of fact and of law. Had an extension of time been sought to investigate the facts and research the law for the accurate formulation of a statement of defence, there is no reason to doubt some further period would have been allowed.

[3] Although the default judgment was sought ex parte so speedily, it was not until a month and a half later, after the Respondent (the plaintiff) had itself sought and obtained the indulgence of an extension of time to do so, that it was served upon Mr Moehau, the First Appellant. The dates are : service of Statement of Claim on each Appellant 20 January 2009 ; application for default judgment made ex parte 18 February ; entry of judgment upon the application 24 February ; service upon Mr Moehau 3 April ; filing by all Appellants of application to set aside default judgment 6 May 2009.

[4] In his affidavit in support of the application of the Appellants, Mr Moehau explained his dilatoriness with respect to the matter by stating – and this was not challenged – that at the time of the service of the statement of claim he "had pressing financial matters concerning [his] businesses generally and [his] attempts to get them refinanced and/or restructured with the Westpac Bank of Tonga" and he "also had overseas commitments". Because of "the pressure of attending to [his] business

affairs and to settling litigation ... with a former joint venturer", he was "distracted ... from the task of defending the Statement of Claim, along with [his] fellow Committee Members", among whom it is clear he was the one taking the leading role. At the same time, he urged the fact that he had already, on behalf of himself and the other Appellants, made it clear orally, to both the manager of the Respondent and its solicitor, that the claim was denied by them. The affidavit of Mr Moehau was not challenged by cross-examination or by the filing of any affidavit on behalf of the Respondent.

[5] The leading case in Tonga on the relevant law is the decision of Ward CJ in *Jewett Cameron South Pacific Ltd v Tu'uholoaki* [1999] Tonga LR 51, where (at 53) his Honour said, after referring to the then Order 13 rule 3 (which was in terms corresponding to the present Order 14 rule 4(1), apart from the insertion in the present rule of express reference to the question whether an order would cause the plaintiff to "suffer irreparable injury"):

> "The defence must establish with potentially credible evidence on affidavit that there is a real likelihood that the defendant will succeed on the facts. The merits of the case is the most important consideration in all such cases and where there is a real possibility of success the defendant should not be denied his day in court. The classic statement of the principle is by Lord Atkin in *Evans v Bartlam* [1937] AC 473 at 480 referring to the, then, equivalent rules in England which gave a discretionary power to a judge in chambers to set aside a default judgment."

Ward CJ then set out the passage from Lord Atkin's judgment, which fully supports his statement of the primacy of the merits upon such an application.

[6] In *Re Coles and Ravenshear* [1907] 1 KB 1 at 4, in a passage cited with approval by the full Federal Court of Australia in *Jess v Scott* (1986) 12 FCR 187 at 189, Collins MR said :

> "Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

[7] In any case, there is authority that, apart from the express Rules of Court, "there is an inherent power in the court to prevent an abuse of its proceedings and a judgment, although the application is out of time, will be set aside if circumstances require it" : The Supreme Court Practice (the "White Book") 1991 p.137.

[8] In Australia, in the analogous case where a party seeks an extension of time to bring an appeal, as was pointed out in *Jess v Scott* at 194 :

> "... the joint judgment of Reynolds, Hutley and Bowen JJA in *Outboard Marine Australia Pty Ltd v Byrnes* [1974] 1 NSWLR 27 at 30 includes the following:
>
> We appreciate that the Rules of Court, particularly those relating to time, should never be allowed to be an instrument of tyranny. They do, however, have purposes, one of which is that the parties may know where they stand and regulate their affairs accordingly. It is also appreciated that where genuine issues ought to be litigated, if such can be done with fairness to all concerned, it is appropriate to take a benign view of applications to extend time.' "

[9] Shuster J rejected the application to set aside the judgment upon a basis that took no account of what was a defence on the merits. Although counsel for the Respondent had submitted that defence was not "an arguable defence", we consider it clearly was arguable, and counsel at the hearing of the appeal conceded it was.

[10] The extremely short time – one day – which elapsed before the application to enter default judgment is a factor which his Honour appeared to overlook, and although the Appellants were dilatory an explanation was made in Mr Moehau's affidavit, the circumstances disclosed not being the subject of contradiction. His Honour treated the issue as if the period of delay to be accounted for were the period that elapsed before the making of the application to set aside the default judgment. To do that involved an error of law. Once the judgment was entered, the Appellants could not have filed a Statement of Defence.

[11] His Honour also stated in one short sentence that he believed "the Plaintiff may suffer irreparable injury if [he] were to set [the judgment] aside". However, the only argument put forward by counsel for the Respondent to support this proposition was that one of the Appellants might dispose of assets. There was, however, no suggestion in the case of any action or circumstance tending to indicate there was any realistic apprehension of that kind. Had there been, of course, an appropriate undertaking to the Court could have been required.

[12] Having regard to all of the matters set out in these reasons, we conclude that his Honour's discretion miscarried ; the orders made below should be set aside ; and in lieu of those orders, the default judgment entered against the Appellants should be set aside. As the normal order below in such circumstances would require the Appellants to pay the costs of and incidental to their application for an indulgence, while the Appellants, as successful parties to the appeal, would normally receive their costs of the appeal, we think justice would be done by an order that there be no order as to the costs of and incidental to the application below or the costs on appeal, and we so order.

Edwards anors v Senituli anors

Supreme Court, Nuku'alofa
Ford CJ
CV 198/07, CV 209/07, CV 236/07, CV 270/07

20 April, 4 and 6 May 2009; 24 July 2009

Practice and procedure – application to strike out defence – application dismissed

There were four defamation actions before the court. The plaintiffs were different in each but the defendants were the same and each case arose out of the same publication. All the claims were consolidated and dealt with together. The defendants pleaded the defences of fair comment and qualified privilege. The plaintiffs made an application to strike out the defence of "fair comment" in each case. The principal submission advanced by the plaintiffs was that there were no factual grounds upon which any comment or expression of opinion could be based. The first and second defendants submitted that the passages complained of had to be read in the context of the article as a whole, and the defence of fair comment could not be said to be so clearly untenable that it could not possibly succeed.

Held:

1. The Court was to rule whether the words were capable of being regarded as statements of fact or capable of being regarded as comments but it was for the jury to decide which they were.
2. The Court found that it could not be said that the defence of fair comment was so clearly untenable that it could not possibly succeed and that was the test for dealing with a strikeout application.
3. The particulars filed on behalf of the third and fourth defendants in relation to their fair comment defence related only to the allegation that the statement related to "legitimate matters of public interest". No attempt was made to particularize the facts upon which the alleged comment was based. However, the Court did not intend to strike out the fair comment defence relied upon by the third and fourth defendants because they come under the same umbrella of legal principles relied upon by the first and second defendants. The Court required the third and fourth defendants to file an amended statement of defence within 28 days correctly particularising the facts upon which their fair comment defence was based.

4. The plaintiff's application to strikeout the defence of fair comment was dismissed.

Cases considered:

O'Brien v Salisbury (1889) 54 JP 215

Slim v Daily Telegraph Ltd [1968] 2 QB 157

Templeton v Jones [1984] NZLR 448

Tse Wai Chun Paul v Albert Cheng [2001] EMLR 777

Counsel for the plaintiffs	:	Mr Edwards
Counsel for the first defendant	:	Mr Tu'utafaiva
Counsel for the second defendant	:	Mr Radich
Counsel for the third defendant	:	Mr Fonua
Fourth defendant in person		

Ruling

Introduction

[1] There are four defamation actions before the court. The plaintiffs are different in each but the defendants are the same and each case arises out of the same allegedly defamatory publication. Sensibly, counsel have agreed that they can all be consolidated and dealt with together.

[2] None of the defendants have raised justification as a defence but they have all pleaded the defences of fair comment and qualified privilege. This Ruling relates to an application by the plaintiffs to strike out the defence of "fair comment" in each case. The principal submission advanced by the plaintiffs is that "there are no factual grounds upon which any comment or expression of opinion can be based."

The publication

[3] The publication in question was an article entitled "Tonga Government blames PCPR for deaths and destruction in Nuku'alofa" which appeared on the Matangi Tonga website on 28 December 2006 and was allegedly on continuous display for approximately 1 month from that date. The third defendant is the owner and publisher of the Matangi Tonga website. The fourth defendant is a director/shareholder of the third defendant and editor of the Matangi Tonga. Although it is not specifically pleaded as such, the article was based on a paper published by the first defendant who was and still is the Press Secretary for the Prime Minister. The second defendant is claimed to be vicariously liable for the actions and conduct of the first defendant.

[4] The plaintiffs allege that the following passages appearing in the Matangi Tonga article are defamatory:

> *"(a) Claims contained in a confidential USP (University of the South Pacific) report that the Tonga Government failed to see the urgency in the warning signs, were yesterday disputed by the Prime Minister's Press Secretary, Lopeti Senituli, who*

> *blamed what he called "extremist" members of the PCPR for the deaths and destruction in Nuku'alofa on 16 November.*
>
> *(b) It is important to identify the origin of this generic label and to seek out the main components and key players as it evolved over the years so as to fully grasp whom the real instigators and perpetrators of the violence were, Lopeti said in outlining a history of the development of the democracy movement and its key personalities from its origins in the early 1990s.*
>
> *(c) Instead Lopeti said that, "the membership of the Peoples Committee for Political Reform (PCPR) must bear the full responsibility for the violence and deaths of 16 November." He identified the key members of the PCPR as Dr. Tu'i Uata, Clive Edwards and Mele 'Amanaki, who he labelled extremist because they opposed the formation of a Tripartite Committee that had been proposed by Government to continue the "talanoa" discussions started by the National Committee for Political Reform".*
>
> *(d) "The Police are continuing their investigations so I would prefer to reserve comment. But as stated earlier, the membership of the Peoples Committee for Political Reform must bear the full responsibility for the violence and deaths of 16 November," said Lopeti."*

[5] The paper released by Lopeti (the first defendant) is not before the court but a transcript of the full Matangi Tonga article ("the article") has been produced. It is made up of a total of 46 paragraphs. The words complained of, in other words, comprise only a small segment of the total article. In his statement of defence, the first defendant denies stating in his paper that "Dr. Tu'i Uata, Clive Edwards or Mele 'Amanaki could be blamed for the deaths and destruction of 16 November 2006."

Plaintiffs' submissions

[6] The thrust of the plaintiffs' objections to the fair comment defence are summarised in the following passage from counsel's written submissions:

> *"2.3 Mr Senituli is the Press Secretary for the office of the Prime Minister of the Kingdom of Tonga. He is by trade a professional wordsmith, and should know better than most, the importance of the use of words. He, of all people, should know the difference between expressing an opinion and an assertion of fact.*
>
> *2.4 The language he has chosen to use here does not frame his comments as opinion, but rather as simple assertions of fact. Mr Senituli is not quoted as saying, "In my opinion, Mr Uata, Mr Edwards and Ms 'Amanaki must bear the*

responsibility for the events of November 16 because . . . " or "based on the information made available to me at this time, and subject to further investigation and verification, it is my belief that the certain factions of the People's Committee for Political Reform were the root cause of the problem . . .".

No. Rather, Mr Senituli makes bold and unfounded assertions such as, "the members of the People's Committee for Political Reform must bear the full responsibility for the violence and deaths of November 16", and he specifically names Dr. Tu'i Uata, Clive Edwards and Mele 'Amanaki as the principal instigators, labelling them "extremists", based simply upon the false accusation that they opposed the formation of a tripartite committee that had been proposed by government to continue the "talanoa" discussions started by the National Committee for Political Reform.

All of this is presented as matters of fact not as opinion or conjectures, or being subject to caveat or verification of any kind."

Defendants' submissions

[7] Through their respective counsel, the first and second defendants submitted that the passages complained of have to be read in the context of the article as a whole. They claim that the facts upon which the comments were based are set out in paragraphs [16] to [41] of the article and that they were already well known in the public domain. It was submitted that the article describes the chronology of events leading up to the riots that occurred in Nuku'alofa on 16 November 2006 and that the opinions expressed in the article were based upon those facts.

[8] In response to the plaintiff's allegation that the statements are framed as assertions of fact rather than comment or opinion, Mr Radich accepted that the phrases "in my opinion" or "it is my belief that" were not used but he submitted that such terminology is not determinative of the issue because "a statement can constitute, and can be understood as constituting, the opinion or comment of a person, without expressing itself in that way." Counsel carefully analysed the wording of the statements complained of, highlighting words such as "disputed", "blamed" and "labelled" and other particular passages, submitting in summary that each of the statements complained of is recognisable as a comment or expression of opinion. "In any event", Mr Radich concluded, "the defence of fair comment cannot be said to be so clearly untenable that it cannot possibly succeed."

Fair comment

[9] The legal significance of the defence of fair comment is summed up in *Gatley on Libel and Slander* 10th edition. Citing relevant authorities, the learned authors state (para 12.1):

> *"It is a defence to an action of libel or slander that the words complained of are fair comment on a matter of public interest. The right of fair comment is one of the fundamental rights of free speech and writing and it is of vital importance to the rule of law on which we depend for our personal freedom. The right is a bulwark of free speech."*

[10] In *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 170 Lord Denning M.R. said that:

> *"The right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements."*

[11] The elements of the defence of fair comment are stated in *Clerk & Lindsell on Torts* (19th edition) at 23-168 as follows:

> *"The modern authoritative statement of the law of fair comment is to be found in* Tse Wai Chun Paul v Albert Cheng *[2001] EMLR 777 where, in the court of Final appeal of Hong Kong Lord Nicholls outlined the history and principles of the defence. The defendant must overcome four hurdles in order to establish the defence:*
>
> 1. *The statement must be comment and not fact.*
> 2. *The comment must have a sufficient factual basis (that is, the comment must be based on facts which are themselves sufficiently true).*
> 3. *The comment must be objectively "fair"-i.e. it must be an opinion which an honest person could hold. This is an objective test, but should not be confused with reasonableness.*
> 4. *The subject matter of the comment must be of public interest.*
>
> *Where these are surmounted, the defence will succeed unless the claimant proves that the comment was maliciously published."*

[12] At paragraph 23-169 of the same text the learned authors state:

> *"Whether a statement is fact or comment can be a very difficult distinction, particularly because in many publications there is a mixture of both. There is no statutory definition of fact and comment"*

[13] It is for the jury to decide whether what has been published is a statement of fact or an expression of opinion. If, however, there is no reasonable doubt that the publication in question is capable of being regarded only as comment or as fact then the trial judge may decide that there is no case or issue to go to the jury. In other

words, the court rules whether the words are capable of being regarded as statements of fact or capable of being regarded as comments but it is for the jury to decide which they are. As *Gatley* states (para 12.7):

> *"The question whether words are fact or comment is in the first instance for the judge: if he is satisfied that they must fall into one of the categories he should so rule; but if in his opinion reasonable people could take either view he must leave the matter to the jury. If a defamatory allegation is to be defended as fair comment it must be recognisable by the ordinary, reasonable reader as comment and the key to this is whether it is supported by facts, stated or indicated, upon which, as comment, it may be based."*

[14] *Halsbury*, Vol 28, para 134 states:

> *"Whether the words complained of were reasonably understood as a comment or a statement of fact must depend on their context and is a matter for the jury subject to the judge's direction that they were capable of being so understood."*

[15] There is no requirement at law that in order to qualify as "comment" a statement has to follow a particular format or be expressed in a particular way. A comment may even be expressed in the form of a fact provided it is clear that it is based on facts sufficiently indicated or notorious.

[16] *Gatley*, citing Field J. in the old case of *O'Brien v Salisbury* (1889) 54 JP 215, states:

> *"Comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed, and from which his conclusion can be reasonably inferred. If, although stated as a fact, it is preceded or accompanied by such other facts, and it can be reasonably based upon them, the words may be reasonably regarded as comment, and comment only, and if honest and fair, excusable; and whether it is to be regarded as a fact or comment is a question for the jury, to be determined by them upon all the circumstances of the case."*

[17] *Clerk & Lindsell* (para 23.169) states the position in these terms:

> *"The defence of fair comment is not limited to pure value judgments. A statement which appears to be factual and which is either true or false, may nevertheless be regarded as a comment where it is apparent that it is an inference drawn from other facts."*

Discussion

[18] Counsel for the plaintiff sought to rely on the decision in *Templeton v Jones* [1984] NZLR 448, where the New Zealand Court of Appeal struck out a defence of fair comment on the ground that the statement sued on, viz, that the defendant despised Jews (which was only one of several allegations made by the plaintiff against the defendant) could not reasonably be understood as comment. Mr Radich submitted that *Templeton v Jones* is distinguishable from the present case and is not on point. In counsel's words:

> *"There the defence of fair comment was struck out on the basis that there was no indication that the defendant's statement that "Mr Jones is a man who despises many people . . . [including] jews" was intended to be anything other than a statement of fact and because there was no reference to any facts upon which the purported comment was based ."*

[19] I agree with Mr Radich's summation of the *Templeton v Jones* case. Indeed, the Court of Appeal decision seems to militate against the proposition advanced by Mr Edwards in that the court clearly indicated that had the statement that the defendant despised Jews (on the face of it a statement of fact) been accompanied by an implied reference to well-known supporting facts, then the fair comment defence may have been sustainable. The contention of the defendants in the present case is that statements which, on the face of it, might appear to be statements of fact, are accompanied by supporting facts in the rest of the article.

[20] It is not appropriate in a strikeout application to go into the facts of a case in any more detail than is absolutely necessary and I do not propose to do so. Suffice it to say, in my view, it cannot be said in this case that the defence of fair comment is so clearly untenable that it cannot possibly succeed and that is the test for dealing with a strikeout application. In due course, having heard all the evidence, it will be necessary for me to determine whether the words in the article are reasonably capable of being regarded as comment and, if I so rule, it will then be for the jury to determine whether they are or not.

[21] Finally, I want to refer briefly to the position regarding the third and fourth defendants. Mr Fonua did have a lawyer acting for him early on but he is now acting in his personal capacity. The first and second defendants filed particulars of the facts upon which their respective fair comment defences are based. The particulars filed on behalf of the third and fourth defendants, however, in relation to their fair comment defence relate only to the allegation that the statement related to "legitimate matters of public interest". No attempt was made to particularize the facts upon which the alleged comment was based.

[22] Mr Edwards was critical of the particulars provided by the third and fourth defendants and he correctly described them as "irrelevant to the question" of whether the words in question were comments or assertions of fact. Nevertheless, I do not intend to strike out the fair comment defence relied upon by the third and fourth defendants because, obviously, they come under the same umbrella of legal principles relied upon by the first and second defendants. I will, however, require the third and

fourth defendants to file an amended statement of defence within 28 days of the issuance of this Ruling correctly particularising the facts upon which their fair comment defence is based.

[23] Defamation is a notoriously difficult branch of the law, even for lawyers to master. In this case from the third and fourth defendants' perspective there is the added complication referred to in para [5] above that the first defendant is apparently alleging that the article published on the Matangi Tonga website contained additional allegations over what was stated in the paper published by the first defendant. In all the circumstances, I respectfully exhort Mr Fonua to engage a legal practitioner at some stage prior to trial.

Conclusion

[24] For the foregoing reasons, the plaintiff's application to strikeout the defence of fair comment is dismissed. Costs will be costs in the cause.

R v Kula

Supreme Court, Nuku'alofa
Andrew J
CR 98/2007, CR 19 and 65 /2009

24 August 2009; 24 August 2009

Criminal law – repeat offender – guilty plea – mother of three – cumulative sentences imposed

The accused pleaded guilty to three separate charges and all were dealt with together. The accused was a repeat offender and was the mother of three young children aged 10, 7, and 10 months.

Held:

1. The Court considered the circumstances of the accused and the fact that she pleaded guilty in determining the sentence. The number of the offences and the continuous re-offending meant that the Court must impose sentences of imprisonment. The hardship to the family was taken into account on sentence and rather than impose cumulative sentences, the Court imposed concurrent sentences so that the accused may deal with all the sentences at the one time and then be re- united with her family.
2. In the matter of CR150/2007 and upon the charge of theft the accused was sentenced to 3 years imprisonment; in the matter of CR15/2009 upon the charge of theft she was sentenced to 2 years imprisonment; in the matter of CR19/2009 upon count 1, the charge of entry, she was sentenced to 2 years imprisonment; on count 2, the charge of theft of goods valued at $5,640 she was sentenced to 3 years imprisonment; and on count 3, the charge of abetment to housebreaking she is sentenced to 2 years imprisonment. All sentences were to be served concurrently.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown : Ms Lavekei'aho
Counsel for the accused : Mr Pouono

Judgment

The accused has pleaded guilty to 3 separate charges of offences and all have been dealt with together.

1. The first offence is CR150 in which she pleaded guilty to one count of theft contrary to S.143 and S.145(b) of the Criminal Offences Act.

The particular of that offence are as follows:

Makeleta Kula of Talafo'ou, on an unknown date in June 2007 at Tofoa, you did dishonestly take without any colour of right from 'Anova Briest, Tongan goods valued at $5500 with intent to deprive her permanently of those goods, and with the intention of converting those goods for your own use.

An undisputed Summary of facts is as follows and I quote.

> "on an unknown date or dates in June 2007, the accused Makeleta Kula was working as a house girl for the complainant at Tofoa, took the following goods from the complainants home
>
> | | | |
> |---|---|---|
> | — | 2 Fala Tahanima | $1,000 |
> | — | 2 Fala Tahaua | $1,000 |
> | — | 1 Taovala Kie Fau | $500 |
> | — | 3 Fola'osi | $1,500 |
> | — | 1 KieTonga(10") | $1,000 |
> | — | 1 Kie Tonga si'isi'l | $500 |
>
> Totaling $5,500. At one time the accused told the complainant 90 year old mother that she would take some mats to be used at the church conference and asked the complainants mother not to tell the complainant. The accused sold some of the goods for money and used the rest as security for loans from small financing businesses.
>
> The accused has previous convictions"

2. CR65/09

The accused pleaded guilty to the offence of obtaining goods by false pretenses, contrary to S.164 of the Criminal Offences Act.

The particulars of the offence were:

Makeleta Kula of Makaunga, on or about 7th February 2009 at Fanga, you did obtain goods by false pretences and that you obtained 1 x 15 foot mat belonging to Temaleti Filipe under the pretence that you will pay her but you in fact ran away without paying her for the mat.

An undisputed Summary of Facts is as follows and I quote:

> "on or about 7th February 2009 the accused Makeleta Kula was riding on a bus from Makaunga heading towards town. When the bus reached Fanga, she noticed a 15' foot mat in

front of the complainant's shop which was being advertised for sale. She later returned to Fanga and asked the complainant Temaleti Filipe if she could take the mat and show it to her mother. The complainant and the accused then got into the taxi and headed to Vaiola bus stop. When they arrived, two girls by the name of Semu and Loisi were waiting for them and they got into the taxi. The accused then told the driver to go to 'Anana and when they reached the small Industrial compound she stopped the taxi and the two girls got out of the car with the mat. The accused then told the complainant and the driver to drive back to town so she could withdraw some money from the bank to pay for the mat. On their way, the accused asked the driver to stop at the TALAMAHU Market so she could buy some tomatoes before heading to the bank. She got out of the car while the driver and the complainant waited for her inside the taxi. The accused fled and never returned back to the waiting car."

When the police interviewed the accused, she admitted to the offence. The accused has previous convictions.

3. CR19/2009

The accused changed her pleas to ones of guilty to the following offences:

- Count 1- Housebreaking, contrary to s 173(1) of the Criminal Offences Act
- Count 2- Theft, contrary to ss 143 & 145(b) of the Criminal Offences Act
- Count 3- Abetment to housebreaking contrary to ss 8 & 173(1) of the Criminal Offences Act.
- Count 4- Abetment of theft contrary to s.8 & 143 & 145(b) of the Criminal Offences Act.

Particulars of these offences are:

Count 1 — on or about 27 April 2008 at Pelehake you did enter the residence of Tevita Siale as a trespasser and committed a crime therein.

Count 2 — on or about 27 April 2008 at Pelehake you did dishonesty take without any colour of right from Tevita Siale, the following goods:

- 1 launima valued at $2000
- 4 Fuatanga tapa valued at $2000
- 1 paper fuatanga valued at $400
- 1 Fihu mat valued at $1000
- 3 white mats valued at $240

and the total value of the goods is $5,640 and you took there goods with intention to deprive Tevita Siale permanently of those goods. You also intended to convert those goods for the use of others without the consent of Tevita Siale.

Count 3 – on or about 29 November 2008 at 'Alakifonua you did abet Susitina Matangi to enter the residence of Salome Manufekai as a trespasser by encouraging her to go inside the home while you waited for her outside.

Count 4 — on or about 29 November 2008 at 'Alakifonua you did abet Susitina Matangi to commit theft by encouraging her to take the following goods from the residence of Susitina Matangi.

— 2 ngatu fuatanga valued at $500
— 1 fihu valued at $1500

and the total value of those goods is $2,000.

A summary of the facts is as follows and I quote:

"On or about Sunday 27 April 2008, the first complainant, Tevita Siale went with his family to Makaunga to spend the day with his relatives. He had locked the front door before he and his family left.

On the same evening, the accused who is the sister of complainant's wife, came to the house in a rental car. She used an iron rod to break the lock and went inside the house. She took all the goods listed on count 2 of the indictment sold some them and used the rest as security for small loans.

On or about 29 November 2008, the accused went in a rental car to pick up a friend by the name of Susitina Matangi at Kapeta. She was going to drop Susitina to Ha'asini and pick her children from Makaunga and bring them back to Ma'ufanga. However, when they reached Nualei her cell phone rang and it was Susitina's sister, Mele Matangi who called to ask the accused to go back to town and pick her up too.

The accused and Susitina then returned to town and picked up Mele Matangi and another girl by the name of 'Oh and they again headed for Makaunga to pick up her children and drop Susitina Matangi at Ha'asini.

When they arrived at 'Alaki at around midday, they passed the house of the second complainant, Salome Manufekai and the accused saw that the front door was open and Tongan goods were lying strewn on a couch inside the house. The complainant's husband was asleep inside the house.

The accused then told Susitina to look at the Tongan goods inside Salomes house and that she should go inside and take

> them. Susitina then told her to stop the car and when the accused stopped the car Susitina and the other two girls got out of the car while the accused drove further ahead to turn the car around.
>
> After a short while she received a phone call from Mele Matangi telling her to come back to the front of the complainant's house. The accused then came and stopped the car in front of the complainant's house and opened the boot of the car for the girls to put the goods inside. They sold the two tapa cloths for $300 to a woman at Nualei and used the fihu mat as security for a loan of $250 at a finance company at Vaini.
>
> The accused admitted the offending to the police and she has previous convictions."

Additionally by the commission of these offences the accused is in breach of suspended sentences imposed upon her on the 13 July 2007. She was sentenced to (1) 18 months imprisonment for housebreaking (2) 12 months imprisonment for theft and (3) 12 months imprisonment for obtaining false pretences. Those sentences were all concurrent and were suspended for 3 years from 13/7/07. Those matters were dealt with in CR215/06. That sentence of 3 is now triggered by the commission of these offences.

What all of this offending shows is that the accused is a repeat offender approaching the level of an habitual criminal.

There are prior offences dating back to 2004 (CR414/03) when she was convicted for Housebreaking and Theft. She was then sentenced to 6 months imprisonment which was suspended for 1 year. Then, as mentioned, she was sentenced for housebreaking, theft and obtaining goods by false pretences [CR215/06] and sentenced on the 13 July 2007 to 18 months, 12 months & 12 months respectively which was suspended for 3 years. She has thus been dealt with leniently in the past and given every chance to repent but has ignored this and continued on her way of reoffending. The probation report shows that she has a poor response to community service orders imposed upon her and failed to complete those orders. The totality of all of this criminal activity means that the time for leniency and the suspension of sentences of imprisonment has past.

However I take into account the subjective circumstances of the accused. She is aged 34. She was married but reported to be separated and has 3 young children aged 10, 7 & 10 months. The probation report describes her employment as housebreaking and theft but does indicate that she most likely committed these offences to support her family and mother and for everyday living. It is not shown that she offended in order to provide for some extravagant lifestyle. The Probation report describes her as a friendly person but has doubt as to how remorseful she really is. She herself says that she is remorseful. Importantly she has pleaded guilty to all offences and has made a clean breast of everything. I take those pleas of guilty as a sign of remorse and I think that they are deserving of a reduction in sentence in the range of 25%.

The accused is the mother of 3 young children aged 10, 7 & 10 months and I am concerned that any sentence of imprisonment is going to impose hardship upon them. But the sheer number of the offences and the continuous re-offending means that reluctantly I must impose sentences of imprisonment. The hardship to the family is taken into account on sentence and what I propose to do is unusual in that this would normally attract cumulative sentences. However as she pleaded guilty to all charges and in all the circumstances I am going to pass concurrent sentences so that she may deal with all the sentences at the one time and then be re- united with her family.

1. In the matter of CR150/2007 and upon the charge of theft the accused is sentenced to 3 years imprisonment.
2. In the matter of CR15/2009 upon the charge of theft she is sentenced to 2 years imprisonment.
3. In the matter of CR19/2009 upon count 1, the charge of entry, she is sentenced to 2 years imprisonment.
   On count 2, the charge of theft of goods valued at $5,640 she is sentenced to 3 years imprisonment.
   On count 3, the charge of abetment to Housebreaking she is sentenced to 2 years imprisonment.

Upon the offence of breaching the suspended sentence imposed in CR215/06 the suspended sentence of 3 years is now imposed. Sentenced to 3 years imprisonment.

All sentences are to be served concurrently.

R v Vaha'i

Supreme Court, Nuku'alofa
Ford CJ
CR 98/2009

26 August 2009; 27 August 2009

Criminal law – indecent assault of daughter – doubts of veracity of allegations – acquitted

The 44-year-old accused, Suliasi Vaha'i, was charged with two counts of indecent assault contrary to section 124(1) of the Criminal Offences Act (Cap 18). The complainant was his 19-year-old daughter. The particulars in the indictment in relation to the first count allege that on or about 29 April 2009, at Popua, the accused indecently assaulted the complainant by touching her buttocks without her consent. The particulars for the second count allege that on or about 10 May 2009, at Popua, the accused indecently assaulted the complainant by touching her on her buttocks without her consent. The accused gave evidence and said that neither incident happened. He maintained that the complainant made up the allegations as an excuse for leaving home.

Held:

1. There was no requirement in the law of Tonga for corroboration of a complainant's evidence in criminal proceedings for sexual offences but the common law applied and it was the practice to warn the jury against the danger of acting on a complainant's uncorroborated evidence, particularly where the issue was consent or no consent. A judge sitting alone should also heed such warning. Although corroboration may not be an essential element of the offence, when there was no independent corroboration it was always wise to be less than certain.
2. The Court was left with very real doubts about the veracity of the complainant's allegations and the accused was entitled to the benefit of those doubts. He was acquitted accordingly on both counts.

Case considered:

R v Falemaka [2006] Tonga LR 370

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown : Ms Lavakei'aho and Ms Finau
Counsel for the accused : Mr Kengike

Judgment

The charges

[1] Suliasi Vaha'i, the 44-year-old accused, is charged with two counts of indecent assault contrary to section 124(1) of the Criminal Offences Act (Cap 18). The complainant is his 19-year-old daughter.

[2] The particulars in the indictment in relation to the first count allege that on or about 29 April 2009, at Popua, the accused indecently assaulted the complainant by touching her buttocks without her consent. The particulars for the second count allege that on or about 10 May 2009, at Popua, the accused indecently assaulted the complainant by touching her on her buttocks without her consent.

[3] The accused gave evidence and called his son, Sifa, as a witness. He denies the charges and says that neither incident happened. He maintains that the complainant made up the allegations as an excuse for leaving home. The background to the case is rather complicated.

The background

[4] The accused and his wife had three children, two girls and a boy. The complainant was the youngest child. Before the complainant's first birthday, her parents separated. The accused at that stage was a musician with a band. He played the banjo. The separation came about when the accused took a dance group on a tour to Japan. He did not return to Tonga but went to the United States where he remained for approximately 15 years. The children were fostered out. The complainant was fostered by the accused's older sister and her husband.

[5] The accused returned to Tonga in 2005 when the complainant was 15 years of age. The day after his return, he met with the complainant (she had never met him before) and they went to live at Popua. The son and brother, Sifa, also lived with them. The reunion appears to have been a success. The accused told the complainant that he wanted to continue raising her. The complainant told the court that she loved her father and the feeling appears to have been reciprocated.

[6] At that stage the accused had become a fisherman. The complainant told the court that on some occasions after he returned from fishing the accused would consume alcohol and when he was drunk he sometimes assaulted both her and her brother.

[7] There was evidence which indicated that the accused became over-possessive in relation to the complainant and he was unhappy about her associating with boys or using a cell phone. He seems to have imposed a rather strict disciplinary regime and there was other evidence which suggested that the complainant may have reacted a little rebelliously. The accused admitted in cross-examination that when the complainant and her brother were disobedient he would beat them but he said that that did not happen as frequently as the complainant made out.

[8] Approximately 4 months before the alleged first incident, the accused's nephew and his wife, 27-year-old Ane Vaha'i, and their children came to live with the accused at Popua. Ane was called as a witness for the prosecution. She told the court that she had five children but she referred to only three children living in the house at Popua. The house was described as having only two rooms -- a livingroom and a bedroom. The accused and Sifa slept in the livingroom; the accused on a bed and Sifa on the floor. The complainant slept in the only bed in the bedroom, top and tailing with Ane's 14 month-old son. Ane and the other two children slept on the floor. Ane's husband slept at a neighbour's house.

[9] There are two other background matters which need to be mentioned. First, the accused volunteered in his examination in chief that he was presently in Huatolitoli Prison. He explained that approximately a month ago he had been convicted in the Magistrate's Court on two counts of assault on his daughter, the complainant in this case, and the magistrate had sentenced him to six months imprisonment on each charge with the sentence imposed being made consecutive resulting in a total sentence of one year's imprisonment. It is not clear when the offending took place but, for reasons which will appear later, the assault incidents would have occurred prior to the alleged indecent assaults.

[10] The other background matter relates to the so-called house that the accused lived in at Popua. In the course of the evidence there was mention made by all the witnesses to a hole in the wall of the house made, apparently, about the time of the second alleged indecent assault. Although the evidence was vague, the accused appears to have formed the view that the complainant had deliberately made the hole in the wall so that she could communicate in some way with boys. At one point, the court asked the accused to describe the size of the hole he had referred to and he explained that it was not really a hole but rather the whole wall had come away with the nails holding on one side only. The complainant had claimed that the wall had come away when her feet knocked against it was she was asleep. Given this rather puzzling explanation and other evidence about the two rooms in the house, the court decided to carry out a site inspection.

[11] It is recognised that Popua is one of the poor areas of Tongatapu. It is unnecessary in this judgment to speculate on the reasons as to why this should be the case. Suffice it to say that the building, which had been referred to in evidence as a house with a living room and bedroom, fell far short of fitting such description in the conventional sense of those words. At best it could be described as a shack clumsily cobbled together with bits and pieces of plywood. Both rooms were tiny and unkempt. The accused described the size of the place in his statement to the police as being approximately 14 feet by 12 feet. It has no electricity, no water supply and no sanitation facilities. From the road it looks something like a car packing case. The "wall", which the complainant apparently knocked out while she was sleeping, was in fact a piece of plywood. Even to reach the building from the roadway was something of an ordeal. The property is adjacent to the lagoon with the rear of the shack being only a metre or two away from the water's edge. The surrounding land is flat and low-lying and, on the day of the court inspection, which was a fine day, it was difficult to walk from the road to the building without stepping into water puddles over one's shoes.

The Crown case

[12] In relation to the first incident, the complainant said that on the night in question the accused had returned from the sea where he had been gathering fish bait and after that they had a hot drink before all going to sleep. She said that while she was asleep she was surprised to feel someone touching the top of her buttocks and as she stirred she saw this person move hurriedly out of her room and "he grunted as if he was not satisfied". The complainant said that she could not go back to sleep and the following morning she told Ane what had happened. The complainant said that there was no light in the room but when she stirred and looked up the man switched off a torch he was carrying, turned around and walked out. She did not see his face but she said that she could tell from his walk that it was her father and she heard his bed creak. The complainant told the court that there was a blanket on her bed but she did not have it over her at the time. She said that she was wearing a skirt with bike shorts underneath. When asked how she felt she replied that she "felt goosebumps all over." In answer to a further question from the prosecutor the complainant said, "when he came and touched me it was not just a brush, it was as if he was trying to fondle my buttocks."

[13] When asked to describe the second incident, the complainant said that on the evening of 10 May 2009 the accused again went to the sea to get some fish bait and when he returned he had a hot drink. The complainant said that she went to sleep and Ane was asleep on the floor with her head at the foot of the complainant's bed. She continued:

> "On this night he touched me on the buttocks again. I stirred in the torchlight and turned around. He turned the torch off. Then he was bending down over Ane's head. He touched me on the buttocks and he was trying to touch me between my legs. I was lying on my stomach. When I saw him bending over Ane's head the torch was on and I saw his face -- it was the accused. When I sat up he turned off the torch and walked into the living room."

[14] The witness was asked how long did the person attempt to touch her between the legs and she answered, "sometime. He did not remove his hand until I stirred." she said that she was able to confirm that the person was the accused because she saw his face in the torchlight when he was bending over Ane's face.

[15] The complainant said that after this incident she sat up in bed and cried and she did not go back to sleep. The following morning Ane asked her what was wrong because she was crying and she replied, "because of my father's behaviour towards me." She said that she told Ane that she was going to leave home because of his behaviour towards her and she never consented to what he did to her. She said that Ane told her she should remain at home because she was the reason why she had moved into their place at Popua. The complainant went to work that day but the following Saturday morning she left home and Ane and the children left that same night.

[16] The evidence relating to what happened subsequently was again rather disjointed but it seems that the complainant went to live with Ane and the children in a house that they had moved into at Ha'amoko and a week or two later the accused went to the house and inquired as to the complainant's whereabouts. The complainant was inside the house at the time but Ane said that she lied to the accused and told him that the complainant was not there but that she would call him and give him a contact phone number. The accused asked Ane if she knew the reason why the complainant had left home and Ane then proceeded to tell him about the two alleged incidents. The accused responded that, in relation to the incident on 10 May, he had only gone into the room to turn the complainant on her side. Ane told the court that she then asked the accused what he had been doing bending over her (Ane's) head and he had replied that he was bending down to remove the mosquito coil so that there would be no fire.

[17] After this development, the complainant decided to go to the police. She was asked by the prosecutor why she had gone to the police station instead of going and talking to her father about the matter. She replied, "because I was afraid." The complainant said that the police officer told her that she had "suffered too much and what her father had done was bad."

[18] In her evidence for the Crown, Ane Vaha'i told the court that in relation to the alleged first incident in April, she could recall that when she woke up the morning after, the complainant was sitting on her bed "looking as if she had lost something". She asked the complainant why she was sitting like that and the complainant told her that the accused had come and touched her on the buttocks and when he went back into the living room she sat up and she had remained sitting up for the rest of the night.

[19] In relation to the alleged second incident on 10 May, Ane said that she was sleeping on the floor with her head at the foot of the complainant's bed and she could recall being woken when the accused stood on her hair which was plaited. She said that she saw it was the accused and so she went back to sleep. The following morning the complainant asked her what the accused was doing by her (Ane's) head. Ane told her that she did not know and then the complainant (who was crying) told her that the accused had "again come and touched her between her legs." She told Ane that she wanted to leave home. Ane confirmed that there had been a mosquito coil close to her head. Earlier the witness said that the accused would often come into the bedroom before they went to sleep and bid them goodnight and kiss his daughter goodnight but the incident on 10 May was the only occasion he had entered the room after they had gone to sleep.

The police statement

[20] The accused was arrested on 25 May 2009. The police documentation was produced by consent. The accused strongly denied the allegations that had been made by the complainant. Although the police officer who took the accused's record of interview did not give evidence, one criticism which is apparent from the question-and-answer exchange is that the police officer did not make it clear at the start of the interview that he was investigating two separate complaints. Instead, he asked:

"Q.20. We have here a complaint from Sesilia Vaha'i about you entering her room while she was sleeping with your daughter-in-law Ane Vaha'i. She was woken by you touching her buttocks and you were carrying a torch, what you say?"

The accused answered:

"That is untrue, what I was doing was checking on their blanket, she was asleep with the child, I always check on her when I return from fishing."

The accused in this answer was clearly referring to the second incident on 10 May.

[21] Nine questions further on in the record of interview, the police officer asked:

"Q.29. Sesilia alleges that the second time you touched her on the buttocks, she felt you touching her between her thighs between her tights and skin and she felt that your hand was very close to her genitalia and when she stirred you then walked into the living room, what do you say?"

The accused responded:

"That is untrue".

[22] The record of interview form records that a short time after the police officer put question 20 (see [20] above), the accused complained of an upset stomach and the interview was adjourned until the next day.

The defence case

[23] In his evidence, the accused could recall nothing whatever about the alleged incident on 29th April. He did, however, have a clear recollection of the incident on 10 May. He said that he recalled returning home from the sea after midnight and as usual he looked into the bedroom and saw the complainant asleep facing the wall. When he went into the room he noticed that her feet were lying on top of the child's chest and so he moved her legs and picked up the blanket to put over them. He said that he then moved the mosquito coil which he thought was too close to Ane's head. He could recall that night because it was the same night that the wall had come away. He arranged for his son to nail up the wall the following day. The accused was surprised to find out the following Saturday that the complainant had left home and he told the court of efforts he made at the time to try and locate her whereabouts.

[24] The accused was asked why he thought the complainant would make up such a story, to which he replied: "all I can think of is that the complainant did these things as a reason for her to leave home."

[25] In examination-in-chief, the accused told about an incident when he was going out to get some fish bait and he asked Ane and the complainant to prepare a hot drink for him for his return. He told the court that as he was about to depart, Ane asked him to give them a ring when he was about to come out of the sea so that she knew he was coming home. He said that at the time he was a bit suspicious about what he was told and so he only walked a short distance from his home and then returned standing in the dark. He said that he saw a man come over the fence from his sister's house to the kitchen (an outside kitchen) and five minutes later he noticed Ane and the complainant going from his house over to the kitchen. The prosecutor noted, quite correctly, that Mr Kengike had not put this evidence to the complainant or to Ane.

[26] Mr Kengike also called evidence from the accused's son, 23-year-old Sifa. He told the court that when his father returned from the sea on the 10th, he was awake and he said that he saw his father enter the bedroom, remove his sister's feet from on top of the child and place the blanket over them. He said that his father then removed the mosquito coil and went to bed.

The law

[27] In order to establish a charge of indecent assault on a female under section 124 of the Criminal Offences Act, the Crown must be able to prove beyond reasonable doubt the following five elements:

1. That there was an assault, the intentional touching of the body of a female;
2. That the touching was indecent according to the commonly accepted community standards;
3. The accused knew that the touching was indecent in that sense and intended to do it;
4. That the complainant did not consent and the accused did not honestly believed that she consented;
5. The complainant was aged 16 or over at the time - *Rv Falemaka* [2006] Tonga LR 370.

[28] There is no requirement in the law of Tonga for corroboration of a complainant's evidence in criminal proceedings for sexual offences but the common law applies and it is the practice to warn the jury against the danger of acting on a complainant's uncorroborated evidence, particularly where the issue is consent or no consent. A judge sitting alone should also heed such warning. Although corroboration may not be an essential element of the offence, when there is no independent corroboration it is always wise to be less than certain.

[29] As noted in paragraph [25], Crown counsel was critical of Mr Kengike's failure to put to the Crown witnesses the evidence the accused would be giving in relation to the outside kitchen incident. Crown counsel made a similar criticism of defence counsel's failure to put to the complainant the evidence the accused would be giving about removing the complainant's feet from the young child's chest. These are valid criticisms. If the evidence of a witness is to be challenged on any important issue, either by contradictory evidence or in submissions, then the challenge should be put to the witness in cross-examination so that he or she has a fair opportunity to answer

it. In a jury trial, a failure to put an issue to a witness may be commented on by the judge. This, of course, is not a jury trial. Crown counsel, however, could have taken objection to the evidence when it was given by the accused or made application to recall the complainant so that the failure could be remedied. Neither of these steps was taken.

Discussion

[30] There are certain aspects of the Crown's case which, upon closer analysis, give cause for some disquiet. In relation to the first alleged incident, right from the outset it was said to have occurred on 28 April 2009. That was the date set out in the summons issued in the magistrate's court and it was the date stated in the charge form completed by the police on 26 May 2009. The indictment issued in this court also recorded the date as 28 April 2009. In her evidence, however, the complainant said that the alleged incident occurred on 29 April 2009 and at the conclusion of her evidence the Crown applied to amend the date shown in the indictment to 29 April. No explanation was given for the variation in date but the application was not opposed.

[31] As noted above, the complainant told the court that on the first occasion the person who entered the room touched her buttocks. She was asked in examination in chief, "Please explain the touch, did his hand just brush you on the buttocks or did he actually touch you?" The complainant replied, "when he came, he touched me -- not just a brush. It was as if he was trying to fondle my buttocks." The complainant also told the court, however, that he only used one hand and he only touched the top of her buttocks.

[32] When it came to the second incident on 10 May 2009, the original indictment alleged that the accused indecently assaulted the complainant, "by touching her vagina without her consent." A day or two before the trial commenced, the Crown filed an amended indictment alleging that in the incident on 10 May 2009 the accused indecently assaulted the complainant, "by touching her between her legs without her consent." After the complainant had completely finished her evidence and cross-examination the Crown applied for leave to amend the indictment again this time alleging that on 10 May 2009 the accused indecently assaulted the complainant, "by touching her on her buttocks without her consent." Although Mr Kengike was critical of this further amendment he did not oppose the application. What this evidence strongly suggests is that, unless Crown counsel got it terribly wrong -- a proposition I would be loath to accept, the complainant had given three different descriptions of the nature of the alleged indecent assault.

[33] In examination in chief in relation to this second alleged incident the complainant said that the accused touched her on the buttocks and "he was trying to touch me between my legs." She was asked, "how long was the attempt to touch you between your legs?" The complainant answered, "sometime. He did not remove his hand until I stirred." At the end of her evidence, the Court sought clarification in relation to the touching on this second occasion. The following passage is taken from the transcript:

"Ct. The second time you said that he was trying to touch you between your legs, so he was trying to touch you between your legs, did he touch you or not?

Wit. No.

Ct. So what made you think he was trying to touch you between your legs if he hadn't touched you?

Wit. Because I felt his hands going down between my legs.

Ct. So he did actually touch you on the inside of your legs did he?

Wit. No, he hadn't touched me between the legs but as his hand was coming down my buttocks, it was as if he was trying to touch me between my legs.

Ct. How do you know his hand was coming down, did you see it?

Wit. No.

Ct. I'm just trying to understand, you're saying that he didn't touch you between the legs but you say that his hand went down as if he was trying to touch you between the legs, how did you know that he was trying to touch you between the legs?

Wit. I felt it because he touched me on the buttocks."

[34] In themselves, the apparent inconsistencies in the extracts from the evidence which I have referred to in the previous four paragraphs and earlier or in this judgment may not be sufficient to raise a reasonable doubt but collectively, as I have observed, they cause me some disquiet, particularly in a case where direct corroboration is lacking.

[35] There is another factor. The evidence was that the complainant slept in the bedroom on her own for approximately 4 years until Ane arrived on the scene and yet there was no evidence whatever to suggest that the accused had made any indecent overtures to the complainant during that four-year period. That then gives rise to the obvious rhetorical question, why would the accused suddenly decide to make indecent approaches to his daughter when his nephew's wife and her children had come to stay with them and were sleeping in the same little bedroom?

Conclusions

[36] With the exception of his behaviour after consuming alcohol, the accused impressed me as a person who was trying his best, as he saw it, to carry out the role of a responsible parent. I have no doubt that he was overprotective of the complainant and he did not like the idea of her associating with boys. In this regard, he probably saw Ane as a bad influence. I suspect that he was perhaps trying to make up for his failure to act in a parental role during the 15 years he was in the States. It was apparent also from the accused's demeanour in the witness box that he considered the notion that he had indecently assaulted his own daughter as quite repugnant. In this regard, it was not surprising to see from the police record of interview that the accused had felt sick in the stomach and the interview had to be adjourned after the officer had put that allegation to him.

[37] On the other hand, the complainant had a clear motive for making up the allegations and involving Ane as a witness. To her, it was a way of leaving home and escaping from her father's overprotective regime knowing that, with indecent assault allegations floating around, the law would be supportive. Crown counsel submitted "that for someone to make up such a serious allegations against one's own father just for the sake of not having to be in his custody is beyond reason and is a preposterous proposition made by the defence." Of course, the notion of a father indecently assaulting his own daughter is equally as preposterous. The reality, sadly, is that in this world of ours preposterous things do happen.

[38] In relation to the evidence given by the son, Sosifa Vaha'i, Crown counsel submitted that he was an unreliable witness and I agree with that assessment. I did not find his evidence convincing or credible and I put it all to one side. I suspect that he, misguidedly, was trying to support his father.

[39] In summary, however, at the end of the day I have been left with very real doubts about the veracity of the complainant's allegations and the accused is entitled to the benefit of those doubts. He is acquitted accordingly on both counts.

Mateni v Pulileka anor

Land Court, Nuku'alofa
Andrew J
LA 9 and 26/2008

15 and 16 June 2009; 2 September 2009

Land law – registration of land – Minister not given full information and acted mistakenly – lease cancelled

Both proceedings in LA9/2008 and LA26/2008 concerned a dispute over a town allotment known as 'UTU'ONE and were heard together.

Held:

1. The Court was satisfied that the Landowner and the Plaintiff attempted to dispossess the defendant but when that was not successful they fraudulently arranged to lease the land to the Plaintiff.
2. The Court was satisfied that the Minister of Lands was not given the full information and therefore acted mistakenly and/or on wrong principles when he approved the lease, submitted it to Cabinet for its approval, and registered it to the Plaintiff.
3. The Court ordered that the Minister of Lands cancel the lease number 7483 in relation to the land known as 'UTU'ONE. It was declared that the defendant TAULUPE TU'UNGAHALA was the rightful occupier of that land.
4. It followed logically that the Plaintiff's application for the defendant to vacate the land known as 'UTU'ONE was dismissed.

Cases considered:

Manu v Tauheluhelu (Supreme Court L201/99, 14 May 2002)
Tukuafu v Tupoumalohi [2002] Tonga LR 268

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff : Mr Fifita
Counsel for the defendants : Mr Tu'utafaiva

Judgment

Both proceedings in LA9/2008 and LA26/2008 concern a dispute over a town allotment known as 'UTU'ONE and have been heard together.

[1] One PALETASALE PULILEKA (also known as PETELO TU'UNGAHALA) who is the first defendant in action No.LA9/2008 is the current registered holder of Utu'one. He is referred to as the landholder.

[2] Pulileka Mateni is the Plaintiff in LA9/2008 but the step grandson of the landholder. He is currently the lessee of 'Utu'one under lease No.7483 (the lease). He is referred to herein as the Plaintiff.

[3] TAULUPE TU'UNGAHALA (the second defendant in Action No.LA9/2008 but plaintiff in Action No.LA26/2008) is a nephew of the landholder and currently the occupier of 'Utu'one. His father who is deceased is a younger brother of the landholder. He is referred to herein as the defendant.

[4] In previous proceedings (LA4/2007) the landowner sought to evict his nephew from 'Utu'one. I am satisfied on the evidence that he clearly wanted the land to pass to his step grandson, the plaintiff, both had resided in the United States whilst Taulupe Tu'ungahala who is the legitimate heir was in occupation of the land.

[5] I should add that the land is 11R 132 P (Pole 53.2P) shown on the Ministry of Land in Book 127 Folio 46.

[6] In LA4 of 2006 the Land Court ordered as follows:

> "1. The defendant [that is Taulupe Tu'ungahala] agrees that the rent from the shop from now shall be paid to the Plaintiff [that is Paletasale Pulileka] or his authorized agent until the death of plaintiff and the plaintiffs widow following which the rent shall be paid to the person entitled to the Deed of Grant to 'Utu'one. Furthermore, the Plaintiff and tenant of the shop may enter into a new agreement in respect of the tenancy of the shop.
> 2. The Plaintiff [that is Paletasale Pulileka] agrees that the defendant and his family shall continue to occupy the property until such time he becomes heir to it and he may then apply for the land to the transferred to himself.
> 3. All monies paid by the tenant to the Court shall be paid to the Plaintiff's counsel Sione Tomasi Naite Fakahua.
> 4. All parties agree to settle this claim on the conditions stated above.
> 5. Both parties shall bear their own costs."

[7] The landowner has stated in a letter dated 23 March 2009 that he was forced or unduly pressed to accept the above settlement which had been drafted by his lawyer. I do not accept this evidence. The Plaintiff agreed that he had assisted the landholder in signing the letter. In my view the validity of this letter is open to doubt. The signature on the letter is very much different from his signature on the Memorandum of Agreement for Settlement. The landholder did not appear on the hearing of this matter to be cross examined.

[8] On the 1 May 2007 the land was leased to the Plaintiff. As stated that is Lease No. 7483. Cabinet decision number 1044 had approved the Plaintiff's application for lease on the 27 September 2006.

[9] The settlement of LA4/06 was formalized as a Court Order by consent, as stated on the 30 January 2007. As submitted, at this point the Court was not advised by the Landholder and/or the Plaintiff of the lease already being approved by Cabinet in September 2006. Secondly, both the Landholder and Plaintiff gave evidence in Court during the hearing of LA4/06 but neither of them told the Court about the lease.

[10] I am satisfied that the Landowner and the Plaintiff, as submitted were attempting to dispossess the defendant but when that was not successful they fraudulently arranged to lease the land to the Plaintiff.

[11] I am satisfied that the Minister of Lands was not given the full information and therefore acted mistakenly and/or on wrong principles when he approved the lease, submitted it to Cabinet for its approval and then having it registered to the Plaintiff. On the evidence of Siope Lomu of the Ministry of Lands he would not have accepted the lease application by the Plaintiff for the lease if he had been aware that there was a land case on foot in relation to this land.

[12] An application for lease requires that there be a declaration that there is no impediment to prejudice the lease. It is clear from the evidence of Mr. Sione Uele and Mr. Matekitonga, both of the Ministry of Lands, that the proceedings in LA4/06 represented an impediment to the lease application but neither the landowner nor the Plaintiff had informed them of this.

[13] In July 2006 whilst LA4/06 was still pending, the Plaintiff and Landholder agreed to lease the land to the Plaintiff.

[14] As submitted, when LA4/06 was settled on 30 January 2007 the Court and also the Defendant were not notified of the Plaintff's lease application nor that it had been approved by Cabinet. The Court ordered settlement by consent on 30 January 2007 was not given to the Minister of Lands especially when the lease had not been registered by them.

[15] In *TUKUAFU v TUPOUMALOHI* [2002] Tonga LR 268 at 274 the case of *MANU v TAUHELUHELU* (Supreme Court L201/99, 14 May 2002) is cited where the Court said:

> "The legal position which has been stated many times by this Court is that once a deed of grant is registered in accordance with the Land Act then it is final unless registration has come

> about as a result of an error of Law (i.e contrary to the Act) or as a result of fraud, mistake, breach of the principles of natural justice or of a promise made by the Minister"

[16] In all the circumstances here, there was clearly an impediment which prejudiced the lease. There was a failure to disclose the proceedings in LA4/2006 I am satisfied that the lease was obtained by fraud. The Minister of Lands and cabinet, when approving the lease no.7483 were not informed by the Landowner or the Plaintiff of the Court order of 30 January 2007 allowing the Plaintiff to occupy 'UTU'ONE.

[17] Accordingly I made the following order in LA26/2009:

Order

1. An order that the Minister of Lands cancel the lease number 7483 in relation to the land known as 'UTU'ONE.

2. I declare that the defendant TAULUPE TU'UNGAHALA is the rightful occupier of the land known as 'UTU'ONE.

3. Costs are awarded to the defendant Taulupe Tu'ungahala as agreed on taxed.

In relation to proceeding in LA9/06 it follows logically and as a result of the above orders and everything that has been said that the Plaintiff's application for the defendant to vacate the land is dismissed.

[18] The order made in LA9/2006 is as follows:

Order

1. The Plaintiff's application for the defendant to vacate the land known as 'UTU'ONE is dismissed.

2. Costs are awarded to the defendant Taulupe Tu'ungahala as agreed or taxed.

[19] I should add that there was an attempt to say that TAULUPE TU'UNGAHALA was illegitimate and accordingly was not the proper heir to the land. The marriage certificate said to be of Taulupe's parents was produced stating that they were married in 1971. There is no clear evidence of the date of birth. Taulupe says he was legitimated. There is nothing to disprove that evidence and the presumption of legitimacy must prevail. In any event this matter was not pleaded and I give it no weight.

R v 'Iongi anor

Supreme Court, Nuku'alofa
Shuster J
CR 235 and 236/2006

25-27 May 2009; 8 September 2009

Criminal law – firearms offences – question as to identification of accused – both accused were acquitted

On 11th July 2006 the 'Iongi family dance was held which brought together a large congregation of people at Tokomololo. The witnesses estimated between 100 and 200 people attended the dance that night. At around 11pm when the dance had ended and various people were packing away their musical instruments and cleaning the premises the Crown contends that a fight broke out between various youths from the neighbouring villages of Pahu and Tokomololo. The evidence revealed the fight included amongst other things, an exchange of rocks between the parties, and there were also reports of gunfire in the vicinity of the 'Iongi dance. The Crown contended that people were injured and admitted to hospital that same night apparently with gunshot injuries. The accused were subsequently arrested, their home searched, and they were charged in 2006 with firearms offences, namely carrying a firearm in a public place and discharging a firearm with intent to intimidate. Each denied their involvement and denied any knowledge of the use of firearms on the night in question.

Held:

1. The main issue concerned the correct identification of the two accused as the principle offenders. It was trite law that any such identification must be treated with all due care.
2. The Court considered all the facts especially the delay in bringing the matter to trial. Memories fade. The Court could not be certain that the identification of the two accused as perpetrators of the alleged crime on the night in question.
3. The prosecution did not prove its case beyond reasonable doubt. The accused were acquitted and discharged.

Statutes considered:

Arms and Ammunition Act (Cap 39)
Criminal Offences Act (Cap 18)

Counsel for the Crown : Miss Tupou
Counsel for the accused : Mr Tu'utafaiva

Judgment

The Defendants

The two defendants were arraigned on 25th May 2009 and pleaded NOT GUILTY to a two count indictment alleging offences of:-

[1] Of carrying an arm in a public place, an offence contrary to section 44 of the Arms and Ammunition Act (Cap 39)
[2] Discharging a Firearm with intent to intimidate, contrary to section 109 of the Criminal Offences Act (Cap 18) on the 11th July 2006.

The defendants both elected to be tried by a Judge sitting alone. The matter was adjourned and set down for trial on the 25th May 2009. The main issue in this case - is one of identification of the two accused persons - as principle offenders.

A preliminary matter: - I accept defence counsel's submission that in the lower court there may have been some confusion about the number of charges brought by the police, as against his two clients, but the case before me concerns but two charges and that is what we are here for, nothing more and nothing less, and these charges were subsequently vetted by Officers from the Crown Law Office.

The Brief Facts

The Crown say: this case emanated from an incident that happened on the night of the 11th July 2006, at the village of TOKOMOLOLO. The Crown says the 'ILONGI family reunion dance took place on that night, which they say was organised by the accused, and their immediate family and the dance took place at the local Mormon Church.

The 'IONGI dance brought together a fairly large congregation of people, inside the tennis facility at the Mormon Church at TOKOMOLOLO where the 'IONGI family dance took place. I was told a number of spectators observed the dance from outside, on the road.

The witnesses put an estimate of between 100 - 200 people who attended the dance that night. At around 23.00 hours on the 11th July 2006 - when the dance had ended and various people were packing away their musical instruments and cleaning the premises — the Crown says a fight broke out between various youths from the neighbouring villages of PAHU and TOKOMOLOLO.

The evidence revealed the fight included amongst other things, an exchange of rocks between the parties, and there were also reports of gunfire in the vicinity of the 'Iongi dance.

The Crown says people were injured and admitted to hospital that same night apparently with gunshot injuries - but strangely the evidence also revealed that there was no sign of any police attendance whatsoever - in the village on that night.

The defendants were subsequently arrested their home searched they were interviewed and charged in 2006 with firearms offences.

The Burden of Proof

In every case the prosecution must prove the defendant is guilty.

- A defendant does not have to prove his/her innocence.
- In a criminal trial the burden of proving the defendant's guilt is, and always remains, on the prosecution throughout the trial.

The Standard of Proof

How does the prosecution succeed in proving the defendant's guilt? The answer is - by making me sure of it, nothing less than that will do.

- So, if after considering all the evidence I am sure that the defendant is guilty, then I must return a verdict of GUILTY.
- If I am not sure then my verdict must be one of 'NOT GUILTY'.

Circumstantial Evidence

Sometimes a judge and / or a jury are asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw a defendant commit a crime; or if there is a video recording of the incident which plainly demonstrates his guilt; or, if there is reliable evidence of the defendant himself having admitted the offence, these would all be good examples of direct evidence against him-her. On the other hand, it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime, and of the defendant; which they say when taken together will lead you to the sure conclusion that it was the defendant or defendants who committed the crime.

It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a judge or a jury can say 'We now know everything there is to know about this case'. But the evidence must lead to the sure conclusion that the charge which the defendants face is proved against him.

Circumstantial evidence can be powerful evidence, but it is important that it is examined with care, and I have to consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does in fact prove guilt. Furthermore, and before convicting on circumstantial evidence I should consider also whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or to destroy the prosecution case.

I should also be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, neither the prosecution the defence nor I, should do that.

The Elements of the Offence of Carrying a Firearm in a Public Place

To find the Accused Guilty of an offence alleging the defendant carried a firearm in a public place; the prosecution must prove each of the essential elements of the offence. In layman's terms and in a nutshell the essential elements are:

- The accused
- Carried and arm, or goes armed
- In a public place
- Without lawful authority of reasonable excuse

The Elements of the Offence of Discharging a Firearm with Intent to Intimidate

To find the Accused Guilty of an offence alleging the defendants discharged a firearm with intent to intimidate; the prosecution must prove each of the essential elements of the offence. In layman's terms and in a nutshell the essential elements are:-

- The accused
- Discharged a firearm
- Near to other persons
- And that the accused intended to intimidate (others)

Oral Evidence

PW1 Tu'ipulotu Talia'uli

This witness gave evidence to the police and the court that he was an eye witness to the shooting of a gun at Tokomolovo on the night in question.

PW2 Lolesio Hassia

This witness testified he found one live .22 bullet inside the second accused room at his home when the police searched the second accused room on 14th July 2006 acting on a search warrant.

PW3 Eliki Tomu

This witness was the police armourer who examined the single live .22 bullet Remington round which was found in the 'Iongi residence and the two fired .22 bullets recovered from the hospital. This officer confirmed neither of the accused held a firearms certificate.

PW4 'Isimoto Vaihu

This officer participated in the search of the 'Iongi residence on the 14th July 2006.

PW5 Mavae Fakaanga

This witness testified he was drunk and he said he saw a man called SAMU but he did not identify the accused Samuela. He told the court he ran towards the

intersection when he heard gunshots he told the court he was throwing stones and was afraid when he heard the gun shots but he still went to see who was firing.

PW6 Havea H Faiva

This witness testified he saw the first accused Sitiveni with a rifle, and he testified he fired it. He also testified he also saw the second accused holding a pistol, and discharging it at the same time. He said he was injured and fell to the road where a T shirt was wrapped around his leg to halt bleeding. He confirmed the witness FAKAANGA was drunk.

The Defendant's VCS

The defendants VCS and charge statement were read into evidence and were admitted as evidence by consent. The evidence revealed the two defendants were interviewed by the police as follows —

- Samuela 'Ilongi was interviewed on the 13thj July 2006 at 11.55 hours
- Sitiveni 'Ilongi was interviewed by the police on the 25th August 2006 at 14.50 hours.

The Law Says:

I am required to carefully consider the defendant's voluntary record of interview, and also his charge statement, to see if it is voluntary, or not, in the true sense of the word. In relation to that, it is my duty to decide two issues in relation to the statements and to any alleged confession.

- First I must decide if the defendant actually made them
- Second but only if I am sure that he did make them, I have to consider whether or not what he said was true.

In determining that I should take into consideration all the circumstances in which I find it was, or may have been made. If for whatever reason I am not sure whether the confession was made, or I am not sure whether it was true, then I must disregard it.

If on the other hand I am sure both that it was made and is true, I may rely upon it even if it was or may have been made by oppression or by other improper circumstances. In this case all these documents were admitted by consent and they contain no admissions to the charges.

Analysis

The evidence adduced by both the prosecution and the defendant reveals the following: The two accused persons CR235/06 SAMUELA 'IONGI and CR236/06 SITIVENI 'IONGI each denied their involvement in this incident, to the police - in both their VCS and to this court. The accused, denied any knowledge of the use of firearms, on the night in question despite as the Crown was said to have proved - a single live round of point .22 ammunition, had been found in the bedroom of the second defendant - by police officers during a search of the accused's premises — and under the authority of a Magistrates - Search Warrant. No firearms were found during the police search of the 'Ilongi residence.

Crucial - The Identification Evidence

This case, concerns the correct identification of the two accused as the principle offenders in this case - and it is trite law that any such identification must be treated with all due care.

The Crown relied heavily upon the evidence of [1] MAVAE FAKAANGA and [2] HAVEA HIKULE"O FAIVA concerning the identity of the defendants as suspects and - as the people carrying and discharging firearms in a public place on the night of the 11th July 2006.

The guideline case of *Turnbull* establishes - that there is always a special need for caution — before I can convict the accused in reliance upon the correctness of the identification and or the recognition of the accused by witnesses. The reasons and the need for caution are well established, in that a witness can be a convincing one - yet he/she can also be mistaken. The same can be said for evidence from multiple witnesses.

The accused via his counsel — properly questioned whether the streetlights at the scene of the locus in quo were working on the night in question. They also questioned whether the lighting at two petrol stations was in good order, alight and working. Indeed much was said concerning even the existence of the lighting at the two petrol stations near the locus in quo in 2006.

I am satisfied on the evidence placed before me in this trial, that there was a fight and that there were gun shots fired. I am satisfied on the evidence put before me that the prosecution witness FAKAAHANGA was drunk because this was confirmed by the Crown witness Mr FAVIA when he gave his evidence, and that evidence I fully accept. Mr. FAKAAHANGA'S evidence cannot in my view be reliable.

Bearing all the facts of this case in mind, especially with the delay in bringing this matter to trial, I accept memories do fade. I cannot be certain that the identification of the two accused as perpetrators of this alleged crime stands up to the test - as enunciated in *R v Turnbull*. I cannot be satisfied the defendants were properly identified as the perpetrators in this case on the night in question.

For this simple reason and this reason alone, I find the prosecution has not proved its case beyond reasonable doubt - so that I am sure the defendants committed the two offences with which they are charged.

Accordingly I acquit and discharge the defendants on this indictment. They are free to go. However, I order the single round .22 Remington bullet found at the 'Iongi residence - is to be destroyed by the police.

Kava v Australia and New Zealand Banking Group Limited

Supreme Court, Nuku'alofa
Shuster J
CV 202/09

14-16 September 2009; 21 September 2009

Companies – application to put liquidation orders aside – failed to establish it would be just and equitable – application refused

On 12 and 13 May 2009 the Supreme Court ordered that Hottsie Anne Company Limited ("Hottsie Anne") be placed into liquidation. This was pursuant to an application by the ANZ Banking Group Limited ("Respondent") after a Statutory Demand under the Companies Act 1995 was served on Hottsie Anne and went unanswered. The debt claimed by the Respondent was for the sum of $1,215,000 and arose through various loan advances made to Hottsie Anne. The applicant, a shareholder of the company, sought to terminate the liquidation.

Held:

1. Section 259 of the Companies Act 1995 gave the Supreme Court a discretionary power to terminate the liquidation of a Company if the Court was satisfied that it was just and equitable to do so bearing in mind all the facts of the particular case.
2. The Court found that the Respondent and its officers always acted in good faith throughout their course of their dealings with Hottsie Anne. There was no direct evidence put before this Court to establish fraud or impropriety.
3. The Court found that all loan agreements between Hottsie Anne and the Respondent had been properly executed by Mr. Kitekei'aho as a Director of the Company with the actual authority to do so. There was no evidence put before the Court to establish that Mr. Kitekei'aho lacked any such authority.
4. The Court preferred the evidence of the Respondent and found the Applicant failed to establish that it would be just and equitable for the Court to set aside the liquidation orders. Accordingly the Application was refused.

Cases considered:

Bell Resources Holdings Pty Ltd v Commissioner for ACT Revenue Collections (1990) 8 ACLC 533

BNZ v Fiberi Pty Ltd (1992) 10 ACLC 1557
Brick and Pipe Industries v Occidental Life Nominees Pty Ltd (1992) 10 ACLC 253
Hely Hutchinson v Brayhead [1968] 1 QB 549
Lyford v Media Portfolio Ltd (1989) 7 ACLC 271
Northside Developments Pty Ltd v Registrar General & Ors (1990) 2 ACSR 161

Statutes considered:
Companies Act 1995
Evidence Act (Cap 15)
Stamp Act (Cap 70)

Counsel for the applicant : Mr Corbett
Counsel for the respondent : Mr Stevenson

Ruling on an application under section 259 of the Companies Act 1995 for the termination of the liquidation of Hottsie Anne Co Ltd

1.0 Background

1.1.1 The Applicant seeks an order from this Court terminating the Supreme Court's orders of May 12 and 13 - placing the Hottsie Anne Company Limited ("Hottsie Anne") into liquidation - signed by Ford CJ.

1.1.2 The order placing Hottsie-Anne into liquidation was granted pursuant to an application by the ANZ Banking Group Limited ("Respondent") after a Statutory Demand under Section 298 of the Companies Act 1995 ("the Act") was served on Hottsie Anne Ltd, by the Respondent Bank and, the Statutory Demand went UNANSWERED.

1.1.3 The debt claimed by the Respondent Bank under the Statutory Demand pursuant to Section 289 of the Companies Act was for the sum of $1,215,000.00. The debt owed to the Bank - arose through various loan advances made to Hottsie Anne Ltd, under agreements advanced to the Company between 2003 and 2008 by the ANZ Bank.

1.1.4 The Applicant in the case - is Atelaite Kava; a shareholder of the company and under the Act, is a party entitled to make application for the termination of the liquidation of the Company — under Section 259 (2) of the Act.

2.0 Grounds for the Application

2.1 The grounds for seeking the termination of the liquidation order by the Applicant - are as set out in the First

Application notice filed on 24 August 2008 the "First Termination Application (FTA) and are:-

(a) The debenture executed by Hottsie Anne on 22 April 2008 and registered with the Companies Registry on 14 August 2008 (the "Debenture") and which are the principal security for the debt owing to the Bank is invalid - because it has not been properly executed: and

(b) The buildings constructed with the loan funds of $860,000 were structurally unsound, and or unsafe; and

(c) The Respondent was negligent in approving loans to Fuka Kitikeiaho knowing he does not have authority to apply for, or draw down loans; and

(d) That the loans, above the initial amount borrowed by Hottsie Anne Ltd in February of 2003 of $155,000 were void and illegal, because the Companies shareholders did not approve the borrowing - pursuant to Section 128 of the Companies Act 1995.

2.2 The Applicant filed a Second Application - to terminate the liquidation of the Company on the 28 August 2009 "the Second Termination Application (STA) the grounds contained in the STA - were based on allegations of fraud and impropriety - in relation to the said loan agreements. Further the Applicant states certain statutory obligations under the Stamp Act had not been complied with.

2.3 The Respondent however confirmed in Court the loan agreements which were produced in court, together with the affidavit of Mr. Yeoman were signed loan agreements which had remained in the Bank's possession following the destruction of the Bank's premises during the riots of 16 November 2006, upon which the Respondent relied. Mr. Kitekei'aho was the signatory to those agreements for Hottsie Anne, and he deposed they were the loan agreements he signed, and his signature appeared on each agreement.

2.4 The Respondent says it relied on the presumption - as to "the proper signing and sealing of documents" (section 47 of the Evidence Act (Cap 15)) which provides:

- "When any document is produced before a court purporting to be a document which by any Act at any time is admissible in evidence if signed or stamped or sealed or otherwise authenticated as required by this Act, the Court shall presume, until the contrary is shown -
  (a) That the signature, stamp, seal, or other authentication of the document - is genuine; and
  (b) That the person signing, stamping, sealing or otherwise authenticating it had at the time he did

so the official or other position which he purported to have"

- The Respondent submitted - the contrary has not been shown via any evidence from the Applicant. Indeed, they say under cross-examination, Mr. Kolo freely admitted his allegations of fraud and impropriety – were based upon supposition, and upon his misinterpretation of both facts and law.

2.5 The Respondent's position and contention, based on the STA, and the affidavit of Mr. Kolo in support of allegations of fraud, they say were nothing more than allegations; because the Applicant provided no evidence whatsoever to substantiate his serious allegations to the court. The presumption under s 47 of the Evidence Act Cap 15 per the proper signing and sealing of documents applied, and the Applicant has failed to provide any direct evidence to rebut that presumption.

3.0 Grounds for Termination under the First Application

The Respondents addressed the grounds in the FTA as follows:

3.1 THE INVALIDITY OF THE DEBENTURE

3.1.1 The Respondent's position whether the Debenture was properly executed which the Respondent contends it was; was of no relevance to the liquidation of Hottsie Anne Co, because, the Respondent says its officers did not rely on the Debenture as the basis for its application to place Hottsie Anne into liquidation. Accordingly the Debenture and any question regarding its validity would only be relevant in the context of Receivership, not to an application for liquidation.

3.1.2 The Respondents says the issue in relation to the execution of the Debenture was essentially whether a debenture, under the laws of Tonga is required to be executed as a deed. The Respondent could find no authority [in law] to support a proposition that a debenture must be executed as a Deed, and no such authority had been provided to the Court by the Applicant. However, if a debenture is a document that is required to be executed as a Deed, then the execution of the Debenture by one director alone may not be sufficient for valid execution unless that Director had a specific power of attorney from the company to do so - under the provisions of Section 189(1)(a) of the Act. If a Debenture is not required to be executed as a Deed, then the provisions of Section 189(1)(5) would apply and the execution by one director with express or implied

authority to do so would be valid. It was submitted by the Respondent - these considerations were academic in the present context, given the fact the Respondent Bank did not rely upon the Debenture in its application to place Hottsie Anne Company into liquidation; and I agree.

3.2 THE BUILDINGS

3.2.1 The Applicant asserted the buildings were structurally unsound and unsafe, and this had a detrimental effect on the business. Mr Woods' report was attached as Exhibit 'J" to Mr. KoloTs affidavit of 28 August, 2009 filed in support of the STA which report stated the Davina Night Club - was of unsound construction.

3.2.2 Mr. Woods gave no direct testimony on this matter and the report attached to Mr. Kolo's affidavit was undated and unsigned. The Respondent's contention was the unsubstantiated allegations regarding the building did not directly relate to the issue of whether or not the liquidation should be terminated; but instead, raised possible issues of liability of third parties, including the builder in tort. The Applicant may have a cause of action against third parties and she was free to pursue those avenues if she wished, but those issues were not germane to the issue of whether or not the liquidation of Hottsie Anne should be terminated by this court today; and I agree.

3.3 INVALIDITY OF AUGUST 28 AGREEMENT

3.3.1 The Applicant alleges this loan agreement was invalid - because a person - Atu Ngaue signed the document as an authorized signatory of Hottsie Anne, when in fact he held no office or shares in Hottsie Anne. The loan agreement Exhibit "H" to Mr. Kolo's affidavit 5 August 2009; was filed in support of the FTA.

3.3.2 The Respondent says a closer inspection of the loan agreement Exhibit H, revealed Atu Ngaue signed the loan document as a witness to the signature of Hottsie Anne director Kitekei'aho. He was not signing in a capacity as an officer or shareholder of Hottsie Anne and the Applicant has not provided evidence why the loan agreement was otherwise not properly executed.

3.3.3 The Applicant's only challenge - to the validity of the August 28 loan agreement in the FTA, was the alleged execution of the loan agreement was by Atu Ngaue - as an officer of Hottsie Anne. Under cross examination, Mr. Kolo admitted Atu Ngaue had in fact signed the document as a witness and not as an officer of the Hottsie Anne as he had alleged. Mr. Kolo also admitted to inconsistencies within his own affidavit of 28 August

2009. In paragraph 26 of that same affidavit he went on to describe Atu Ngaue as signing as a witness to Mr. Kitekeiaho's signature. The Respondent says given the clear documentary self explanatory nature of Atu Ngaue's signature on the loan agreement as a witness; the admission of this fact, in the absence of any other grounds advanced by the Applicant in the FTA, that the loan agreement was invalid, then the Respondent contended the loan agreement was valid and enforceable in all respects. They said the Applicant has provided no grounds or evidence, as to why it should otherwise be found to be invalid; and I agree.

3.3.4 Mr. Kolo, in paragraph 13 of his affidavit of 5 August 2009 - in support of his STA, asserted the signature of Atelaite Kava was required on the loan agreement of August28 - in order to 'legalize the loan". The Respondent says the meaning of "legalize" and the basis for this assertion was unclear. The Respondent's position was Ms. Kava's signature on the document was initially sought by the Bank -in her personal capacity — but as a guarantor of the loan. That requirement was subsequently waived by the Respondent - something which the Respondent was clearly legally entitled to do- that requirement being solely to the benefit of the Respondent, and was not required in order to provide efficacy to the loan itself. The background to waiver was set out in Mr. Yeoman's affidavit of 25 August, 2009, and reaffirmed in his evidence — even under cross examination.

3.3.5 The Respondent says it was unclear from the wording of paragraph 5 of the PTA - in the event the Applicant was asserting the execution of the loan agreement by Mr. Kitekei'aho himself was invalid, the Respondent addressed that issue as follows:-

4.0 Approval of the Loans to Fuka Kitekei'aho

4.1 The Applicant, in paragraph 5 of the PTA, alleges the Respondent was negligent in approving certain loans, specifically: "The Respondent through its loan officers was negligent in approving loans *to Fuka* and, allowing him to draw funds knowing he did not have authority to apply for the loans, nor draw any money in relation to those loans".

4.2 The Respondent argued - the Applicant's stated grounds for the termination of the liquidation of Hottsie Anne were in relation to loans made by the Respondent to "Puka".

They say the reference to "Fuka" was to Mr. Fuka Kitekei'aho. However, they say it was clear any loan arrangements which the Respondent may have approved or, made to Mr. Kitekei'aho in his personal capacity, had no bearing whatsoever on the subject matter of the present application(s) -which was - the liquidation of Hottsie Anne. On that basis the Respondent says no further consideration of this point is required.

4.3 The Respondent said the Applicant has only challenged the validity of one of the Hottsie Anne loan agreements with the Respondent - the Loan Agreement of 28 August 2008. The Respondent says the grounds for termination as pleaded by the Applicant in paragraph. 5 of the FTA - did not establish a sufficient basis for termination of the liquidation of Hottsie Anne, for all the reasons outlined.

5.0 The Authority of Fuka Kitekei'aho

5.1 The Respondent said based on a plain reading of the grounds contained in paragraph 5 of the FTA - it did not appear the Applicant was challenging the authority of Fuka Kitekeiaho in relation to the loans made by the Respondent Bank to Hottsie Anne, but - in the event Mr. Kitekei'aho's authority to apply for and, draw to loans to Hottsie Anne - was challenged by the Applicant- then the Respondent made the following submissions on the assertion.

5.2 MANAGEMENT OF COMPANY

5.2.1 There could be no issue that Mr. Fuka Kitekei'aho - was at all relevant times a Director and the Secretary of Hottsie Anne, until he was removed from office on 24 November 2008: - when Mr. Kolo, took his place as the Director and the Secretary of Hottsie Anne because- this was affirmed in evidence by both Mr. Kitekei'aho and Mr. Kolo and I agree.

5.2.2 The Applicant maintains she is and was at all material times also - a Director of Hottsie Anne, whether or not this is the case - is not entirely clear from the evidence before the court. The destruction of the Official Companies Record's Office in November of 2006 leaves this an - open question. The Applicant produced some evidence to the court to suggest Ms. Kava was a Director, yet it was Mr. Kitekei'aho's recollection - that he was the only director; this issue seems open to question. What was admitted and ascertained via Mr. Kolo in his evidence and under cross examination — and in addition via his own admission, was that - Mr. Kolo

had been Ms. Kava's financial advisor and her business partner since 2004. Mr. Kolo has been the Director and Company Secretary of Hottsie Anne since 24 November 2008), and Mr. Kolo also admitted the following in evidence:

(i) Ms. Kava had been receiving audited financial statements for Hottsie Anne; and

(ii) Ms. Kava had known about the loans to Hottsie Anne by the ANZ - as the Loans had been disclosed as term liabilities in the financial statements - which Ms. Kava had received.

5.3 POWER OF ATTORNEY

5.3.1 The Applicant contends the first loan agreement between the Respondent and Hottsie Anne - for the sum of $155,000 was executed by Hottsie Anne under a purpose - specific Power of Attorney granted to Mr. Kitekei'aho, by Ms. Kava in her capacity as majority shareholder in Hottsie Anne. A letter dated December 2002 purportedly from Ms. Kava, written to the General Manager of the ANZ Bank was produced as - Exhibit "F" Kolo's affidavit of 05 August.

5.3.2 The Applicant claimed a copy of a Power of Attorney, was received by the Respondent sometime in December 2002, or early 2003. By way of further affidavit of Mr. Kolo of 11 September 2009, the Applicant produced correspondence from Mr. Kieron Ward, ANZ Relationship Manager – dated 10 January 2003, addressed to Ms. Kava. The correspondence acknowledged receipt of a Power of Attorney - allowing Mr. Kitekei'aho to sign loan documents on her behalf. (Exhibit "D" of the affidavit). The Respondent said it was not clear from the letter exactly what form that Power of Attorney took or, what it provided no date was referenced. The Power of Attorney might have been a broad or General Power of Attorney. It was simply not known for certain by the Court and I agree.

5.3.3 The Respondent said the Applicant also produced a letter addressed to the General Manager of the ANZ Bank dated 30 December 2002 which authorized Mr. Kitekei'aho to sign a loan of $ 170,000, the letter signed under a name "Atelaite Kava, - as proprietorship, Hottsie Anne". The Respondent acknowledged - this may be the letter Mr. Ward referred to in his correspondence, but, in the absence of direct testimony from Ms. Kava - or Mr. Ward this cannot be known for certain.

5.3.4 What was also uncertain on the evidence was whether the signatures appearing on the Power of Attorney are

authentically those of Ms. Kava. Mr. Kolo gave no direct testimony he witnessed Ms Kava sign the letter. Mr. Kolo acknowledged in paragraph 6 of his affidavit 28 August, he met Ms. Kava in late 2003, after the event transpired. The Respondent says while a number of documents produced to the Court are purportedly signed by Ms. Kava, and they include the stamp of a notary confirming Ms. Kava signed the document, the powers of attorney do not contain independent verification. They also submit - under s 52 of the Evidence Act - the Court may presume due execution of a Power of Attorney produced if it is - duly notarized. The respondent says the Power of Attorney dated 30 December 2002 alleged to have been signed by Ms. Kava - is not notarized.

5.3.5 The Respondent says it was possible other powers of attorney may have followed subsequently, but this could not be known for certain. The Respondent has no record of the receipt of other Powers of Attorney. Following the riots of November 2006, and the destruction of the Respondent's premises in Tonga, most if not all of the Respondent's documents and records - relating to Hottsie Anne Co, were destroyed. After November 16, the Respondent no longer has any record of that Power of Attorney or any other Power of Attorney that might have been subsequently received to refer to. Mr. Yeoman in his evidence a member of staff advised him, he recalled the Bank had held a Power of Attorney for Mr. Kitekei'aho from Ms. Kava' but the Respondent says - that document is not in evidence, and the staff member has not given evidence. The court must conclude the Power of Attorney, if held, and in whatever format, was lost by fire on 16 November 2006 and I agree.

5.3.6 The respondent went on to say - under the headings "Implied Authority" and "Implied Actual Authority' the existence of and receipt by the Respondent, of the initial Power of Attorney, was not critical to the validity or to the enforceability of the subsequent Loan Agreements, and I agree.

5.4 LOAN AGREEMENTS THE FIRE

5.4.1 Because some of the original loan agreements between Hottsie Anne and the Respondent could be produced to the Court, because they were lost when the Respondent's offices were burned during the riots of November 2006 evidence was given of the fire in the affidavit of Esei Tu'ipulotu dated 15 September, 2009. Mr. Tu'ipulotu was the project manager in the Operations Department of the Respondent Bank, with experience in IT matters. He

affirmed -only very limited account information, such as account names, numbers and balances - was recoverable from the Bank's computer systems following the November 2006 fire - this evidence was not challenged.

5.4.2 It is not in dispute the first loan agreement for an amount of $155,000 was entered into shortly after the incorporation of Hottsie Anne, in January 2003. How the loan agreement was executed cannot be known for certain, because the Respondent's executed copy has - been lost by fire and the Applicant produced an unsigned copy - Exhibit "E" Kolo's affidavit of 05 August 2009.

5.4.3 Respondent says - over a period of 6 years, the initial loan to Hottsie Anne increased through a number of loan facilities and agreements - to $1,215,000, the loan agreements were signed by Mr. Kitekei'aho - acting in his capacity as Director and Company Secretary of Hottsie Anne.

5.4.4 The following loan agreements were produced to the Court as Exhibits A - F - Mr. Yeoman's affidavit.

Date of loan agreement	Description of facility	How executed
19 April 2004	Increase of existing loan of $153,462 by $96,000 to a total of $249,462	Signed by Fuka Kitekei'aho as Director and as Company Secretary
7 June 2007	Increase of total lending by an amount of $15,000 to a new total of $414,739.00	Signed by Fuka Kitekei'aho as Director and as Company Secretary
24 August 2007	Restructuring existing Overdraft and Term Loan into one Term Loan of $420,000 – no effective increase in lending	Signed by Fuka Kitekei'aho as Director and as Company Secretary
4 March 2008	Providing a new additional overdraft facility	Signed by Fuka Kitekei'aho as

Date of loan agreement	Description of facility	How executed
	of $10,000 bringing total lending to $428,000	Director and as Company Secretary
6 March 2008	Increasing the overdraft limit by $30,000 and the term loan by $700,000 bringing total lending to an amount of $1,145,000.00	Signed by Fuka Kitekei'aho as Director and as Company Secretary
28 August 2008	Providing an additional facility of $130,000 and combining overdraft and term loan into one term loan, bringing total lending to $1,255,000.00	Sole Signature of Fuka Kitekei'aho is witnessed by Atu Ngaue, Bar Manager of Hottsie Anne

5.4.5 The Respondent affirms all- loan agreements produced in evidence to the Court by the Respondent have been duly stamped as required by Section 5 of the Stamp Act. The Respondent also says - pursuant to Section 11 of the Stamp Act, there is no restriction or, constraint placed upon the time when a document must be stamped, provided that the appropriate duty is paid at the time the document is so stamped. The amount increases after passage of time.

5.4.6 The question is whether or not the ANZ loan agreements have been validly executed under the terms of the Act and the Hottsie Anne's Constitution. With regard to Hottsie Anne's Company Constitution it was apparent that - because of the destruction of the Companies Office records in the riots of November 2006 it cannot be known for certain what format the Company's constitution took, but, in the absence of evidence to the Court otherwise, it can/should presumed to be to the standard Constitution under the Act. Further Mr. Kolo, the new Company Secretary, produced no copy of the Constitution to the Court.

5.4.7 To fully address the issue of the validity of the execution of the loan agreements, the respondent says it is necessary to look at Section 189 of the Companies Act 1995, which addresses the method(s) of contracting by companies.

5.4.8 Section 189(1)(a) of the Act has already been addressed earlier in relation to the execution of the Debenture by Mr. Kitekei'aho on behalf of Hottsie Anne. Section 189(1)(a) by its terms applies to contracts or obligations which, if entered into by a natural person, would, by law, be *required* to be by deed. However the Respondent argues the loan agreements referenced would not, under Tongan law, be *required* to be entered into by Deed and therefore they submit that Section 189(1)(a) does not apply. If it did however, Mr. Kitekei'aho, as Director and Secretary of Hottsie Anne could validly execute the agreements in those capacities under Section 189(1)(a)(ii) of the Act.

5.4.9 The respondent says it follows - Sections 189(1)(b) or (c), which relate to the execution of agreements which if entered into by a natural person would (under subsection (b)) or would not (under subsection (c)) - be required to be in writing, must be applicable.

5.4.10 The agreements are in writing, so the respondent said it would simply rely on the language of Subsection (1)(b) which states: "An obligation which, if entered into by a natural person, would, by law, be required to be in writing, may be entered into on behalf of the company in writing by a person acting under the company's express or implied authority". The issue then becomes - was Mr. Kitekei'aho acting under Hottsie Anne's express or implied authority when executing the various loan agreements?

5.5 ACTUAL (EXPRESS) AUTHORITY TO SIGN

5.5.1 Mr. Kitekei'aho attested he was the Managing Director and Secretary of Hottsie Anne Company Limited on its incorporation.

5.5.2 Mr. Yeoman attested it was his understanding from Mr. Kitekei'aho that Mr. Kitekei'aho was the sole Director and the Company Secretary at the time Hottsie Anne applied for - a $700,000 loan in March 2008.

5.5.3 The Respondent argued if it was accepted Ms. Kava was a also Director at that time, then Mr. Kitekei'aho would still be imbued with actual authority to sign the loan agreements as long as Ms. Kava, as the other Director and Shareholder, authorized him. Mr. Kitekei'aho gave direct testimony that Ms. Kava did authorize him to sign

the loan agreements. Ms. Kava has not appeared before the Court to refute Mr. Kitekei'aho testimony. I must say I found Mr. Kitekei'aho - to be a convincing witness.

5.5.4 When approving the loan in March 2008, the respondent argued Mr. Yeoman could only practically rely on Mr. Kitekei'aho advice regarding the company structure, because both the Respondent's records and the Companies Registry records regarding - Hottsie Anne had been destroyed by fire in the riots. Mr. Yeoman understood Mr. Kitekei'aho was the sole Director of the Company and in the circumstances Mr. Yeoman had and was entitled to rely upon this assertion. The surviving loan agreements bore only Mr. Kitekei'aho signature as - Company Director and Secretary. What was left of the Bank's records indicate Mr. Kitekei'aho was the only signatory to the company's bank account. With all other official company records destroyed, there was no further inquiry Mr. Yeoman could reasonably make - he had to rely on Mr. Kitekei'aho, who also affirmed in court - he informed Mr. Yeoman that:-

(i) He was both the Director and Secretary of Hottsie Anne Co Ltd; and

(ii) Mr. Kitekei'aho partner Ms. Kava, and their three minor children all reside in America, and they are the only shareholders; and

(iii) Hottsie Anne was a family company, and Kitekei'aho deposed he advised Ms. Kava, of his plans to renovate the building and apply for further funding from the ANZ of $700,000 to facilitate that; and

(iv) Ms. Kava had agreed to the further loan funding.

The Respondent said the Applicant - Mr. Kolo had also given evidence in court that Ms. Kava had received - audited financial statements for Hottsie Anne and as such she was fully aware of all the loans.

5.6 IMPLIED AUTHORITY TO SIGN

5.6.1 The Respondent says even if Mr. Kitekei'aho did lack actual authority to enter into the loan arrangements there was no evidence before the court establishing that this was the case, then the question was - did he have implied authority to do so - for the purposes of Section 189(1)(b) of the Act?

5.6.2 The respondent says a Director or Agent of a Company has the implied authority to do those things which experience shows — is usually completed by a Director or Agent of the business.

5.6.3 The Respondent drew the courts attention to the case of *Hely Hutchinson v Brayhead* [1968] 1 QB 549 where the court found that notwithstanding the absence of an express agreement between the parties, the principal and the agent, they may conduct themselves in such a way that it is was proper to infer that the relevant authority has been conferred on the agent. Where the question is whether the agent has implied authority to act in a particular way, the court should direct its attention to the conduct of the parties in order to decide whether inference of authority should be drawn.

5.6.4 They argues in the present case under the scenario where if Ms. Kava is taken to be a Director, it was argued it was clear Mr. Kitekei'aho - was the only Director of Hottsie Anne actually residing in Tonga - and he was also the Company Secretary. As a result, Mr. Kitekei'aho — his authority went well beyond the role of a "normal" director — the Respondent says he was conferred the powers of a "Managing Director". Mr. Kitekei'aho had given evidence that it was always understood, that he had the authority to run everything to do with the said company.

5.6.5 The Respondent argues the Standard Constitution for a Tongan company does not actually include provision for the appointment of a Managing Director (although the Constitution of Hottsie Anne may have done so), but it does include provision for the delegation of the powers of the Directors - to a third party, such delegation is also permitted under the terms of Section 129 of the Act. Clearly the respondent says this is what occurred in the circumstances of the present case, and as such, Mr. Kitekei'aho was effectively a Managing Director. The extent of the powers of the Managing Director turn on the circumstances of the case and the nature of the company involved. Given the offices he occupied as both Director and Secretary of Hottsie Anne and the fact that he was the only officer of Hottsie Anne physically present in Tonga, it was submitted that there was ample evidence to conclude that Mr. Kitekei'aho authority extended to the application for and acceptance of all loans to Hottsie Anne, including the $700,000 construction loan facility in March 2008, and the subsequent loan of $130,000 in August of 2008 and I fully agree.

5.6.6 Following on, the respondent says it would also be helpful to look at the history of the loans made to Hottsie Anne, as evidenced by the loan agreements produced to the Court — although without copies of all loan

documents it will not be possible to know accurately what purpose the loans were applied - for:

- It was acknowledged by the parties, the original loan of$155,000 in early 2003 was for the initial purchase of the bar by Hottsie Anne, and this loan was authorized by the shareholders.
- The 19 April 2004 loan as stated in the loan agreement was to be an increase of $96,000 to the operating overdraft, taking the total borrowing to $249,963.00 which the respondent says could properly be said to be within the ordinary course of the company's day to day business.
- The next loan agreement is 7 June 2007, at this stage the loan had been converted to a term loan of $349, 739 with an overdraft of $50,000 equating a total borrowing of $399,739— an increase of $99,776.00 in the intervening 3 years. The respondent says this borrowing could also quite properly and reasonably be said to have been within the ordinary course of the company's day to day business. The June 7 facility was a small increase to the overdraft of$15,000, so it could be also reasonably be assumed to be within the course of day to day business.
- The next loan facility agreement 04 March 2008. The existing lending at this point was $418,000 - there has apparently been a relatively small increase in the lending under the prior agreement, by an amount of $18,261.00. The 04 March facility was for a $10,000 overdraft, again the respondent says it's a borrowing within the ordinary course of the company's day to day running business.
- The next loan facility 06 March 2008 was for $700,000, a term loan - for the extension and refurbishment of the bar/night club. The Respondent argues this loan, in the circumstances of this case, continues to be in the ordinary course of the company's business - for the following reasons. The plans, relate to the expansion of the existing bar, and the plans were made at a time when almost every hospitality business, if not every business in Tonga, was raising and spending money to expand and/ or refurbish their operations - in anticipation of the influx of business for HM the King's coronation and related celebrations in August 2008 - attested by Mr. Kitekei'aho. In the context of the business environment at the time

and because of the nature of the Company's business, it was submitted by the Respondents that this loan transaction was still within the ordinary course of business of Hottsie Anne at the time - and I fully agree.

5.6.7 The Respondent said given the acquiescence of Ms. Kava to the prior borrowings, which Mr. Kolo, her financial advisor and business partner had advised the Court she was aware of- a strong inference of implied authority could in the circumstances quite properly be-drawn. Mr. Kitekei'aho also gave clear evidence to the Court he had advised Ms. Kava of the renovations and the borrowing and he said - she agreed as such he had **actual authority** to execute the loan agreement. The respondent pointed out - Ms. Kava has not appeared before the Court to dispute testamentary evidence.

5.7 IMPLIED ACTUAL AUTHORITY TO SIGN

5.7.1 Even in the event Mr. Kitekei'aho lacked both actual and implied authority, the Respondent submits that Mr. Kitekei'aho was nonetheless authorized to enter into the loan agreements with the Respondent on behalf of Hottsie Anne - under the doctrine of Implied Actual Authority.

5.7.2 The Respondent - cites Fords Principles of Corporations Law (13th edition at para.13.030) which states:

- "where a person who has not been appointed agent nevertheless assumes to act as agent for a principal and over a period the principal, knowing what is going on, acquiesces in the agent continuing to act for the principal in new transactions, the conduct of the principal gives authority for the new transaction. The authority so given can amount to actual authority, at least where the question is between the principal and the third person."

The authors go on to state at para.13.040 that:

- It was stated earlier that implied actual authority could be given where a person stood by while an agent acted as if authorized and the person acquiesced in the assumption of authority. Once that acquiescence appears, persons thereafter transacting business with the agent can have a contract with the principal on the basis of there being actual authority. Hence it can happen that a person transacting with the agent can make a contract with the principal even without knowing of the previous acquiescence. But if there has been

no history of acquiescence, then for a third party transacting with a person whom he or she supposes to be an agent to obtain a contract with the alleged principal depends on proof of a representation made to the third party by the alleged principal".

5.7.3 The Respondent also submitted Hottsie Anne, through its Board of Directors, again noting that under the Act the Board can delegate their powers to third parties, or for that matter its Shareholders, acquiesced to the entering into of the loan agreements by Mr. Kitekei'aho, which acquiescence was communicated through their words or conduct (including standing by while Mr. Kitekei'aho acted as if authorized). So they argue implied actual authority has been conferred on Mr. Kitekei'aho and under the doctrine of implied actual authority, the execution of the loan agreements by Mr. Kitekei'aho met the requirements of Section 189(b), as he had actual authority implied by acquiescence.

5.7.4 Mr. Kitekei'aho had given direct evidence to the Court that he advised Ms. Kava, (whether in her capacity as a Director and/or Shareholder of Hottsie Anne) of the borrowing and the renovation plans, and indeed of all prior activities and borrowing entered into by the company. Having given actual authority to Mr. Kitekei'aho for the prior borrowing, or having consented to it by her acquiescence, Ms. Kava in her capacity as the majority Shareholder and for as a Director granted implied actual authority to Mr. Kitekei'aho to enter into subsequent loan agreements for / on behalf of Hottsie Anne.

5.7.5 Mr. Koto also gave evidence to the Court that Ms. Kava was aware of the loans from the ANZ bank - she had been receiving audited financial statements for Hottsie Anne - and thus implied actual authority could then be imputed from that knowledge and acquiescence, even if Mr. Kitekei'aho had not informed her any of the loans himself although, Mr. Kitekei'aho gave unrefuted testimony, that he did.

5.7.6 The Respondent says there was no direct evidence before the Court that Ms. Kava took any action prior to November 2008 to question any of Hottsie Anne's activities, or to remove Mr. Kitekei'aho as a Director, which she could have done at any time had she been dissatisfied with the company's affairs.

5.7.7 Furthermore, the respondent argues in relation to the granting of this implied actual authority to Mr. Kitekei'aho, even if it were to be argued that Ms. Kava

was unaware of the renovations and the construction borrowing in March 2008 (which it was submitted is somewhat hard to believe in all the circumstances), then it was submitted that by her conduct in relation to the prior borrowing she has nonetheless conferred implied actual authority on Mr. Kitekei'aho to enter into those "construction loan obligations" on behalf of the company and I fully agree.

5.7.8 The loans by the Respondent to Hottsie Anne were drawn over a period of years from 2003 through 2008. Over that 5 year period of time, Ms. Kava must have - or at the very least should have - been aware in her capacity as a Director (if she was a Director) or at the very least in her acknowledged capacity as a majority Shareholder, of what was going on within the company and I fully agree.

5.8 RESPONSIBILITIES OF DIRECTORS AND SHAREHOLDERS UNDER THE ACT

5.8.1 The Respondent's refer to Part XI of the Companies Act – regarding Accounting records and audit.

5.8.2 Section 203 requires the Board of Directors of a company to maintain proper accounting records that correctly record and explain the transactions of the company, including a record of the assets and liabilities of the company - failure to do so is an offence under the Act.

5.8.3 Under Section 204 of the Act, the Company need not keep its accounting records in Tonga although copies of certain records must be sent to, and be kept here.

5.8.4 Section 205 of the Act requires that a company at each annual meeting of the company, which applies to Ms. Kava whether or not she was a Director, since there was no issue over her being a shareholder - shall appoint an auditor to audit the financial statements of the company. An exception is provided for in subsection 2, in that a company need not appoint an auditor if at or before the meeting, a unanimous resolution is passed by the company that no auditor be appointed. The Respondent says the Applicant has produced no evidence to the Court that such resolutions that no auditor be appointed were passed and - indeed Mr. Kolo has informed the Court that an auditor was consistently appointed.

5.8.5 Assuming accounts were prepared, and an auditor appointed, and Mr. Kolo in his evidence affirmed this was the case, Ms. Kava as a Director and/or Shareholder of Hottsie Anne would, or at least should, have known of the loans entered into by Hottsie Anne- with the Respondent Bank. That being the case, the Respondent

argues - Ms Kava has again clearly acquiesced to all such loans by taking no action over a period of 6 years - to either direct the Respondent that Mr. Kitekei'aho lacked authority to so bind the company, or to take direct steps to prevent him from being able to do so- i.e. - by removing him as a Director and Secretary (prior to late November 2008), or by taking other appropriate legal action against him, and I fully agree.

5.8.6 The respondent argued the above is so, even in the event that it were irrefutably established that the Respondent had received the initial power of attorney as alleged by the Applicant. The imputation of actual authority by acquiescence to the continued borrowing would still arise with the ongoing loans over the passage of time, notwithstanding that Ms. Kava's initial authority as the major shareholder to the first loan was granted under that Power of Attorney.

5.8.7 As a final point in this regard, the Respondent argued- in his affidavit filed with the STA -28 August, Mr. Kolo asserted in paragraph 7 Ms. Kava had verbally agreed to transfer to him "half the shares of the business". Neither Mr. Kolo, nor the Applicant produced any evidence to the Court of the consummation of that transaction (e.g. a Directors' Resolution approving the transfer, signed share transfer forms and / or entries in the share register as required under Section 85 of the Act. At no other point in his prior affidavits has Mr. Kolo alleged or claimed to have any interest in Hottsie Anne, other than by his appointment as a Director and Company Secretary in November 2008. It was submitted by the Respondent - as there was no evidence before the Court supporting Mr. Kolo's assertion; his claim cannot be viewed as proven or valid. However, even if it were established Mr. Kolo was a shareholder in Hottsie Anne, since late November 2004, the same comments regarding shareholder's duties would similarly apply to Mr. Kolo. In relation to this assertion I found Mr. Kolo to be evasive, and further he had no evidence to support his assertion that he held half shares in the business.

6.0 Section 128 of the Act - Major Transactions

6.1 A further ground advanced by the Applicant to justify the termination of the liquidation of Hottsie Anne is that various loans from the Respondent to Hottsie Anne are in rendered void - by the operation of Section 128 of the Act.

6.2 This section 128 of the Act provides that - a company shall not enter into a major transaction, unless the transaction is approved by special resolution (as defined by Section 2 of the Act, a resolution approved by 75% or more of the shareholders entitled to vote). The Respondent states that as the three children of Mr. Kitekei'aho and Ms. Kava - who are also shareholders in the company and were all minors at the relevant times, by reference to the birthdates as evidenced in Mr. Kitekei'aho affidavit 25 August, it was submitted Ms. Kava's authorization, and indeed that of Mr. Kitekei'aho for all purposes in these submissions would be imputed - to the children.

6.3 In this regard, the Respondent said the unrefuted evidence of Mr. Kitekei'aho - that he advised Ms. Kava of all loans that were entered into by the company with the ANZ, and that he testified she approved them, it was submitted in effect therefore, on the evidence, the approval of all of the shareholders was given to all the loans, and consequently, Section 128 of the Act has been complied with, and I agree.

6.4 In evidence the Respondents says Mr. Kolo informed the court Ms. Kava received audited financial statements for the company so she was aware of the loan arrangements and therefore, at the very least she subsequently ratified the borrowing - by acquiescence. Section 128(2)(c) defines a major transaction as including a transaction which has, or is likely to have, the effect of the company incurring obligations or liabilities equivalent to more than half of the value of the assets of the company before the transaction.

6.5 In order for the Applicant to succeed on this ground, the Respondent claims the Applicant would need to establish that the Respondent's lending to the company constituted a major transaction. In order to do so, it would be necessary to establish the value of the assets of Hottsie Anne at the time of the execution of each of the Loan agreements. Neither - the Applicant herself as the major shareholder, nor Mr. Kolo who describes himself as an Accountant and the Company Secretary have provided any evidence of this to the Court whatsoever - and in the absence of such evidence, the Respondent says they have failed to establish that the terms of Section 128 of the Act are applicable and, I fully agree.

6.6 The respondent also argues even if Section 128 of the Act were applicable to all or part of the Respondent's lending

to Hottsie Anne, and shareholder approval had not been granted, the effect of the failure to comply with Section 128 does not necessarily render the loan illegal, void and unenforceable as has been asserted by the Applicant. There was no evidence before the Court that the borrowing prior to the $700,000 loan in March of 2008, was in amounts giving rise to the operation of Section 128, nor that the loan of $130,000 in August of 2008 would have triggered the application of that particular section. The Applicant has produced no evidence whatsoever as to the value of the company's assets in this regard, and I agree.

6.7 The respondent argued in point of fact, and - quite critically, the Applicant has failed to provide any evidence to the Court to establish that Hottsie Anne is or was in fact solvent. This, if established, might well be a valid reason for the termination of liquidation. However, the Applicant has offered no evidence of a financial nature whatsoever to the Court to establish the company's ability to pay any debts - whatsoever, let alone a debt of $1.2 million and I agree.

6.8 Section 296 of the Act states that,

"Unless the contrary is proved, and subject to Section 297, a company is presumed to be unable to pay its debts if: (a) the company has failed to comply with a statutory demand" The Respondent argues it was an undisputed fact that Hottsie Anne was placed into liquidation - due to the failure by the company to comply with a Statutory Demand under Section 298 of the Act, and yet the Applicant has made no effort in her application(s) to terminate the liquidation, nor via Mr. Kolo's supporting affidavits, to rebut the presumption and establish Hottsie Anne's ability to pay its debts, and thus establish its solvency, by the provision of any financial statements or - records to the Court. Even in the event that the provisions of Section 128 were triggered, and was not complied with, the Respondent asked what the effect in terms of the Act was. The Applicant asserted a company's failure to comply with the terms of section 128 renders the transaction in question illegal, void and unenforceable. The Respondent submitted that the Applicant's assertion in this regard was incorrect and I agree.

6.10 The Respondent says the effect of a failure to comply with Section 128, pursuant to Section 184 of the Act, is to deem the action or conduct undertaken by the Company in

breach of Section 128 to be unfairly prejudicial to the shareholders or former shareholders of the company. Under Section 183 of the Act, an aggrieved shareholder may make application to the Court for such orders in respect of the transaction as the Court thinks fit, which (under the terms of subsection 2 of that section) may include setting aside the action taken by the company in breach of the Act or the Constitution. In other words, a transaction under Section 128 is voidable upon application to the Court by an aggrieved shareholder at the Court's discretion (and the Court is certainly not required or mandated to void the transaction upon such an application). Failure by a company to comply with Section 128 cannot have been intended by the legislature to make such a transaction void *ab initio,* as effectively asserted by the Applicant, as this would effectively render the provisions of Section 183 and 184 redundant.

6.11 At the time the Application for an Order Appointing a Liquidator of Hottsie Anne was filed by the Respondent, and at the time the Order appointing a liquidator was made on May 12, 2009, no application to set aside the transaction had been brought by any shareholder of the company under Sections 183 and 184 of the Act, and no such application has since been made. The company - and its shareholders did not raise it as a dispute or bring an action under Sections 183 and 184 of the Act during the statutory period of response to the Notice of Demand under Section 298.

6.12 The Respondent submitted- a breach of Section 128 of itself does not render the Respondent's loans to Hottsie Anne invalid or unenforceable to any degree - unless and until an order is made by the Court to that effect. As no such order had been made when the Company was placed into liquidation (or since) the loans were then, and are now, due and payable in full, and must be properly accounted for in determining the company's solvency. This being the case, Hottsie Anne is, it was respectfully submitted, is and was unable to pay its debts as they fall due and as such, is hopelessly insolvent. As a result, it was in fact -just and equitable that the liquidation of Hottsie Anne not be terminated - and I fully agree.

7.0 Section 22 of the Act - The Indoor Management Rule

7.1 The respondent argues even if Section 128 were applicable and it were proved that no shareholders' resolution approving the loan had been passed, the Respondent is nonetheless afforded protection by Section 22 of the Act, which is the statutory codification, or extension, of the Indoor Management Rule, or as it is often referred to - the rule in Turquand's case. In essence this rule provides that persons dealing with a company - in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.

7.3 It is necessary to look specifically at the wording of Section 22 itself and relevant case law and at all the circumstances of this case, to determine whether or not the Respondent can rely upon the rule - in the event that it should be necessary to do so.

7.4 Section 22 (insofar as it is relevant to this matter) provides;

"A company or guarantor of an obligation may not assert against a person dealing with the company or with a person who has acquired property, rights or interests from the company that -

(a) This Act or the constitution of the company has not been complied with; and

(d) A person held out by the company as a director, company secretary, employee or agent of the company with authority to exercise a power which a director, company secretary, employee or agent of a company carrying on business of the kind carried by the company customarily have authority to exercise, does not have authority to exercise that power:- unless the person - has or ought to have by virtue of his position with or relationship to the company, knowledge of the matters referred to in any of paragraphs (a) to (e) as the case may be.

7.5 The Respondent's first submission in this regard was that it has not been proven that the series of loans made prior to 06 March 2008 (including the 04 March loan of $10,000) fall within the scope of Section 128, because no evidence has been provided to the Court, that the loans exceeded

50% of the value of the assets at the times the loans were made. In fact, the Applicant has provided no evidence to the Court in relation to the 06 March 2008 loan and financial position. For these reasons, and acknowledging the size of the 06 March loan, it was submitted the operation of Section 22 might only need to be applied, if at all, to the 06 March loan of -$700,000.

7.6 The Applicant alleges the Respondent had actual knowledge that a shareholder's resolution authorizing the loans had not been passed. The respondent says this was not the case. Obviously, the Respondent could only know this at the time the loan was processed -if Ms. Kava told them. This issue was not even raised until November 2008, when a formal demand was being made for repayment of the loan. The respondent says the evidence now shows in point of fact Mr. Kolo has now informed the court in evidence that Ms. Kava was aware of the loans, and Mr. Kitekei'aho also give unrefuted evidence he had informed her of all company loans and she approved them and I agree.

7.7 The respondent argued in any event and by contrast, under Section 22(a) the Respondent as a lender is entitled to assume that the Act and the Constitution of Hottsie Anne has been complied with, i.e.: that if a Shareholders Resolution was required, it has been passed. This makes the provisions of Section 128 a shareholder's shield, as opposed to a sword, despite the Applicant's apparent attempt to employ it as the latter, and I fully agree.

7.8 The Respondent is not entitled to make this assumption however if, by virtue of its position with or relationship to the company, the Respondent had knowledge, or ought to have had knowledge that the relevant Shareholder's Resolution had not been passed.

7.9 To address this issue it is necessary to turn to relevant case law. There are a number of Australian cases arising from corporate collapses in the late 1980's and early 1990's which are relevant. Although the wording of the Australian legislation at the times in question was not identical to the Tongan Act, the relevant wording is sufficiently close to make the principles applied legitimate.

7.10 The respondent says there are in fact two lines of judicial authority in this regard. The first, as espoused by Nicholson J., in *Lyford v Media Portfolio Ltd* (1989) 7 ACLC 271 invokes a narrow interpretation of the

requirement for imputed knowledge, holding that this refers to knowledge that a person ought to have by reason of their connection or relationship with the company, and not to knowledge that the person ought to have because of the circumstances of the transaction itself Hence a Director or Secretary of the Company, (or possibly even a solicitor accountant or other professional advisor to the company) would be deemed to have knowledge of irregularities in the company's affairs (such as the failure to have the shareholders ratify a transaction when required by the Act and Constitution to do so), but a Bank as a lender would not. This view was affirmed by Jenkinson J. in the case *Bell Resources Holdings Pty Ltd v Commissioner for ACT Revenue Collections* (1990) 8 ACLC 533.

7.11 The other line of authority -has held that a third party may be imputed with knowledge, i.e. the third party ought to have known, due to the nature of the transaction involved. The essence of the decisions in this regard are that if there was something in the nature of the transaction itself which should have put the third party on notice, then the third party cannot rely on the indoor management rule. Examples of this are where no benefit is derived to the company itself from the transaction, or where the transaction has no relation to the company's business, or the provision of a third party guarantee and security (*BNZ v Fiberi Pty Ltd* (1992) 10 ACLC 1557, *Brick and Pipe Industries v Occidental Life Nominees Pty Ltd* (1992) 10 ACLC 253, and *Northside Developments Pty Ltd v Registrar General & Ors* (1990) 2 ACSR 161).

7.12 In the case of the $700,000.00 loan to Hottsie Anne of 06 March 2008, it is the Respondent's position that there *was* nothing in the nature of the transaction itself that would have put the Respondent on notice that the Shareholders of Hottsie Anne had not approved the transaction. Although the loan is for a significant amount, that is not the only fact which is to be taken into account. The loan is for a legitimate purpose related to the business of the company (being the expansion and refurbishment of the company's bar premises at a time when most all hospitality related companies were so doing in anticipation of the coronation celebrations in August 2008) and it was personally guaranteed by (i) the company's known principal Fuka Kitekei'aho, and (ii) another company controlled by Mr. Kitekei'aho, Tevoi Investments Limited, which owned the leasehold land that the bar premises were constructed upon.

7.13 The Bank may have known of the requirement for a Shareholder's Resolution due to the size of the loan, but is nonetheless entitled to assume that the necessary resolution was duly passed.

7.14 As a result, the Respondent seeks to invoke Section 22 of the Act which prevents Hottsie Anne (or its shareholders) from asserting that the loan is void or voidable due to their having been no shareholder approval of the borrowing. This would also be equally true, of course, of the other smaller loans made previously and after the 06 March 2008 loan.

7.15 Section 22(1)(d) applies in relation to the issue of Mr. Kitekei'aho's execution of the loan agreement itself—although it is the Respondent's position that reliance on section 22(1)(d) is unnecessary in this regards given that Mr. Kitekei'aho nonetheless had actual authority (or at worst, implied actual authority) as required under Section 189(1)(b) of the Companies Act, for the reasons previously provided.

7.16 However, were Section 22(1)(d) to be relied upon in this regard, the issue is whether or not the entering into of the loans by Mr. Kitekei'aho on behalf of the company was something which an agent in his position would customarily have - the authority to do. The Respondent relied on the same principles and submissions which have already been outlined in relation to the issue of implied authority in paragraphs 5.7 and 5.7 above which are, in essence, that due to;

- The particular circumstances of this case;
- The nature of the company's business (hospitality), and the unique business environment at the time (the coronation and related celebrations);
- The special position held by Mr. Kitekei'aho as sole and/or Managing Director of the Company, and Company Secretary;
- The familial structure of the company and the business;
- The shareholders' acquiescence to the prior borrowing of $420,000;

Mr. Kitekei'aho as an agent - in Mr. Kitekei'aho's unique position would in the respondents view, customarily have the authority to enter into the loan agreements on behalf of the Applicant company and I agree.

7.17 The Respondent submits that for these reasons the entering into of all the loans, including the March 2008 loan for the

renovation of the company's premises was something that an agent of the company in Mr. Kitekei'aho's unique position would customarily have authority to do, and that the provisions of Section 22(1)(d) would apply.

8.0 Conclusion and Ruling

8.1 I have considered everything that has been said to me in Court in connection with this particular case CV202/2009, concerning a formal application - to terminate the liquidation of the company known as Hottsie Anne Ltd, which Company had been placed into liquidation on the 12th May 2009 by Order of Ford CJ.

8.2 I have considered the affidavit evidence -the exhibits, and have perused the relevant case law forwarded by counsel, over the past weekend. I have also read and have incorporated in my ruling, the very helpful written submissions from both the Applicant — and the Respondent's counsel.

8.3.1 An Application to terminate the Liquidation of Hottsie Anne had been brought in reliance upon section 259 of the Companies Act 1995. Section 259 of the Act gives the Supreme Court, a discretionary power to terminate the liquidation of a Company:- "***If the Court is satisfied that it is just and equitable to do so".*** These fourteen [14] words appear to be the operative words for this particular case- ***"If it is just and equitable to do so"*** — along with a caveat — ***"bearing in mind all the facts of the particular case"***

8.3.2 Throughout the proceedings, the Respondent made very strong submissions to prove that the Applicant has failed to establish - any just or equitable grounds for the termination of the liquidation of Hottsie Anne Company Ltd, and has also failed to provide the Court with any scrap of evidence, that the Company was solvent thus enabling the court to invoke its discretionary powers to terminate the Order.

8.3.3 In my view the case focuses upon the truthfulness and or the accuracy of the affidavit evidence of the Applicant witness Mr. Koro and the knowledge of the majority shareholder Ms Kava of the operation of Hottsie Anne Co Ltd. The Respondents questioned the truth, the sincerity, the accuracy and the motive for the Applicant's request for termination of the Order - at this late time.

8.5 The Respondent's submissions were focused as follows:

8.5.1 The Applicant's allegations of fraud and impropriety were simply allegations - and they have not been supported by any evidence. I entirely agree with the respondent on that point, and I find as a fact - the Respondent and its officers have always acted in good faith throughout their course of their dealings with the Hottsie Anne Company and for over six years. There was no direct evidence put before this Court to establish otherwise.

8.5.2 The Applicants assertions regarding the validity of the Debenture are in my view not relevant to this - the liquidation process. The evidence revealed the Debenture was simply not relied upon by the ANZ Bank - when they issued the Statutory Demand Notice — seeking to place Hottsie Anne into liquidation. The Applicant Company Hottsie Anne chose not to respond to the Formal Demand Notice and as a result FORD CJ signed the notice for liquidation on the 12 May 2009.

8.5.3 Upon hearing the evidence I find as a fact all Loan agreements placed before me, between Hottsie Anne and the Respondent Bank had each been properly executed by Mr. Kitekei'aho as a Director of the Company- with the actual authority to do so, pursuant to the terms of Section 189(1)(b) of the Act. There was no evidence put before the court to establish that Mr. Kitekei'aho - lacked any such authority.

8.5.4 I also fully accept the evidence that Mr. Kitekei'aho had provided direct testimony to the Court testifying that he informed Ms. Kava of all Hottsie Anne's loan arrangements with the Respondent Bank and that she had knowledge of all such loans. His evidence was not contradicted in any way shape or form. More importantly - not one shred of evidence has been put forward to show that the applicant company is or was solvent in May 2009.

8.5.5 For all the reasons put forward in this case – I prefer the evidence of the Respondent in this case. I find the Applicant has failed to establish that it would be just and equitable for this Court to set aside the Court Orders of May 12, 13 2009 signed by FORD CJ which Order placed the Company known as Hottsie Anne into liquidation. Accordingly the Application is refused.

Vaiangina v Lopeti

Supreme Court, Family Jurisdiction, Nuku'alofa
Salmon J
FD 94/2009

24 September 2009

Divorce – adultery allegation needs co-respondent joined – not named – petition dismissed

The petitioner petitioned for divorce on the ground that the respondent behaved in such a way that the petitioner could not reasonably be expected to live with the respondent. The respondent had been improperly associated with a named person with whom she was now living. The named person was said to be the petitioner's cousin.

Held:

1. Where adultery was alleged the person with whom the adultery was alleged to have been committed must be joined as a co-respondent.
2. This was not done and therefore the petition was dismissed.

Statute considered:

Divorce Act (Cap 29)

Rules considered:

Divorce Rules

Counsel for the petitioner : Mr Fili

Judgment

[1] This is an undefended petition for divorce. The grounds for the divorce are those set out in s 3(1)(g) of the Divorce Act (Cap 29). This Clause provides as a ground for divorce that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

[2] In this case the allegation is that the respondent has been improperly associated with a named person with whom she is now living. The named person is said to be the petitioner's cousin. In evidence the petitioner said his wife had told him she was in a de facto relationship with the named person and was pregnant to him.

[3] Rule 5 of the Divorce Rules provides:

> (1) Where a petition alleges that the respondent has committed adultery, every person with whom the adultery is alleged to have been committed (if still alive) shall be made a co-respondent in the cause unless:
>
> (a) the person is not named and the petitions states that his or her identity is not known to the petitioner; or
>
> (b) the Court otherwise directs on an application made ex-parte before issue of the petition.
>
> (2) Where a petition alleges unreasonable behaviour under section 3(1)(g) of the Act on the ground that the respondent has been guilty of an improper association (other than adultery) with a person named, the petitioner shall apply to the Court at the time when the petition is issued for directions whether such person should be made a co-respondent in the cause.

It is clear from the rule that where adultery is alleged (as it is in reality in this case) the person with whom the adultery is alleged to have been committed must be joined as a co-respondent. This has not been done in this case and the petition must therefore be dismissed.

[4] Petition dismissed accordingly.

Pacific Royale Hotel v Tevita Siale Trading As Siale Tyre Shop

Supreme Court, Nuku'alofa
Ford CJ
CV 662/2006

29 July 2009; 2 October 2009

Debt recovery – bailiff seized property – judgment debtor non-legal entity – could still be enforced against individual owners - seized goods could be sold

On 5 December 2008 a writ of distress was issued against the judgment debtor, the Hotel, in the sum of $10,538 which represented the total amount owing to the judgment creditor, Siale, under the judgments in both the Supreme Court and Court of Appeal. The bailiff initiated interpleader proceedings to determine whether property seized by him on 11 December 2008 pursuant to a distress warrant, belonged to the judgment debtor Pacific Royale Hotel (the Hotel), and therefore could be seized, or to the interpleaders. Interpleaders argued that the Hotel (judgment debtor) was "an unincorporated body not recognised by law as being a body capable of suing or being sued." Counsel submitted that because the Hotel was a non-legal entity, there was no legal basis under which Siale could enforce his judgment against the individual owners of the Hotel, 'Olive Ramanlal and her husband Joseph.

Held:

1. As a general proposition judgment against a non-legal entity was worthless. It was equivalent to having judgment against "the Raintree" in Post Office Square. One of the first things that counsel in any civil litigation should do was check the status of the parties to ensure that, in the event of a successful outcome, judgment in the client's favour would not be rendered otiose.
2. Leave was granted by the Court for the judgment creditor to issue execution in the form of a warrant for distress against Mr and Mrs Ramanlal. The bailiff acted pursuant to the warrant and there was no reason why the Court should not order the vehicles and other goods seized to be sold by public auction with the proceeds going towards the reduction or extinguishment of the judgment debt owed.
3. The Court would ordinarily award full costs to the judgment creditor but it declined to do so because it was clear from the submissions filed that counsel had not carried out even basic research into the law. No authorities

or rules of court were cited or referred to. Clients should be able to expect more from their counsel in commercial litigation. To show the Court's concern over the issue, the judgment creditor was awarded costs against Mr and Mrs Ramanlal in an amount to be agreed or otherwise fixed at 50% of those allowed on taxation together with reasonable disbursements.

Cases considered:

FC Nichols (Wholesales) Pty Ltd v 'Ofa Simiki, trading as OSB (CV 215/03, judgment dated 16 August 2006, Webster CJ)
Pacific Royal Hotel v Vakalahi anor [2007] Tonga LR 36
Pacific Royal Hotel v Vakalahi anor [2007] Tonga LR 46 (CA)
Sadler v Whiteman [1910] 1 KB 868

Rules considered:

Civil Procedure Rules (UK)
Supreme Court Practice (UK)
Supreme Court Rules 2007

Counsel for the defendant/judgment creditor : Mr Fakahua
Counsel for the interpleaders : Mrs Vaihu

Judgment

[1] The bailiff has initiated interpleader proceedings to determine whether property seized by him on 11 December 2008, pursuant to a distress warrant, belonged to the judgment debtor Pacific Royale Hotel (the Hotel), and therefore could be seized, or to the interpleaders.

[2] The judgment creditor Tevita Siale, trading as Siale Tyre Shop, (Siale) was sued unsuccessfully by the Hotel in a complicated case relating to repair work carried out on a motor vehicle allegedly owned by the Hotel. I need not go into the facts of that case but in a judgment dated 14 May 2007, Laurenson J. found against the Hotel and entered judgment for Siale on his counterclaim in the sum of $4,130.00 together with interest, costs and disbursements [see *Pacific Royal Hotel v Vakalahi anor* [2007] Tonga LR 36].

[3] The Hotel then appealed against the judgment of Laurenson J. but in its decision dated 20 July 2007 the Court of Appeal dismissed the appeal and ordered costs against the Hotel. On 5 December 2008 a writ of distress was issued against the Hotel in the sum of $10,538.00 which represented the total amount owing to Siale at that time under the judgments in both courts [see *Pacific Royal Hotel v Vakalahi anor* [2007] Tonga LR 46 (CA)].

The seizure

[4] On 11 December 2008, a bailiff officer acting pursuant to the writ of distress taken out by Siale seized by way of special seizure the following goods:

1. Three 50ft Tapas;

2. One white car, registration No. C11400;
3. One black car, registration No. C13856;
4. Two tapas;
5. Three mats.

[5] On 12 December 2008 the lawyer acting for the interpleaders gave notice making claims against the seized property which can be summarised as follows:

> (i) "J R Rental Car" produced certificates of registration issued by the Traffic Department dated 20 February 2003 and 31 October 2005 respectively which stated that motor vehicles registration numbers C13856 and C11400 were "the property of J R Rental Car".
>
> (ii) "J R Finance" claimed to be a loan company that loaned money to the public taking Tongan mats and tapas as security. The notice stated: "Once paid off the security assets are returned to each borrower. If unpaid the company would then sell them on account of the borrower's debt." No details were provided, however, of any loan taken out by the Hotel from J R Finance.
>
> (iii) Mr Solomone K. Vi claimed to be the owner of another motor vehicle, registration No.J5404 which was also allegedly seized by the bailiff. The certificate of registration produced to the court shows this vehicle to be the property of "Pacific Royale". Mr Vi claims in his notice that he was employed as "handyman for Pacific Royale Hotel" and in April 2007 "his employers Mr and Mrs Ramanal" gifted him the vehicle because they had been happy with his work performance. It is not clear whether the bailiff did, in fact, seize vehicle No.J5404. It was included in the original list of seized goods but on the copy before the court, the item has lines through it and appears to have been deleted.

The contentions

[6] The Hotel, which was also known as Ramanlal's Hotel, was a well-known establishment located in Taufa'ahau Road close to the centre of Nuku'alofa. It was one of the many businesses looted and completely destroyed by fire in the riots of 16 November 2006.

[7] The principal contention by Mrs Vaihu acting for the interpleaders was that the Hotel is "an unincorporated body not recognised by law as being a body capable of suing or being sued." Counsel submitted that because the Hotel is a non-legal entity, there is no legal basis under which Siale can enforce his judgment against the individual owners of the Hotel, 'Olive Ramanlal and her husband Joseph.

[8] Mr Fakahua, for Siale, contended that the Ramanlals, as owners of the Hotel, were sole traders and, without citing any authority on the point, submitted that they were, therefore, liable for the judgment debts of the Hotel. Counsel for Siale further submitted that the "JR" in both JR Finance and JR Rental Car stood for "Joseph Ramanlal" and the bailiff was therefore entitled to seize the motor vehicles and goods in question.

[9] In addition to the documentation filed in respect of the interpleader proceedings, the court did hear evidence given on oath by Mrs 'Olive Ramanlal in the course of an oral examination on 4 September 2008. From all the evidence, I am prepared to accept that the Hotel was owned by the Ramanlals; that they operated the business as a partnership under the name Pacific Royale Hotel and JR Finance and JR Rental Car were trade names for two of Mr Ramanlal's ventures. When Mrs Ramanlal, who was represented by counsel, was orally examined as to her means she did not dispute these issues nor did she dispute liability for the debt. She did, however after giving her own evidence, seek an adjournment of the examination until her husband returned from overseas. An adjournment was granted but there has been no subsequent request to the court to have the examination reconvened.

Discussion

[10] As a general proposition, it is difficult to take exception with Mrs Vaihu's principal contention. Judgment against a non-legal entity is worthless. It is equivalent to having judgment against "the Raintree" in Post Office Square. One of the first things that counsel in any civil litigation should do is check out the status of the parties to ensure that, in the event of a successful outcome, judgment in the client's favour will not be rendered otiose. So, without more, Mr Fakahua's submissions could not succeed.

[11] In *FC Nichols (Wholesales) Pty Ltd v 'Ofa Simiki, trading as OSB* (CV 215/03, judgment dated 16 August 2006) Webster CJ was faced with a submission that the plaintiff had not been proved to be a legal entity in Tonga. As to this point, His Honour said:

> *"I have to say that I am not at all sure that it is necessary for a party to be **proved** to be a legal entity for it to raise an action, as was submitted for the defendant -- no authority was cited for that -- though from a plaintiff's point of view it is important for him to be sure that he is suing a legal entity as defendant if he wishes to have prospects of recovering any monetary award."*

The same would apply, of course, to a defendant making a counterclaim against a plaintiff. He would need to be sure that the plaintiff is a legal entity if he wishes to have any prospect of recovering any monetary award.

[12] Although Mr Fakahua made no reference in his submissions to the rules of Court, it would seem that the situation faced by his client is covered by Order 81 of the English Supreme Court Practice which is applicable in the Kingdom of Tonga

under Order 2, Rule 3 of the Supreme Court Rules 2007, formerly Rule 2(2) of the 1991 Supreme Court Rules.

[13] Order 81/1 provides:

> "Subject to the provisions of any enactment, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued."

[14] The comment on this rule in the White Book includes the following passage:

> "The firm name is a mere expression, for a firm is not a legal entity, nor for some purposes is it a "person," although for convenience under this Order, the firm name may be used for the purpose of suing and being sued."

[15] In *Sadler v Whiteman* [1910] 1 KB 868, 889, Farwell L.J., who was dealing with the same provision in an older version of the English rules said:

> "In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under (the equivalent of Order 81) it may be used for the sake of suing and being sued."

[16] Order 81, r.2 provides that a defendant to an action brought by partners in the name of the firm is entitled to request a written statement setting out the names of all persons who were partners in the firm at the time when the cause of action accrued. Counsel for Siale did not, of course, take this step but I do not see his failure in this regard as being fatal to his right to enforce judgment against the firm.

[17] Order 81, r.5 deals with the enforcement of a judgment against a firm and paragraph (4) allows a plaintiff who has obtained such a judgment to apply for leave to issue execution against any other person as being a member of the firm at the time the cause of action arose, provided he had not to the knowledge of the plaintiff left the firm before the issue of the writ. This provision would apply equally, of course, to a successful defendant in a counterclaim.

[18] Under O.2 Rule 3 of the Tongan Supreme Rules 2007, the English Rules of the Supreme Court (the "White Book") apply where there is no relevant provision in the Tongan rules and it is only in the event of there being no relevant provision in either set of rules that the English Civil Procedure Rules have application.

[19] For completeness, however, I record that the situation in England is now covered by r.7.2A of the English Civil Procedure Rules (which came into force on 1 October 2006) and associated Practice Direction (Number 7) paragraphs 5A and 5B.

Paragraph 5A provides as follows:

> *"Claims by and against partnerships within the jurisdiction*
>
> *5A.1 Paragraphs 5A and 5B apply to claims that are brought by or against two or more person who —*
> *(1) were partners; and*
> *(2) carried on that partnership business within the jurisdiction at the time when the cause of action accrued.*
>
> *5A.2 For the purposes of this paragraph, 'partners' includes persons claiming to be entitled as partners and persons alleged to be partners.*
>
> *5A.3 Where that partnership has a name, unless it is inappropriate to do so, claims must be brought in or against the name under which that partnership carried on business at the time the cause of action accrued."*

Conclusions

[20] Leave was granted by the court for Siale to issue execution in the form of a warrant for distress against Mr and Mrs Ramanlal. The bailiff acted pursuant to the warrant and I see no reason why this court should not now order the vehicles and other goods seized to be sold by public auction with the proceeds going towards the reduction or extinguishment of the judgment debt owed.

[21] As noted above, there appears to be some confusion as to whether motor vehicle No. J5404 claimed by Mr Vi has been seized by the bailiff but, if that is not the position, then I direct the bailiff to proceed and seize that vehicle forthwith so that it can be sold along with the other vehicles. Mr Vi's interpleader claim is rejected. His alleged title to the vehicle does not supersede Siale's rights to enforce his judgment.

[22] Ordinarily, I would award full costs to Siale but I decline to do so in this case because it is clear from the submissions filed that counsel had not carried out even basic research into the law. No authorities or rules of court were cited or referred to. Clients should be able to expect more from their counsel in commercial litigation. To show the court's concern over this issue, Siale is awarded costs against Joseph and Olive Ramanlal in an amount to be agreed or otherwise fixed at 50% of those allowed on taxation together with reasonable disbursements.

Eco-Friendz Limited v Island Beverage Limited

Supreme Court, Nuku'alofa
Salmon J
CV 109/2009

5 October 2009; 9 October 2009

Practice and procedure – application for summary judgment – arguable defence – declined

The plaintiff and the defendant entered into a contractual arrangement for the supply of liquor. That plaintiff claimed and the defendant accepted that no product had been delivered to the plaintiff. As a consequence the plaintiff claimed specific performance of the contract or in the alternative repayment of the amount paid together with interest and an amount for lost profits. The plaintiff applied for summary judgment. The defendant opposed the application and claimed there was a defence to the claim.

Held:

1. The defendant raised the possibility that the arrangements between the parties involved an illegal transaction using an export agent when the real intention was that the goods should remain in New Zealand. There was sufficient evidence to justify the matter going to trial so that the conflicting evidence could be tested and the Court could properly determine whether, as counsel for the defendant claimed, the contract was illegal.
2. Accordingly the application for summary judgment was declined.

Counsel for the plaintiff : Mr Stephenson
Counsel for the defendant : Mr Corbett

Judgment

[1] This is an application for summary judgment. The application is opposed by the defendant who says there is a defence to the claim.

[2] The claim pleads a contract between the parties for the purchase of liquor. The original contract was for the purchase by the plaintiff from the defendant of 1500 cartons of Heineken beer for a total sum of NZ$37,125.00. The plaintiff claims and the defendant accepts that this sum was paid to the defendant in December 2008.

[3] The contract was later varied to provide for the supply of different brands and quantities of liquor of a total value of NZ$41,736.00. It is agreed that in January 2009

the plaintiff paid the defendant a further sum of $4,611.00 to make up the difference in purchase price.

[4] That plaintiff claims and the defendant accepts that no product has been delivered to the plaintiff. As a consequence the plaintiff claims specific performance of the contract or in the alternative repayment of the amount paid together with interest and an amount for lost profits.

[5] In its Statement of Defence the defendant claims that there was a previous deal with the plaintiff which involved the services of a customs clearance agent with a New Zealand export license. The Agent charged a commission for his services. The defendant alleges in relation to the present transaction that the plaintiff tried to persuade its director Tanusia Paea to act as agent to avoid commission fees. Mr Paea explained that the defendant does not have an export license and cannot clear the goods for export. The plaintiff's case is that it did not wish to export the goods but rather to sell them in New Zealand. In his affidavit in opposition to summary judgment Mr Paea says that the plaintiff knew that the defendant could only purchase goods for export but in fact wanted the goods to remain in New Zealand for sale. Apparently goods purchased for export can be obtained for a lesser price than those purchased for sale in New Zealand and the arrangement was to ensure a greater profit for the plaintiff. In fact counsel for the defendant argued that the transaction was illegal.

[6] The plaintiff denies illegality and claims this is a straight forward agreement for the supply of goods and if the defendant has to send them to Tonga and then back to New Zealand that is not the concern of the plaintiff.

[7] The defendant's affidavit raises the possibility that the arrangements between the parties did involve an illegal transaction using an export agent when the real intention was that the goods should remain in New Zealand. At least there is sufficient evidence to justify the matter going to trial so that the conflicting evidence can be tested and the court can properly determine whether, as counsel for the defendant claims, the contract was illegal.

[8] Accordingly the application for summary judgment is declined. The proceedings are set down for a directions conference at 9am on Friday 16th October. Costs are reserved.

Tu'ivai v Nalesoni anor

Supreme Court, Nuku'alofa
Salmon J
CV 173/2009

13 October 2009; 14 October 2009

Practice and procedure – order sought for release of bus from repairer – contract issue to be resolved – order denied

The plaintiff had contracted the defendant to repair a bus. The parties had different accounts of the contractual arrangements for the repairs to the engine of the bus. The defendants held the bus because the plaintiff had not paid for the repairs. The plaintiff claimed damages and an order for release of the bus.

Held:

1. The repairer of a motor vehicle was entitled to hold the vehicle until paid and also had certain rights to sell the vehicle in the event of non-payment. It was inappropriate for the Court to make an order for release of the bus.
2. The Court ordered that the defendants deliver the bus to ASCO Motors so that the plaintiff could obtain a report on its mechanical condition. The bus must be returned to the defendants after it was inspected.
3. The substantive proceedings should be set down for hearing.

Mr Tu'ivai in person
Counsel for the defendants : Mrs Fakatulolo

Judgment

[1] Mr Tu'ivai issued proceedings relating to a bus repaired by the defendants. The defendants still hold the bus because Mr Tu'ivai has not paid for the repairs. His claim is for damages and an order for release of the bus.

[2] The hearing before me related to an application, originally made ex parte, seeking as interim relief the immediate release of the bus and certain other orders. It was apparent from the pleadings and was emphasised during the hearing that the parties had very different accounts of the contractual arrangements for the repairs to the engine of the bus. It was obvious that these differences could only be resolved at a full trial with the opportunity for cross examination. After the conclusion of the

hearing I was advised that the parties had reached a settlement but it appears that Mr Tu'ivai is not prepared to proceed with it.

[3] I pointed out to Mr Tu'ivai during the hearing that the repairer of a motor vehicle is entitled to hold the vehicle until paid and also has certain rights to sell the vehicle in the event of non payment. For this reason and because of the widely divergent views as to the terms of the contract it would be inappropriate to make an order for release of the bus at this stage.

40 [4] I am however prepared to make an order that the defendants deliver the bus to ASCO Motors so that Mr Tu'ivai can obtain a report on its mechanical condition. The bus must be returned to the defendants after it has been inspected.

[5] The substantive proceedings should be set down for hearing. The file will be returned to Shuster J to arrange an appropriate directions conference.

Vea anor v Vea anors

Land Court, Nuku'alofa
Salmon J
LA 22/2009

8 October 2009; 16 October 2009

Practice and procedure – application for security for costs – strong case and unjust if unable to pursue – refused

The case concerned a dispute over the validity of the registration of a town allotment. The defendants made an application that the plaintiffs provide security for costs in the sum of $15,000.

Held:

1. The Court had a broad discretion as to whether to grant security for costs against a plaintiff. The fact that the plaintiffs live outside the jurisdiction was one factor to be taken into account as was the comparative strength of the parties' cases. Another factor was the existence of assets within the jurisdiction. The plaintiffs' claim that they would not be able to pursue their case if required to provide security was another relevant factor particularly if their case appeared strong.
2. The Court was satisfied on the facts that the plaintiffs had a strong case. It would be unjust if they were not able to pursue it. The application for security was refused.

Statutes considered:
Land Act (Cap 132)
Nationality Act (Cap 59)

Counsel for the plaintiffs : Mr Niu
Counsel for the defendants : Mr Fakahua

Judgment

[1] This judgment concerns an application by the defendants seeking that the plaintiffs provide security for costs in the sum of $15,000. The application is opposed by the plaintiffs.

[2] The first named plaintiff claims the right to occupy land at Kolomotu'a as the widow of the deceased lawful holder. In 2002 the deceased leased half the land to the

second plaintiff (his youngest son) for 50 years. The second plaintiff built a workshop on the leased land. There is a house on the balance of the land.

[3] The plaintiffs have lived for some years in New Zealand and the first plaintiff became a naturalised citizen of that country prior to her husband's death. Shortly after the husband's death in 2006 and while the plaintiffs were living in New Zealand the defendants entered into occupation of both buildings on the site. The first defendant is the eldest son of the deceased and the 2nd and 3rd defendants are his 2 eldest sons.

[4] In their statement of defence the defendants claim that the registration of the town allotment in the name of the 1st plaintiff was invalid because she was a New Zealand citizen at the time. Mr Fakahua was unable to provide me with any basis for this claim when he appeared before me. However it is likely to be based, as Mr Niu said, on S4 of the Nationality Act which I note has now been deleted by the 2007 Amendment Act.

[5] The effect of S4 is by no means clear in its Application to the 1st plaintiff. S 113 of the Constitution and S 80 of the Land Act would both suggest that a widow's entitlement to occupation may not be affected by S4. In any case the registration of the allotment in the 1st plaintiff's name must be prima facie evidence of her entitlement. In addition the 2nd plaintiff appears to have a valid lease of his half of the land.

[6] All of this is relevant because the Court has a broad discretion as to whether to grant security for costs against a plaintiff (see O17, R1 of the Supreme Court Rules). The fact that the plaintiffs live outside the jurisdiction is one factor to be taken into account as is the comparative strength of the parties' cases. Another factor, where it exists, is the existence of assets within the jurisdiction. In this case there is at least the house and the 2nd plaintiff's lease although there is no evidence as to their values. The Plaintiff's claim that they will not be able to pursue their case if required to provide security is another relevant factor particularly if their case appears strong.

[7] In the present case I am satisfied on the facts presently before me that the plaintiffs do have a strong case. It would be unjust if they were not able to pursue it. The application for security is therefore refused. Should the circumstances change the defendants are always able to make a further application. The plaintiffs are entitled to costs on this application.

[8] Mr Fakahua wishes to file an amended statement of defence. He must do so on or before the 22 October 2009. I have set the proceedings down for a 2 day trial on 18 February 2010.

R v Taufa

Supreme Court, Nuku'alofa
Ford CJ
CR 129/2009

22 October 2009

Sentencing – fraud and forgery – guilty plea – 2½ years imprisonment – no suspension

During the first week of March 2009 the accused took the opportunity to steal two blank cheques from the company's cheque-book. On 3 March 2009 he filled in the first cheque made out to cash in the amount of $970 and forged the signature of one of the official signatories for the company. He then gave the cheque to a friend and told him to go to Westpac Bank of Tonga and cash the cheque on his behalf as he was busy at work. His friend duly went to the bank and cashed the cheque and was given $150 from the proceeds. On 19 March he filled in the second cheque for $970 and again forged the signature. He then took the cheque to Westpac Bank and cashed it. When asked to write his name on the back of the cheque he falsely wrote the name of a fellow worker. When his fraudulent activities were later discovered he was interviewed by the police and admitted to the offending.

Held:

1. The accused was entitled to credit for pleading guilty at the first opportunity. He was also entitled to credit for not having any previous convictions but, if he had of had a criminal record, he would not have held the position of trust he had. The Probation Officer stated that he had made an apology which was accepted but the complainant wanted the money repaid. The accused agreed to repay the full amount but there was no evidence that he had made any repayments even though the offending took place seven months earlier.
2. There was a strong need for the Court to impose a sentence that would act as a deterrent and send a clear message to the community that theft involving a breach of trust as a servant would inevitably result in a custodial sentence.
3. If it had not been for his guilty plea he would have faced a sentence of 3½ - 4 years imprisonment. His offending was calculated and deliberate. The sentence imposed on counts 1, 2, 4 and 5 was 2½ years imprisonment and

on counts 3 and 6 one years imprisonment. The sentences were concurrent making 2½ years in total.

4. The Court considered suspension of part of the sentence and whether that would aid in the rehabilitation of the offender. The Court did not consider that suspension was likely to aid in rehabilitation. The likelihood of him offending again was remote. The Court was mindful of the seriousness of the offending and the need for an effective deterrence.
5. The Court declined to order the suspension of any part of the sentence.

Case considered:

Mo'unga v R [1998] Tonga LR 154 (CA)

Counsel for the Crown	:	Miss 'Atiola
Counsel for the accused	:	Mr Pouono

Judgment

[1] You are appearing for sentence having pleaded guilty to six counts involving two separate incidents in early March 2009 of forgery of cheques belonging to your employer. At the time you were employed as an Accounts Clerk in the spare parts division of the company, Si'i Kae Ola. You had been with that firm since 2008.

[2] According to the summary of facts, while you were alone in the office on one occasion during the first week of March 2009 you took the opportunity to steal two blank cheques from the company's cheque-book. You took the two cheques from the back of the cheque-book so that no one would detect your crime. On 3 March 2009 you filled in the first cheque made out to cash in the amount of $970 and you forged the signature of one of the official signatories for the company, Mr Dion Fifita. You then gave the cheque to a friend and told him to go to Westpac Bank of Tonga and cash the cheque on your behalf as you were busy at work. Your friend duly went to the bank and cashed the cheque for you. In turn, you gave him $150 from the proceeds.

[3] Knowing that your fraudulent activity on that occasion had gone undetected, 16 days later on 19 March 2009 you filled in the second cheque again in the sum of $970 forging the signature of Dion Fifita. On 20 March 2009 you took the cheque to Westpac Bank and cashed it. The teller asked you to write your name down on the back of the cheque and you falsely wrote the name of a fellow worker.

[4] When your fraudulent activities were later discovered, you were interviewed by the police and you admitted to the offending. You told the police that you had used all the money to buy alcohol.

[5] In recent times, this court has had a number of similar cases coming before it involving theft and forgery by accused persons holding positions of trust in either private companies, the public service or with banks. In all those cases, as in your case, the accused is a person of impeccable character who is most unlikely to ever offend again and in each such case, as in yours, there is evidence not only of the

accused's complete humiliation and disgrace but also of severe hardship to his or her immediate family.

[6] As indicated, your case is no exception. You are now 36 years of age. According to the probation report you left Apifo'ou College after passing your Form 5 external examination and you began working for the government owned Chronicle newspaper where you met your future wife. In 2006 you were made redundant having worked in the government civil service for some 12 years.

[7] You married in 1999 and you have three children as well as 2 other children your wife had before your marriage. Your wife has written a very moving letter to the court pleading for "a merciful decision" because you are the only breadwinner but she does point out that your church and extended family is taking care and helping with your children's studies as their final examinations are approaching. It is impossible, not to feel immense sorrow for your wife and children. They will be suffering enormously because of your inexplicable criminal activities but the fact of the matter is that you should have stopped and thought about them before you embarked on your fraudulent scheme. It was inevitable that you were going to get caught and given your age and family circumstances, you should have known better.

[8] The Probation Officer has attached to his report references from your Town Officer and the Administrator of the Catholic Cathedral. Your priest speaks about your family being well-known around the inner circle of the diocese and he states that they are noted for their commitment and devotion to the church and its mission. Your standing and the standing of your family in the Catholic community of Ma'ufanga simply makes your actions all the more inexplicable.

[9] You are entitled to credit for pleading guilty at the first opportunity. You are also entitled to credit for not having any previous convictions but, as I have already observed, if you had of had a criminal record, you would not have held the position of trust you had with your employer. The Probation Officer states that you had made an apology which was accepted but the complainant wanted the money repaid. You apparently agreed to repay the full amount but the offending took place some seven months ago and there is no evidence of you having repaid any thing to date.

[10] The maximum sentence on the two forgery counts you face is seven years imprisonment, on the two counts of dealing with forged documents the maximum sentence is five years imprisonment and on the two counts of obtaining by false pretences, the maximum sentence is two years imprisonment. Given the prevalence of this type of offending which I have mentioned earlier, there is a strong need for the court to impose a sentence that will act as a deterrent and send a clear message to the community that theft involving a breach of trust as a servant will inevitably result in a custodial sentence.

[11] If it had not been for your guilty plea, I would have been looking at a sentence of 3½ - 4 years imprisonment. Your offending was calculated and deliberate. Given your guilty plea, however, and the other mitigating factors I have mentioned, the sentence I impose on counts 1, 2, 4 and 5 is 2½ years imprisonment and on counts 3 and 6 one years imprisonment. The sentences are concurrent making 2½ years in total.

[12] I have given careful consideration to the question of suspension of part of the sentence and I have taken into account the guidelines restated by the Court of Appeal in *Mo'unga v R* [1998] Tonga LR 154. In that case the court stated that the major consideration to be taken into account in considering whether part of a sentence should be suspended is whether the suspension is likely to aid in the rehabilitation of the offender. The court said, "if it is not, or if for any reason rehabilitation is not relevant to the sentence to be imposed, suspension of any part of the sentence is unlikely to be appropriate."

[13] I do not consider that suspension of any part of the sentence is likely to aid in your rehabilitation. As I have earlier noted, the likelihood of you ever offending again is remote. The court is also mindful of the seriousness of your offending and the need for an effective deterrence. In all the circumstances, I decline to order the suspension of any part of the sentence.

Kaho v R

Supreme Court, Nuku'alofa
Schuster, Acting CJ
CR 136/09

13 November 2009; 16 November 2009

Bail – application for bail pending appeal – only where reasonable prospect of appeal success – application refused

The appellant pleaded not guilty to the offence of murder but pleaded guilty to manslaughter. The matter was adjourned for trial on the murder charge commencing 26th October 2009 as the Crown wished to pursue the charge of murder as was their legal right. The appellant was found guilty of murder and was sentenced to life imprisonment. The appellant appealed that decision and applied for bail pending the determination of her appeal. The appellant was 11 weeks pregnant. The Crown opposed bail on the basis there was no reasonable prospect of the appeal succeeding.

Held:

1. The granting of bail after conviction was a totally different proposition from the granting of bail pending trial, at which point the presumption of innocence still prevailed because a convicted person's right of appeal did not revive the pre-conviction presumption of innocence. The grant of bail to convicted persons should be regarded as very much the exception rather than the rule.
2. The Court needed to be satisfied that there were *reasonable prospects* of the appeal succeeding and that element in turn required a consideration of the grounds of appeal.
3. The use of a knife against a person in a Church during a squabble with the evidence of two stab wounds, coupled with the fact the Appellant then ran from the scene tended to show and to establish the necessary intent to prove a murder charge and would no doubt lead to a conviction as against the appellant for murder. The appellant could, in the Court's view, have only a very limited prospect or chance of success.
4. The applicant failed to persuade the Court that there was a reasonable prospect of the appeal succeeding; and accordingly the application for bail pending appeal was refused.

Cases considered:

Giordano, Application by 6 A. Crim. R 397
Kafoa v R (App No 347, 348, 743/1996, 20 June 1997, Court of Appeal)
Mahera, ex parte [1986] 1 Qd R 303
R v Hartstone (CA 261/87, 6 January 1988) 11 TCL 2/5
Sefo anor v R [2004] Tonga LR 266

Statutes considered:

Bail Act 1990
Criminal Offences Act (Cap 18)

Counsel for the appellant : Mr Pounou
Counsel for the respondent : Mr Kefu

Ruling on the issue of bail pending appeal

Introduction

This is an appeal against a jury conviction of the Appellant, on the 30th October 2009 for the offence of murder and a request by the Appellant that she be released on bail pending her appeal - which appeal will likely be heard during the July 2010 session of the Court of Appeal.

The Court record notes the appellant was arraigned on the 18th September 2009 before Ford CJ, and at her arraignment the Appellant pleaded Not Guilty to an indictment alleging the crime of murder. The Court record indicates the appellant pleaded guilty, to a count alleging the crime of Manslaughter on that same date. The matter was adjourned for trial on the murder charge - commencing 26th October 2009, before Laurenson J and a jury- as the Crown wished to pursue the charge of murder as is their legal right.

The Court record indicates from 11th September 2009 - to 30th October 2009 the appellant had been granted and she had enjoyed bail - granted by Ford CJ. The Court record also shows that the Appellant had remained on bail from that without problem and - this fact was readily conceded by the Crown in court on Friday the 13th November 2009 during the bail application.

The Court had also been informed by defence Counsel that as of today's date - [the 13th November 2009] the appellant is 11 weeks into her pregnancy and I was informed that fact was unknown during the trial and during the sentencing process on the 30th October 2009 by Laurenson J.

The Charge Against the Defendant

- **Count One** - MURDER an offence contrary to section 86(1)(a) and 87(1)(b) and 91(1) of the Criminal Offences Act (Cap 18)
- Particulars of which are: - ILAISAANE KAHO on or about the 18th April 2009 at MATAKI'EAU you did kill LESIELI 'OKUIS by unlawfully stabbing her with a knife

and you intended to cause bodily injury knowing that such injury was likely to cause death, but you were reckless whether death ensued or not, when you stabbed her with a knife

After the trial of this matter before Laurenson J and a jury, the appellant was convicted as per the Court record dated 30th October 2009. The appellant was sentenced to - LIFE imprisonment (after trial) Crown Counsel told me the issue of the imposition of the death penalty did not arise.

Notice of Appeal

The appellant issued and filed her Notice of Appeal - against her conviction and sentence on the murder charge - on the 05th November 2009 and, at the same time the appellant applied for BAIL pending the final determination of her appeal.

The oral hearing upon the merits of her application for bail pending appeal was set for the 13th November 2009 the Court ordered that the appellant be present in court in person. The Court also ordered the Appellant to supply the Court with a medical report - indicating that the Appellant was in fact pregnant and that medical report was also required to indicate the period of the Appellants gestation.

On 13th November 2009 Mr. Pounou made his submission for his client to be released on bail pending appeal - ostensively via his written submission which are now contained in the file record. For the Crown, MR KEFU simply argued the Crown opposes bail in this case - on the basis there is and can be no reasonable prospect of the appeal succeeding.

The Grounds of Appeal

1. His honour was erred in law and fact when he directed the jury on the element of intention to cause bodily harm
2. His Honour was erred in law and fact when he directed the jury on the element of knowing that such harm will likely to cause death
3. His Honour was erred in law and fact that he directed the jury on the elements of the offence which is reckless intention

In the alternative

4. The Supreme Court may make a recommendation that after a certain number of years, the appellant's sentence may be reviewed by the Prison department for a parole.

The Granting of Bail Pending Appeal Post Conviction

The granting of bail after conviction - is a totally different proposition from the granting of bail pending trial, at which point the presumption of innocence still prevails because a convicted person's right of appeal does not revive the pre-conviction presumption of innocence.

In most jurisdictions, admission to bail pending appeal is unusual, and - *exceptional circumstances* must be shown to exist, before bail will be granted. In

those jurisdictions, as is noted in Halsbury - volume 11(2), paragraph 904 *"It is a power - which is rarely exercised."*

The common-law principle has been considered in a number of cases and is probably best summed up in the following extract from Hall's Sentencing, LexisNexis NZ Ltd, 2004, paragraph VI. 14.3: "The inveterate practice in the Court of Criminal Appeal in England; has been to refuse bail unless there are exceptional circumstances...

> • The true question is - are there exceptional circumstances, which would drive this Court to the conclusion that justice can only be done by the granting of bail."

The High Court of Australia has adopted a similar approach ... In this country the Court of Appeal observed in *R v Hartstone* (CA 261/87, 6 January 1988) 11 TCL 2/5 that different considerations apply to the granting of bail to a person who has been found guilty of an offence, than those that apply where it is sought pending the trial.

- In the first case, a determination of guilt has been reached;
- In the second, the presumption of innocence still applies.

For these reasons, the Court said (per McMullin J.) that, while the issue: whether bail is granted will depend on the circumstances of the particular case,

> • The grant of bail to convicted persons should be regarded as very much the exception rather than the rule.

Moreover, if bail is granted pending the outcome of an appeal which proves to be unsuccessful ... "the appellant has to be recalled from the community, possibly months after his/her conviction, to serve the sentence imposed": *Sefo anor v R* [2004] Tonga LR 266

In an *Application by Giordano* 6 A. Crim. R 397 at 398, the Court of Criminal Appeal of South Australia speculated on what the situation might be if a more relaxed approach was taken to applications for bail pending appeal:

> • "There is then the serious risk of availability of bail pending appeal leading to a proliferation of unmeritorious appeals, thereby adding to the strains on the system of justice.

Persons undergoing punishment in custody are prone to seize any opportunity to secure release, perhaps leave the future to take care of itself. Appeals would be launched irrespective of the prospects of success simply in order to secure release, or perhaps with a view to creating situations which would tend to frustrate justice by making it difficult to return the appellant to prison."

In *ex parte Mahera* [1986] 1 Qd R 303, 310, Thomas J. observed:

> • "The spectacle of a recently sentenced man walking free may be seen by the public as equivocation by the courts, and does not tend to foster respect for the system."

In Tonga, the position is governed by section 4B of the Bail Act 1990 - which reads as follows: "4B(1) A person who has been convicted of and sentenced to imprisonment for a criminal offence and who has appealed or applied for leave to appeal against that conviction or sentence **shall** be granted bail **if** the Court is satisfied that–

- (a) There is a reasonable prospect of the appeal succeeding; or
- (b) The appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; and
- (c) There are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will surrender to custody without committing any offence while on bail.

In taking the decision required by subsection (1), the Court shall have regard to all the relevant circumstances and in particular-

- (a) The nature of the offence and length of the sentence;
- (b) The grounds of appeal;
- (c) The character, antecedents, associations and community ties of the person; and
- (d) His record in surrendering to custody at the trial and on other occasions."

Although, with reservation, some guidance can no doubt be obtained from decisions in other jurisdictions, section 4B really contains a quite comprehensive code for dealing with applications for bail - pending appeal.

I must ask myself the following question, does this particular application today - come within the *Sefo anor v R (SC)* category of case envisaged in subsection (1)(b) where the appeal is unlikely to be heard before a substantial part of the sentence has been served.

In this case the Court of Appeal sits on the 5th July 2010 for three weeks that is by my calculation in *231 days or just thirty three weeks time*.

The present application is made - pursuant to subsection 1(a) which requires the Court to have regard to the prospects of the appeal succeeding. This Court needs to be satisfied that there are *reasonable prospects* of the appeal succeeding and that element in turn requires a consideration of the grounds of appeal. On the one hand, Mr. Kefu for the Crown says her chances of success in this case are slim, while Mr. Pounou disagrees.

The Court's obligation under the Bail Act is less equivocal. As I see it, I am obliged by the statutory provisions of the Bail Act to give proper consideration to the grounds of appeal - and to the prospects of the appeal succeeding.

In dealing with a bail application pending appeal, the judge has to consider the force of a ground of appeal, which alleged that the trial judge had misdirected the jury on various matters as set out in counsel's very helpful written submissions.

This Court asked Crown Counsel if the learned trial judge had directed the jury on the issues of self defence and of provocation, and the reply was in the affirmative any further questioning would of course tread on the feet of the Court of Appeal.

So to that extent, with the jury's finding of guilt on the murder charge and with the Appellants own guilty plea to a manslaughter charge in my respectful view it would be inevitable that a lengthy custodial sentence would more likely than not be imposed upon this appellant.

With some diffidence, therefore, I now turn to consider the grounds and the merits of the appeals. On an application for bail pending appeal there is a reversal of the usual onus of proof obligation in criminal cases. The onus is on the applicant to show cause, by reference to the relevant statutory criteria, why bail should be granted.

At the bail hearings, both counsel were given the opportunity to present any submissions they wished to make over and above the information that was already before the Court. Mr. Pounou addressed the court briefly on the merits the fresh evidence - ostensively that the Appellant is now 11 weeks pregnant and he said the Appellant should not do hard labour whilst in prison - and she should be home for Christmas - waiting for her appeal with her family.

I stress that I do not wish to be seen in any way as appearing to pre-empt the ultimate decision the Court of Appeal will need to make after it has heard the full arguments in July of next year.

Under the Bail Act, however, I am clearly required to make an assessment of the merits of the appeals at this stage based upon the material I have before me; see the case of *Sefo anor v R* (SC). Those decisions were made by my findings of facts in what I considered to be a very grave crime. I heard the facts as alleged by the Crown Prosecutor Mr. Kefu that the accused went with the deceased to a Church function where at a point in time an argument ensued culminating in the Appellant pulling the deceased's hair.

I was told the Appellant that then reached into the pocket of her husband's coat which he was wearing, and pulled out a 12cm long sharp knife. I was told the Appellant then stabbed the victim in the chest - the knife puncturing the deceased's left and right ventricles of her heart. This was I was told the fatal blow, and I was also told there was another stab wound which did not go in far - but there were two stab wounds inflicted in anger. The Appellant then ran away from the scene. I am told the Appellant did co-operate with the police when she was subsequently arrested and that is to her credit as is her guilty plea to Manslaughter.

Having carried out that exercise and having made my assessment all I can say is that, for this appeal the applicant can in my view have only a very limited prospect or chance of success.

The use of a knife against a person in a Church during a squabble - with the evidence of two stab wounds - one a deep cut to the heart - followed by a second wound in the chest area in my respectful view coupled with the fact the Appellant then **ran** from the scene - *R v B* (a House of Lords decision) in my respectful view the surrounding facts would tend to show and to establish the necessary intent to prove a murder charge and would no doubt lead to a conviction as against this Appellant for murder.

Medical treatment - confinement.

I have been assured by the Solicitor General in open Court that the appellant will be provided access to proper medical and hospital treatment - if she remains confined in prison, and of this I am quite sure she will be looked after.

Conclusion

Having reached that conclusion, it would in my view be inappropriate for me to grant bail to the Appellant in this case - at this time.

In this regard I am mindful of the admonition of the Court of Appeal in *Kafoa v R* (App No 347, 348, 743/1996, 20 June 1997, Court of Appeal) where the Court was critical of the Judge's decision to grant bail to three appellants in a rape case pending appeal having regard, in particular, to the gravity of the offences and the appellants' meager prospects of success.

There is one further consideration which I must also that is the welfare of the unborn child and the issue of hard labour. I order that during her confinement whilst pregnant the Appellant is not to perform hard labour - she is to be regularly seen by a medical officer and she is to be placed upon light duties within the prison confines.

Accordingly the applicant and her counsel have failed to persuade me that there is a reasonable prospect of the appeal succeeding; and accordingly her application for bail pending appeal is **refused**.

Cho anors v Hwang anor

Supreme Court, Nuku'alofa
Laurenson J
CV 272/2009

26 November 2009; 26 November 2009

Practice and procedure – interim orders sought – to preserve assets pending resolution – granted

The parties were involved in a business venture. The first applicant was the person who paid much of the capital to the venture. In the meantime, the parties had fallen apart and there were real arguments between them as to who was entitled to various assets and who was entitled to the product being produced by the company. The dispute between the parties would not be able to be heard until at least the middle of 2010. The applicants had not filed a statement of claim but undertook to file and serve a statement of claim by 12:30 on Wednesday 2 December 2009. The applicants applied for an interim injunction and interim orders.

Held:

1. The intent of the orders sought was to preserve the position pending final resolution.
2. The applicants had an arguable claim to preserve their interest in the company and assets. The Court was satisfied that there were serious questions to be tried, therefore, it was an appropriate case for the Court's discretion to be exercised in favour of granting the draft orders based on the balance of convenience which was to preserve assets pending the final outcome.
3. If the orders were not obeyed then the respondents would be in default and liable to penalty accordingly. The Court directed that the respondents were to comply with the orders by 4:30 pm on the following Monday. If they failed to do so, then it would be for the applicants to take whatever further action they saw fit.

Case considered:

American Cyanimid Co v Ethicon Ltd [1975] AC 396

Counsel for the applicants : Mr Fusitu'a
Counsel for the respondents : Mr Edwards

Judgment

The applicants have applied for an interim injunction and interim orders.

The applications arise out of a business venture involving the parties. It is clear from submissions made to me by his counsel Mr. Edwards that the 1st applicant has been the person who has paid much of the capital to the venture. In the meantime, the parties have fallen apart and there are real arguments between them as to who is entitled to various assets and perhaps more particularly who is entitled to the product being produced by the company. It is unfortunately the case that the disputes between the parties will not be able to be heard until at least the middle of next year and I am concerned that the assets previously held by the parties being preserved pending that time. The applicants have not filed a statement of claim but have undertaken, to file and serve statement of claim by 12:30 on Wednesday 2.12.09. According to rule 22.7, if an application is one of extreme urgency, the court may make an order upon the applicant undertaking to issue a writ within a specified time and that undertaking is to be endorsed at the foot of the application for injunction. I see no reason why in this case that cannot be done now. There will be an order accordingly that the applicants' counsel attend to that forthwith.

The applicants have filed a draft order all directed to the issue of preservation of assets and ensuring that the company in which they are minority shareholders shall not take any further steps to have them removed as directors. As I say, the whole intent of the orders sought is to preserve the position pending final resolution. As I have indicated, the court is concerned in terms of *American Cyanimid Co v Ethicon Ltd* [1975] AC 396, to address the following matters, the applicants are to establish a good arguable claim and then establish that there is a serious question to be tried, if they are able to establish that then the court must as a matter of discretion determine the matter on the balance of convenience. I have heard lengthy submissions from counsels outlining the background to this matter. I have no idea at this stage what is likely to be the final outcome but certainly, the applicants have an arguable claim to preserve their interest in the company and assets at this stage. I am also satisfied that there are serious questions to be tried this being the case, I am satisfied that this is an appropriate case for the court's discretion to be exercised in favour of granting the draft orders based on the balance of convenience which as I've already noted I perceived to be to preserve assets pending the final outcome. There will be cost in the cause and order that the applicants' counsel attend on the Registrar and endorsed an undertaking in terms of the order already made on 23 November namely that the applicants will file and serve a statement of claim by 12:30 pm Wednesday 2 December 2009.

Leave to apply for further directions on 48 hours notice.

Mr. Fusitu'a raises the question whether some further orders should be made in respect of the orders numbers 2 and 4 of the order dated 23 November 2009. Pointing out that until those position is known with regards to each of those matters it would be difficult prepare a statement of claim. I don't accept that, the statement of claim will still be prepared but without the precise figures. More importantly though is the question, what time should be given to the respondents to attend to both those two matters? Mr. Fusitu'a points out that the respondents are both at default. Mr. Fusitu'a raises the point that orders numbers 2 and 6 have not been complied with, that the respondents are therefore in default. Mr. Edwards says that he has done what he can to get the documents; his client apparently is not being helpful as it should be. The

question, what is to be done? If the orders are not obeyed then the respondents are in default and are liable to penalty accordingly. I therefore direct that the respondents are to comply with these orders by 4:30 pm on Monday next. If they fail to do so, then it will be for the applicants to take whatever further action they see fit.

There will be one final order that either party or any party may seek further directions on 38 days notice.

Latu v Family Assurance Limited

Supreme Court, Nuku'alofa
Laurenson J
CV 182/2008

25-27 November 2009; 3 December 2009

Insurance law – life insurance – non-disclosure of pre-existing medical condition – no insurance cover

The Plaintiff and her late husband Tevita (the deceased) married in 1996. A life insurance policy had been taken out on the life of the deceased. The deceased died suddenly at home on 30 July 2008. The plaintiff applied for the cover under the policy to be paid to her and provided a medical report (as requested). After receipt of the report the defendant declined liability on the ground that the deceased had failed to make full disclosure of his medical condition. The plaintiff claimed the proceeds of the life insurance policy.

Held:

1. The law was well established. An insurer who wished to decline liability where the ground of avoidance was a breach of a condition relating to non-disclosure or misstatement then the insurer was required to show: that by express stipulation the duty of disclosure was contractual; that the non-disclosure or misstatement alleged to have been made was a breach of duty as defined in the stipulation; and that the assured was guilty of the alleged non disclosure or made the alleged misstatement.
2. The Court was satisfied that the deceased must have known in 2001 that he had medical conditions namely peptic ulcer disease and diabetes and that these should have been disclosed.
3. The defendant had discharged the burden on it and the plaintiff's case failed. Judgment was entered for the defendant.

Counsel for the plaintiff : Mr Pouono
Counsel for the defendant : Mrs Vaihu

Judgment

Introduction

[1] This a claim for the proceeds of a life insurance policy taken out on the life of the Plaintiff's late husband. The claim was rejected by the Defendant on the ground that there had been a failure to disclose pre-existing medical conditions at the time of the proposal.

Factual Background

[2] The Plaintiff and late husband Tevita (the Deceased) married in 1996. They were both employed by the Ministry of Fisheries at that time. Plaintiff was 24, and the Deceased 43. They had two sons born on 10.11.2000 and 12.10.2002.

[3] On 4 September 2001 Deceased signed a proposed with the Defendant company for a Medical Personal Accident and Life Insurance Policy. The sum insured was $30,000. This was under a group policy arranged with other employees of the Ministry of Fisheries. Premiums were paid by the Deceased until 2006 when he became redundant.

[4] The Plaintiff who continued in employment with the Ministry then took over payment of the premium from 26 July 2006. At the same time she also arranged cover for herself of $10,000 and the eldest son for the same amount. In October 2006 a further $10,000 was arranged in respect to the youngest son.

[5] Cover for all 4 members of the family was then transferred to a family policy because the Deceased was no longer employed by the Ministry and hence no longer qualified for a premium based on the lower group rate.

[6] The original group policy was destroyed in the fires of November 2006. Some correspondence and other papers were saved. Included amongst these were:

1. Photostat copy of proposal form by Deceased dated 4.9.01.
2. Disclosure form of same date also signed by Deceased.
3. Proposal and disclosure form dated 26.7.06 both signed by Plaintiff in respect to her own cover.
4. Further copy of a disclosure statement dated 15.3.2007 signed by Plaintiff but relating to the deceased.

[7] Counsel could not assist me as to why a further disclosure form was completed by the Plaintiff for her husband on 15.3.2007. It seems reasonable to assume that somehow it became relevant at the time when the near family policy was issued. The failure of the Defendant to be able to provide a coherent explanation in relation to this and other matters has been a cause of frustration. In the final analysis however, I have concluded that the main issues are sufficiently clear to enable this matter to be resolved.

[8] To complete the narrative, the Deceased died suddenly at his home on 30 July 2008.

[9] The cause of death was

> *"Probable cardiac arrest secondary to an acute coronary event"*.

[10] The Plaintiff applied to the cover under the policy to be paid to her. She was asked to provide a medical report. She requested Dr Sione Latu (not a relative) to do so.

[11] In his report the Dr noted the following comorbidities ie. other medical conditions present.

1. Complicated type II diabetes mellitus
2. Chronic renal failure with normocytic anaemia and fluid retention
3. Chronic gout with past NSAIDs abuse
4. Complicated duodenal ulcer with history of bleeding
5. Coronary artery disease-old anteroseptal MI and with occasional ventricular premature complexes (VPCs)
6. Congestive heart failure
7. Hypertension
8. History of dyslipidaemia
9. *Helicobacter pylon* infection

[12] Following receipt of this report the Defendant declined liability under the policy on the ground that the Deceased had failed to make full disclosure of his medical condition in 2001 and nor had his wife done so in 2007.

Discussion

[13] The law in cases such as this is well established. An insurer wishing to decline liability where the ground of avoidance is a breach of a condition relating to non-disclosure or misstatement (as was the case here) then the insurer is required to show

(i) That by express stipulation the duty of disclosure is contractual;

(ii) That the non-disclosure or misstatement alleged to have been made is a breach of duty as defined in the stipulation; and

(iii) That the assured was guilty of the alleged non disclosure or made the alleged misstatement.

[14] The Policy in this case includes the following:

> Non disclosure. "If you fail to comply with your duly of disclosure we may be entitled to reduce our liability under the Contract in respect of a claim, or we may cancel the contract.

If your non-disclosure is fraudulent we may also have the option of avoiding the Contract from its beginning."

The Defendant undertook the onus upon it by relying on the following matters referred to the Dr Latu's report.

(a) He was first diagnosed in 1974 with peptic ulcer disease when he was admitted to this hospital. In 1989 he was investigated in Hawaii for this undergoing abdominal ultrasound and getting a Barium meal done which confirmed that he has Peptic Ulcer Disease. Another Barium meal in 1990 confirmed scarring of his of the duodenal cap consistent with chronic DU. He had another admission in 1990 for ulcer related pain. In 1993 he was again admitted for abdominal pain. In 1999 he had gastroscopy which showed superficial gastric erosions. By this stage he has received multiple empirical *H. pylori* eradication regimens in addition to acid reduction therapy. In 2002 he showed evidence of upper GI bleeding presenting with melaena and another gastroscopy was done with antral biopsies showing active gastritis and presence of *Helicobacter pylori*. No follow up of his ulcer is noted after 2003.

(b) He was first diagnosed with diabetes in 1997 but was initially diet controlled. There is a strong family history of diabetes with his father having had diabetes. In 1999 he had a total cholesterol level of 6.4 mmol/L. The last record with regards to his diabetes we have is in 2000 as he was leaving to go overseas before his acute admission again to us in 2007.

[15] The Plaintiff said she suspected the Deceased may have diabetes in 2001 because of his Father's involvement with this disease. She said that she noted the Deceased was careful with his diet but accepted from him that this was a precaution to avoid the same problems as his Father.

[16] So far as the ulcers were concerned she was not aware of any problem prior to and including 2001.

[17] When one comes to consider the Dr's evidence in relation to peptic ulcer decease in relation to the Deceased's knowledge of this it seems very clear to me that he must have been aware of this condition in 2001.

Even if he did know that he was suffering from was a "digestive disorder" (question 1 of the disclosure form) he must have known on 4.9.2001 that he had consulted a doctor for medical or surgical advice on treatment of any ailment injury on sickness during the past five years.

[18] Plaintiff's Counsel submitted that the Deceased may not have been aware of the English words involved in the proposal. He was a senior official with the Ministry

therefore I find it difficult to accept this. The present manager for the Defendant said the Defendant could speak English.

[19] The Plaintiff's final submission was that the authority at the foot of the proposal form amounted to a disclosure. I disagree. This is simply an authority to the Defendant to get access to medical records of disclose has been made of a medical condition.

[20] I note that the Plaintiff conceded that the combination of illness suffered by the Deceased had ultimately caused the heart condition which was the proximate cause.

160 [21] I am satisfied that the Deceased must have known in 2001 that he had medical conditions namely peptic ulcer disease and diabetes and that these should have been disclosed. The record supplied by the Dr Latu speaks for itself.

For those reasons I find that the Defendant has discharged the burden on it and accordingly the Plaintiff's case must fail.

Judgment should therefore be entered for the Defendant together with costs and disbursements including witnesses' expenses all according to scale.

[22] For the sake of completeness I should mention one final matter. A great deal of time was taken in trying to decide who was at various times the beneficiary under the policy. I have come to the conclusion that this issue was and still is, irrelevant to the
170 determination of this case.

R v Yang Yu Zhen

Supreme Court, Nuku'alofa
Ford CJ
CR 50/2009

20, 21, 24, 25 August; 3, 4 September and 5, 6, 7, 9, 13, 14, 20 October 2009; 11 December 2009

Criminal law – possession of arms and ammunition – no knowledge of presence – no possession
Evidence – false evidence given – rejected and accused acquitted

The accused was a 59-year-old Chinese grandmother and retired storekeeper. She was originally charged with attempted murder and other offences relating to possession of arms and ammunition. In court she faced one count of discharging a firearm with intent to intimidate, one count of possession of arms without a licence, two counts of possession of ammunition without a licence and one count of common assault. The offences were alleged to have occurred on 29 and 30 January 2009. The complainant, 40-year-old Feng Zheng, was a former close friend and business partner of the accused. He operated a vegetable plantation on an allotment at Tokomololo, where the firearm incident and assault was alleged to have occurred. The accused denied all the charges and alleged that she was the victim of an elaborate and concerted scheme played out by Feng Zheng between 25 December 2008 and 30 January 2009 to have her imprisoned or confined to an institution. She denied ever using the firearm and ammunition in question and claimed that they belonged to Feng Zheng and that it was he who used the pistol and fired the shots that resulted in the charges.

Held:

1. The accused should not have imputed to her an intention to possess or knowledge that she did in fact possess the unlicensed ammunition because she had no knowledge of its presence. "A man does not have possession of something which has been put into his pocket or house without his knowledge".
2. The Court found that the principal witnesses relied upon by the Crown, namely, the complainant Feng Zheng, his nephew Huang Bin, his sister Zheng Yin and his brother Zheng Biao had all got together and concocted a saga full of lies and then had the audacity to go into the witness box and give false evidence on oath. The Court rejected their evidence completely.
3. The accused was acquitted on all counts.

Cases considered:
R v McNamara 87 Cr.App.R. 246
R v Tau anors [2005] Tonga LR 418

Statute considered:
Arms and Ammunition Act (Cap 39)

Counsel for the Crown	:	Mr Sisifa, Ms Finau, Ms Lafaiali'i
Counsel for the accused	:	Mr Niu

Judgment

The charges

[1] The accused is a 59-year-old Chinese grandmother and retired storekeeper. She was originally charged with attempted murder and other offences relating to possession of arms and ammunition. In this court she faced one count of discharging a firearm with intent to intimidate, one count of possession of arms without a licence, two counts of possession of ammunition without a licence and one count of common assault. The offences were alleged to have occurred on 29 and 30 January 2009.

[2] The complainant, 40-year-old Feng Zheng, was a former close friend and business partner of the accused. The accused was said to have regarded him as a son. He now operates a vegetable plantation on an allotment at Tokomololo. That is where the firearm incident and assault is alleged to have occurred.

[3] For her part, the accused denies all the charges and alleges, in effect, that she was the victim of an elaborate and concerted scheme played out by Feng Zheng between 25 December 2008 and 30 January 2009 to have her imprisoned or confined to an institution. She denies ever using the firearm and ammunition in question and claims that they belonged to Feng Zheng and that it was he who used the pistol and fired the shots that resulted in the charges. When asked why he would have done that to her when she had treated him like a son, the accused answered:

> *"I think he used me in the beginning. Now he doesn't need me. I became useless for the business and he does not like me going to the farm."*

[4] Against that background, it was inevitable that the evidence was going to focus on other events apart from the immediate incidents on 29 and 30 January 2009 which gave rise to the charges in the indictment. In effect, we ended up having several mini trials within the trial itself. For this reason, the hearing took considerably longer than had been anticipated. Before turning to the prosecution case, it is necessary to say something more about the historical relationship between the accused and Feng Zheng ("the complainant").

Background

[5] Both the accused and the complainant came to Tonga from China in 1996. They emigrated separately. The complainant said that he came "to do business". The accused said that she came to Tonga because she knew other Chinese people who were living in Tonga, including her brother. She is estranged from her husband who lives back in China. He has apparently made two trips out to Tonga. The couple have a 33-year-old son, Chen, who gave evidence at the trial and a daughter whose evidence was taken before a magistrate prior to trial because it was necessary for her to travel back to China.

[6] In that same year, 1996, the accused opened a small shop near Vaiola Hospital and she was assisted by her daughter, her son and the complainant. The accused explained that the complainant had become a friend. He wanted to open his own store and he had approached her for assistance. She gave him money to buy a vehicle and, although the evidence was vague on detail, she appears to have given him other financial assistance. The complainant then set up his own store at Ma'ufanga. In 1999 the accused moved into a larger store opposite Vaiola Hospital and around that same time she and the complainant became business partners in a company called Xiang Long Trade Co Ltd. The company operated the large store together with the store at Ma'ufanga. The accused held 51% of the shares and the complainant 49%.

[7] Initially neither the accused nor the complainant could speak the English language but the complainant soon became conversant in English and picked up some knowledge of Tongan. The business began to expand and other stores were acquired. The complainant set up the stores and did the buying of the produce. The accused, whose knowledge of the Tongan and English languages was restricted to the usage necessary to deal with shop customers, worked behind the counter. Within a few years the company operated five stores and in about 2001 it also started a vegetable plantation on an allotment at Tokomololo which belonged to the landlord of the Vaiola store. Apparently, the landlord let the company operate the vegetable plantation without any additional rent having to be paid over and above the rental on the store. On the farm, the couple also raised chickens and ducks.

[8] Before they established the large Vaiola store, the accused and the complainant lived in the house next door. The accused had her room upstairs and the complainant lived downstairs. When the new store was opened in 1999, the accused moved to a bedroom at the back of the store and the complainant stayed on in the house next door until he married for the first time in 2005. At that point they swapped accommodation. The complainant and his wife moved into the bedroom at the back of the Vaiola store and the accused went to live in the house next door. After about one year, the complainant's wife returned to China. He also then returned to China, obtained a divorce and in 2007 married again. After he returned to Tonga, the complainant and his new wife moved into a house at Pahu where they have remained.

[9] In 2006 there came an important development. The complainant suggested to the accused that they separate their business operations so that he would take over the farm at Tokomololo and she could have the store. It is not clear from the evidence how many stores the accused was left with at that stage but all the focus was on the

large Vaiola store opposite the hospital. The accused agreed to the proposal on condition that she would own the chickens, ducks and bananas that were all in a special enclosed area at the farm. In evidence that area was often referred to simply as "the duck pond". The accused estimated that she had between 200 - 300 ducks and over a 100 chickens. She would feed them every day.

[10] Even though they had separated their activities, up until the end of 2008 the accused and the complainant continued to be good friends. Every day the markets were open, the complainant would take vegetables in to sell at the market and then between 5 and 6 p.m. he would pick the accused up from the Vaiola store and take her out to the farm to feed her ducks and chickens. They would then return to the store where the accused would cook a meal and the complainant would help out in the shop until closing time. He would then go back to his home at Pahu.

[11] Another important development in the narrative occurred in 2007 when some of the complainant's immediate family emigrated from China to help him out with his vegetable plantation at the farm. They included his brother Zheng Biao with his wife and child, his sister Zheng Yin and her husband and his nephew, Huang Bin, the 21-year-old son of his sister. The nephew lives with the complainant. The others reside on the farm. They do not speak English or Tongan.

[12] Earlier, in around 2005, the complainant's parents had come out to Tonga and stayed at the farm for a period. During their stay there was an unfortunate incident when they were badly beaten up by Tongan youths who also killed the chickens and ducks. Following on from that incident, the complainant decided that he needed protection against a similar occurrence and so he acquired a licence and purchased a .12 rifle.

[13] There was much evidence also about an incident on Christmas Day 2008 when the accused was alleged by the complainant to have deliberately taken a deadly poison. The Court was told that the poison in question is made from the roots of a Chinese herb and apparently it can kill a person within a very short space of time. The complainant admitted that he had brought the poison plant in from China and he said that he had given some to the accused around 2005 for medicinal purposes. He explained that it can cure certain types of skin problems. The accused denied that she had ever been given the product and her son said in evidence that the complainant had told him at the time that the reason he had acquired the poison was because he wanted to do something at the farm in connection with the attack on his parents by the Tongan youths. The complainant was recalled and he denied that proposition. The poison incident did, however, figure prominently in evidence.

The shooting incident

[14] The case as outlined by Crown counsel in opening was that on Thursday 29 January 2009 between 6 pm and 7 pm the accused had driven out to the farm to feed the chickens and ducks. The complainant with his nephew was in an area adjacent to the pigsty measuring out a small piece of land for the storage of a container. The accused followed the complainant around and told him that there was no point in doing what he was doing. As the complainant was then bending down taking a measurement, the accused got out a pistol and fired one shot. The complainant was

pushed aside by his nephew and the shot missed. She then fired again but the second shot also missed. At the same time the complainant and his nephew moved towards the accused and struggled to remove the pistol from her hand. During the struggle the accused bit the complainant on his hand but he did manage to remove the pistol. The police were then called and the pistol was handed to them. The complainant told the police that the accused had also thrown a plastic bag of bullets into the mud. The accused was arrested. She held no firearms or ammunition licence.

[15] In his evidence, the complainant said that on the evening in question he was at the farm with his nephew measuring an area for a container to be placed into position. The accused followed him around. At one point she told him not to do anything stupid but he did not know what she meant. As he went to take the last measurement, he said he felt someone push him and then he heard a gunshot. The complainant said it was his nephew who had pushed him and when he was pushed aside he looked up and saw that the accused had a pistol in her hand and then he heard the second gunshot. He said that she was aiming the pistol at him. He then started to take the gun away from her. He held her hand and his nephew and brother came to help. When his brother opened her hand, the complainant took the pistol from the accused. He then called the police and telephoned the Chinese embassy reporting that someone had attempted to shoot him.

[16] In cross-examination the complainant said that before the accused fired the first shot, his nephew pushed him away, he fell down and the bullet missed him. After the accused fired the first shot he saw the accused holding the gun in one hand by her waist and then he heard the second shot, "very fast, bang, bang". He went to her to take the gun away. He pulled her hand up and while he was still holding her hand he threw her down. He hit her once on the body. He said that he, his nephew, his sister and brother all helped to take the gun off her. He said his sister pulled her hair.

[17] In the area between where the incident is supposed to have taken place and the pigsty there was quite a large patch of muddy effluent from the pigsty. On 30 January 2009 the police recovered from that area a small plastic bag containing 15 live bullets. They had been told about the bag of bullets by the complainant the previous evening. One of the police officers said that the complainant had informed him that the accused had thrown an object into the mud and "it was bullets in a plastic bag." The officer looked into the mud but he was unable to work out what the object was. It was getting dark at the time although there was some light from the pigsty and the police vehicle. The police told the complainant to leave the object where it was and it was recovered the following morning.

[18] In his evidence, the complainant's nephew said that he had been helping his uncle with the measurements and next thing he saw was the accused holding a gun pointed at his uncle. He pushed his uncle aside just before the first gunshot and then there was the second gunshot. He said he was shocked and he helped his uncle and his uncle's sister take the gun away from the accused.

[19] The complainant's sister told the court that she had just come out of the vegetable plantation and she saw the accused following her brother. As she watched, she saw the accused bend down and pull something out of her gumboot. She was not sure what it was but she then heard two gunshots fired. She joined in the struggle with her

son and the complainant to recover the gun from the accused and she recalled pulling the accused's hair. She said that after the complainant called the police she noticed the accused take something from her pocket and throw it into the mud. She did not know what it was but she told the complainant about it. In cross-examination it was put to the witness that on the Crown case, although the accused had been subdued and they were all standing around waiting for the police to arrive, neither the complainant or her other brother or her son had seen the accused throw any object into the mud. The witness, nevertheless, insisted that she had seen the accused throw the object into the mud which turned out to be the plastic packet of bullets.

[20] The fourth eye witness called for the Crown was the complainant's 37-year-old brother, Zheng Biao. He resides at the farm with his wife and third child. Their two other children are back in China. He told the court that at the time of the incident he was doing something in the plantation and he heard two gunshots and the complainant call out for help. He said that he ran over and saw the accused holding a gun and his brother was trying to take the gun away from her with the help of his nephew and his sister. He tried to open the complainant's hand to take the gun away but she bit his hand. He said that he pulled the accused's hand and the complainant took the gun off her. The witness said that he remained with the others until the police arrived at the scene. In cross-examination, he said that he had not seen the accused throw anything away but his sister told him that she had seen her throw a plastic bag into the mud. He explained that he could see the top of the bag in the mud but he did not know there were bullets inside until the police removed the bag the following day.

[21] The police removed two dead shells and four live bullets from the magazine of the pistol. They did not, however, test the pistol or the bullets for fingerprints or rather, if they did, no evidence was given about the results of any such tests. Understandably, the police at the scene relied and acted upon the information given to them by the complainant who was the only witness at the scene who could converse with them in the English language. His siblings and nephew could only speak in the Chinese language and the accused told the court that she had limited understanding of English and she only knew "shopkeeper's language" in Tongan. The police officers who attended the scene told the court that the accused had been able to say to them that, they (the complainant and the others) were all lying because they were all related and she was the only person not related. She told them that it was the complainant who had fired the shots from the pistol.

[22] Apart from the shooting incident on 29 January 2009 and the earlier poisoning incident on 25 December 2008, when the complainant alleged that the accused had tried to poison herself, evidence was given about a motor vehicle accident on 27 December 2008 when, according to the complainant, the accused had said to him, "I just want to hit you and kill you." Then on 28 December 2008 there was another incident involving the recovery of a rifle from the accused's Vaiola store and charges being laid in the magistrate's court. The police on that occasion acted on a tipoff from the complainant. Finally, in the narrative, much evidence was given about a search of the accused's Vaiola store by the police pursuant to a search warrant on 30 January 2009, the day after the shooting incident, when the police recovered from the pocket of a leather jacket hanging in the accused's bedroom a box of bullets containing 36 live .22 bullets and a plastic bag which also contained 36 live .22 bullets. The accused

said that she knew nothing whatsoever about the bullets but the jacket belonged to the complainant. He had bought it from the market for his first wife along with another leather jacket (both of which were produced in evidence) when he was living at the Vaiola store but his wife had never worn them. Counsel for the accused submitted that the complainant had planted the bullets in the pocket of the jacket. For his part, the complainant denied any knowledge of either the leather jackets or the bullets. I now deal briefly with each of these incidents.

The poisoning incident

[23] In his examination in chief, the complainant referred to this incident only briefly. It was put to him that it happened on 24 December 2008 but the medical records confirm that the date was 25 December 2008. The complainant said that the accused's daughter had called him by phone at the farm and told him that the accused had taken a poison herb and told her that she was wanting to commit suicide. He said that the daughter asked him to go and look for the accused at the farm. The complainant said that he went to the area of the chicken farm (the duck pond) and saw that the accused had some of the herb and he took it away from her hand. He then called the daughter and told her to take the accused to hospital. Later in his evidence, the complainant said that the poison was in a Coca-Cola can. He said he tore the can in half and saw the poison roots inside. The daughter came and took the mother to hospital. The complainant followed in his vehicle. The accused strongly denied having taken any poisonous substance. She claimed that the complainant had made up the whole story.

[24] The Senior Medical Officer who examined the accused and made out a report on that occasion, Mr 'Alauna Fuka, gave evidence. He described the various tests carried out on the accused at the hospital and he confirmed that they had revealed nothing whatsoever to suggest that the accused had consumed any type of poison. The Medical Officer said that the complainant who accompanied the accused (the Medical Officer wrongly thought that he was the woman's husband) told him that the accused had tried to commit suicide. He told the Medical Officer that she had used sticks which were part of a very poisonous plant in China. She had soaked parts of this very poisonous plant in Coca-Cola and drank the liquid. The complainant was recalled and he denied giving that information to the witness. The Medical Officer's hospital notes were produced as exhibits, however, and they confirmed his evidence that the complainant had told him that the accused had put the poison inside the Coke container and drank it.

[25] The complainant confirmed that on the day of the alleged poisoning incident he had told the accused that he did not want to come to her store to help anymore. He was asked in examination in chief if he knew why she would have taken the poison. He replied that she told him that if something happened to her then her children would do something to him. The accused said that she was released from hospital immediately but when she returned to the farm the following day to feed her chickens and ducks everyone at the farm thought that she had tried to kill herself. The complainant denied in cross-examination telling them any such thing. The accused said that she was angry over what the complainant had done to her.

The motor vehicle incident

[26] The next day, 26 December 2008, the accused drove herself out to the farm to feed the chickens and ducks. She did the same the following day, Saturday 27 December. The motor vehicle incident happened on 27 December just after the accused had finished her chores at the farm and was driving back along the narrow side road that ran from the farm out onto the main road. In his examination in chief, the complainant said that at the same time he was returning to the farm and their vehicles met along the side road. The complainant said in evidence that the accused drove her van into his vehicle. She then reversed her van and drove into the driver's side of his vehicle for the second time. He said that he jumped out and stopped her ramming into his vehicle a third time by entering her van through the passenger door and taking the keys out of her van. He claimed that as he did so, she said to him, "I just want to hit you and kill you." The complainant said that he reported the matter to the police but he just wanted the police to give the accused a warning - not charge her.

[27] Details of the incident were pursued further with the complainant by Mr Niu in cross-examination. Counsel put it to the witness that it was he, the complainant, who had deliberately swerved his vehicle towards the accused's van resulting in a glancing collision between the two vehicles and then he had swerved his vehicle back to his side of the road with the front of his van ending up in the tall grass to the side of the road and the rear part still positioned on the roadway. The complainant denied that scenario. Counsel put it to the complainant that after he entered the passenger side of the accused's vehicle he punched the accused on her face and head while his sister, who had also been in his vehicle, grabbed and pulled the accused's hair through the driver's door and his brother tried to break the window screen wiper of the accused's van and his nephew released air from the front tyre. Mr Niu then put it to the complainant that there was no second impact. The complainant denied all of these allegations. He did, however, agree that there had also been a red coloured vehicle on the same road which his van had passed just before the collision and Tongan people from that van had come back and attended at the scene.

[28] The complainant's nephew and siblings were also questioned in cross-examination about the motor vehicle incident. The nephew said that the accused deliberately swerved her van and hit the complainant's van. She then reversed some 7 or 8 meters and came at them again ramming the same side of the complainant's van for the second time. The witness said that he got out of his uncle's vehicle and stopped the engine of the accused's van by turning off the key and taking it away. It was put to the witness that the complainant had claimed that he (the complainant) had been the one who had taken the key out of the accused's vehicle but the witness was adamant that it was he who had removed the key.

[29] The complainant's sister said that the accused had reversed her van 2 or 3 meters before hitting their vehicle on the second occasion. The witness said that it was the complainant who had gone over and taken the keys from the accused's van. She claimed that she had stood by her vehicle after the incident and she denied having gone over and pulled the accused's hair.

[30] The complainant's brother also said that the accused had reversed her van 2 or 3 meters before hitting them for the second time. He said that it was the complainant who took the key off the accused but when he was asked whether the complainant was inside or outside the van when he took the keys the witness answered, "I forget". He said that he did not see his sister pulling the accused's hair nor did he or anyone else try to damage the wiper blade of the accused's vehicle." In cross-examination both the sister and brother were asked to demonstrate what they meant by "2 or 3 meters". It was significant that the distances they each pointed out in relation to certain points in the courtroom differed considerably.

[31] The police were called after the motor vehicle incident and the accused was taken to the Central Police Station. The complainant also went to the police station and the accused overheard him tell the police that she had hit his vehicle and tried to kill him. A number of Chinese friends of the accused who had heard of the incident then arrived at the police station and persuaded the complainant not to take the matter to court. The accused was released and allowed to go back to her store at Vaiola.

The rifle incident

[32] The next day, Sunday 28 December, the accused drove to the farm between 9 a.m. and 10 a.m. to feed her chickens and ducks. When she arrived at the farm the police were waiting for her and they asked her whether she had a gun at her home. She told the police that she did and so after she had finished feeding the chickens and ducks Police Officer Latu Lavaki followed her back to the Vaiola store and the policeman waited outside while the accused went and got the gun from the wardrobe in her bedroom and gave it to the officer.

[33] When the accused gave evidence she was asked in examination in chief how she came to have the rifle in her possession. She said that it had been given to her by her brother to mind about a year before because he was going back to China. He had not given her any bullets. The accused said that the complainant knew that she had the gun in her room at the store because he had been with her when her brother gave it to her to look after in his absence (although the accused referred to the owner of the gun as her brother, she said that their mothers were sisters and so he would have been her first cousin).

[34] Corporal Lavaki was called by the Crown and he said in evidence that he recalled receiving a complaint from the complainant on Sunday 28 December 2008. The complainant told the officer that he had a problem with a woman who was a business partner of his and it was his general belief that the woman would shoot him if she came into possession of any firearms. The complainant made reference to the motor vehicle incident the previous day and he told the officer that he was afraid to go back to his farm because the woman had some chickens and ducks at the farm and she might cause him injury. He therefore asked the officer if he could go across to Tokomololo and he would meet him at the side road that led into the farm. He wanted the officer to assist him by giving him protection because he believed that the woman (the accused) did, in fact, have a gun.

[35] The police officer travelled across to Tokomololo and found the complainant waiting for him at the intersection. While they were talking, a vehicle drove past into

the farm and the complainant told him that that was the woman he was afraid of. The officer told the complainant to follow him and he would escort him back to the farm. When they arrived at the farm the officer could not see the woman driver but there was someone else in the van who told him that the driver (the accused) was feeding the ducks. When the accused returned back to the van the officer told her that he wanted to search her vehicle in case she had a gun. He searched but could not find a gun. He then asked her if there was anything else and the accused had volunteered that she had a gun in her premises opposite the hospital which belonged to someone else. He followed the woman back to the Vaiola store and she went inside and brought out a .22 rifle. After checking with the Police Armourer the officer found that the rifle was not licensed and so he charged the accused with possession of an unlicensed firearm. She pleaded guilty to the charge in the magistrate's court and was placed on probation for two years.

[36] In cross-examination the officer was asked whether he had believed at the time that the accused was innocently simply holding the gun on behalf of the person who had gone overseas as she had claimed and the officer replied, "yes". The officer was also asked whether, when the complainant had told him to check the accused's store to see if there was a gun, he, the complainant, had said that he had seen a gun in a room at the store. The officer answered, "yes, he said he recalled seeing a gun at her house but he could not confirm whether she was carrying it around in the van."

The search warrant incident

[37] The shooting incident referred to earlier occurred on Thursday 29 January 2009. That evening the accused was taken into custody and kept in the police cells overnight. The following morning she was taken to court. The police wanted her kept in custody but, because of the condition she was in, the magistrate requested the police to take her to the hospital and he ordered her release on bail. She returned to her home at the Vaiola store and had a bath and something to eat and then the police arrived at her premises with a search warrant allowing them to search the premises for arms and ammunition.

[38] The officer in charge of the search was Corporal Lavaki who also gave evidence in relation to the rifle incident. It was during the search that one of the police officers found in the pocket of the leather jacket hanging in the bedroom the box and the plastic bag each of which contained 36 live bullets. Corporal Lavaki was cross-examined at length about the search and it was put to him that as the room where the jacket was found was formerly the complainant's bedroom and the jacket was the complainant's, the complainant would have been the only person to know about the bullets in the pocket of the jacket. Counsel endeavoured to obtain an admission from the officer that it had been the complainant who had suggested to the police that they take out a search warrant of the premises. Corporal Lavaki originally agreed that there had been a complaint about arms and bullets but when asked by defence counsel to produce the police records relating to the complaint, the officer contradicted his earlier evidence and said that there had not been a complaint but it was normal police procedure after an incident like the shooting incident at the farm the day before to carry out such a search.

[39] After discovery of the bullets in the leather jacket, the police again took the accused to the police station and back to the magistrates court where she was charged with having possession of ammunition without a licence -- one of the charges in the indictment before the court. Again, the police wanted the accused remanded in custody but, after being taken to the hospital for treatment and observation, the magistrate released her on bail.

The defence

[40] The accused gave evidence herself and called other witnesses on her behalf. I have already referred to the evidence given by the medical officer in relation to the poisoning incident. Other evidence relating to this incident was given by the accused's 33-year-old son Chen Zhining who has been referred to earlier in this judgment. Chen recalled receiving a telephone call from the complainant on the day of the incident telling him that his mother had some poison at the farm and to go there at once. The witness said that he went to the farm with his sister and he saw the complainant holding a broken Coke can. The complainant told Chen that there was some poison inside the can and his (Chen's) mother had drunk it. Chen told the court that he looked inside the can and he saw what seemed to be tree leaves with some liquid. The colour looked like Coke but there wasn't much in the can. The complainant told him that he had taken the can from his mother's hands but she had already drunk the poison. The complainant told Chen that he should take her to the hospital right away. Chen said that they were speaking in Chinese and his mother was standing beside him. He told the court that his mother said, "don't believe him -- it's not true. I didn't drink no poison." Chen said that he did not think that his mother wanted to kill herself and he felt terrible but he thought that he should take her to hospital to have the claim checked out.

[41] Mr Niu also called evidence from the four Tongan occupants of the red van mentioned in relation to the motor vehicle incident. That van had been travelling along the side road heading out towards the main road and it passed the complainant's van just before its collision with the accused's van. Although there were some understandable conflicts in their evidence in relation to minor matters of detail, what clearly emerged from the evidence of these independent witnesses was that there was no second collision. Contrary to the evidence given for the Crown by the complainant and his three relatives, there was just the one initial impact. The Tongan witnesses also confirmed that the complainant's sister had pulled the accused's hair and one of the Chinese men had tried to damage the window screen wiper on her van.

[42] In relation to the shooting incident on 29 January 2009, the accused told the court that on that day she went as usual to feed her chickens and ducks. Earlier she had noted that some of the bananas in the duck pond area had ripened and so she took with her a cardboard box and a knife to cut the ripe bananas. On the pathway to the duck pond there was a corner and as she came around the corner she turned and saw the complainant, his nephew, his brother and his sister near the pigsty. She said they all came towards her and it looked like something was going to happen. The complainant stood in front of her and she asked him what they were going to do. He answered, "doing what"? The accused then put the cardboard box down on the ground. Nothing else was said but the complainant pushed her hard on the chest and

she fell to the ground in the area where the effluent emerged from the pigsty. He was wearing boots and he then kicked her and beat her. The others joined in. She said she struggled and her clothes were torn. She tried to roll away and she thought that maybe they were just going to beat her to death and bury her on the farm. She tried to get her mobile phone to call her daughter and ask her to ring the police but the complainant saw her getting out her mobile and he shouted, "stop her -- don't let her call." They then took away her mobile phone. The accused admitted that in the struggle over the mobile phone she may have bitten the hand of the complainant and his brother.

[43] The accused told the court that she then heard two gunshots. They came from the direction where the complainant was standing and she looked up and saw him holding a pistol. At that point the sister, brother and nephew were still holding on to the accused. After the complainant fired the second shot he walked up to the accused and said: "last time I did not put you in prison but this time you will go to prison. How you will die you'll never know. You won't know how you die." The accused said that the complainant then called the Chinese Embassy and Inspector Kainga Hia (whose home number he knew) and told them that the accused had used a gun and tried to kill him.

[44] Later, as already indicated, the accused was taken to hospital where her injuries were treated and she was given medication to relieve her pain. Evidence was given by a medical officer about the nature of the injuries she had received during the struggle in the course of the shooting incident and the medical report written up at the time was produced as an exhibit. Helpful photographs taken the following day showing the nature of the accused's injuries were also produced as an exhibit. The clothing she had been wearing was produced in evidence at the preliminary inquiry in the Magistrates' Court but it was not produced at the trial. Counsel were in agreement, however, that it was "dirty and torn".

[45] The accused also gave evidence about the bullets found the following day in the pocket of the leather jacket hanging in her bedroom at the Vaiola store. She told the court that the complainant had bought the jacket at the market in 2005 as a gift for his first wife. The accused had been with him at the time and she lent him the money for the purchase. She said that the complainant was concerned that his wife would not bring any winter clothing with her from China and he did not want her to catch a cold. At that stage his wife had not yet arrived in Tonga but, in any event, the accused said that the complainant's wife never wore the jacket and it was left stored in a box in the bedroom at the back of the Vaiola store which at the time was the complainant's bedroom. The accused produced a similar leather jacket with silver buttons which she said the complainant had also purchased at the market two years earlier and a teddy bear which she said belonged to him and he had used it as a pillow. The accused claimed that the two jackets and the teddy bear all belonged to the complainant and he left them in the bedroom at the Vaiola store.

[46] The accused then related to the court how, during a period of heavy rain, flooding caused damage to items stored at the back of her Vaiola shop including the leather jacket which was still packed away in the box. She said that that happened in 2007 prior to the complainant's second marriage. The complainant was still in China at the time and the accused was using the bedroom. She said that she took the jacket

out of the box, washed it and hung it up on a coat hanger in the bedroom where it remained until it was taken down by the police on 30 January 2009. The accused said that when the complainant returned to Tonga with his second wife and went to live at Pahu she told him to remove his belongings from the room at the store and he did so apart from the two jackets and the teddy bear. The accused was adamant that she knew nothing about the bullets found in the pocket of the jacket. She told the court that the complainant had access to her bedroom right up until the time of the motor vehicle incident on 27 December 2008 because he worked at the Vaiola store each evening and he would walk past the bedroom to the bathroom each night to take a bath.

The law

[47] There were a total of seventy two .22 calibre bullets found in the pocket of the leather jacket and one of the charges the accused faces arising out of that discovery is unlawful possession of ammunition contrary to section 4(1) of the Arms and Ammunition Act (Cap 39). That section provides that no person shall possess ammunition except under a licence.

[48] In *R v Tau anors* [2005] Tonga LR 418, 420 it was necessary for me to consider the meaning of the word "possession" in a drugs trial where the accused were charged with possession of cannabis leaves and seeds. There is no special statutory definition of the word possession and what I held in that case would have equal application to a charge of possession of a firearm or ammunition under the Arms and Ammunition Act. In *Tau* I adopted a passage from the 2005 edition of *Archbold* (para 26.61) which stated:

> *"A person is in possession of something when he has knowledge of its presence and some control over it; but he would not have possession unless he either knew, or the circumstances were such that he had the opportunity, whether he availed himself of it or not, to learn or to discover in a general way, what the items were."*

[49] That passage has been restated in the 2009 edition of *Archbold* at para 27.61 under the heading "*Drugs found in premises occupied by/ associated with defendant*". In *R v McNamara* 87 Cr.App.R. 246 the Court of Appeal acknowledged the general difficulty in expressing the concept of "possession". In *Tau* (supra) I went on to state:

> *"The question to be answered in each case is whether on the facts the accused was proved to have or ought to have imputed to him (or her) the intention to possess or the knowledge that he or she did possess what was in fact a prohibited substance."*

[50] In the present case, for the words "a prohibited substance" one can substitute "unlicensed ammunition". On the accused's version of events, she should not have imputed to her an intention to possess or knowledge that she did in fact possess the unlicensed ammunition because she had no knowledge of its presence. As was stated

by the Court of Appeal in *McNamara* (supra): "A man does not have possession of something which has been put into his pocket or house without his knowledge."

Discussion

[51] During the trial I inspected the scene of the shooting incident at the farm and I also had the opportunity to inspect the vans belonging to the accused and the complainant which were involved in the motor vehicle incident. No repair work had been carried out since the incident. It was clear to me from my observations that the complainant's van had not been hit a second time as he and his siblings and nephew had alleged. In this regard, I accept the unqualified evidence of the four Tongan witnesses who were travelling in the third van at the scene. It was also clear from my observations that the graze marks on the complainant's van were consistent with defence counsel's proposition that it had been the complainant who had deliberately driven his van into the side of the accused's van in a glancing manoeuvre rather than the accused having driven into his vehicle.

[52] I found the evidence regarding the plastic bag of live bullets discovered in the muddy effluent by the pigsty to be most revealing. The evidence was that even though the complainant and the three others were allegedly all standing around the accused at the time, with at least two of them actually holding on to her, it was only the complainant's sister who claimed to have seen the accused take the bag from her pocket and throw it into the mud. On top of that, the evidence was that it was not possible to tell what was in the bag simply by looking into the mud and yet when the police arrived on the scene the complainant was able to tell them that the accused had thrown a bag of bullets into the mud. That statement was made by police constable 'Etuate Siale in evidence which I accept.

[53] On the evidence, the only way it was possible for the complainant to have known what was inside the plastic bag was if he, in fact, had been the one who had planted it in the muddy effluent. That is my finding. Similarly, I have reached the firm conclusion that it was the complainant who had placed the live bullets in the pocket of the leather jacket which he had purchased for his first wife and left hanging in the bedroom at the Vaiola store. As stated above, in those circumstances it cannot be said that the accused had possession of the ammunition.

[54] I have earlier observed how the complainant was caught out in his evidence relating to the poisoning incident. The medical officer took careful notes of what the complainant had told him and I accept that evidence rather than the complainant's denials. I am equally satisfied that the complainant has lied about virtually every other aspect of this case. Worst of all, being in a position where he had and still has enormous influence over his siblings and nephew who are relatively recent arrivals from China, he has abused that position and persuaded them also to come before this court and lie on oath.

Conclusions

[55] I regret that there is only one conclusion open to me on the evidence in this quite bizarre case and that is that the principal witnesses relied upon by the Crown, namely,

the complainant Feng Zheng, his nephew Huang Bin, his sister Zheng Yin and his brother Zheng Biao have all got together and concocted a saga full of lies and then had the audacity to go into the witness box and give false evidence on oath. I reject their evidence completely.

[56] On the other hand, I found the accused, Yang Yu Zheng, and her son, Chen Zhining, to be refreshingly honest witnesses. I accept their evidence completely. It is difficult to begin to imagine the total humiliation and disgrace the accused would have endured as a result of the wrongs inflicted on her by the complainant and his cohorts. They conspired to set her up by planting evidence and committing perjury. For whatever reason, they wanted her out of the way. They nearly succeeded.

[57] I stress that in no way am I being critical of Crown counsel or of the police who had to investigate this sordid case. They were entitled to proceed on the basis that the complainant and his witnesses were being candid and truthful. Sadly, that was far from the position.

[58] Finally, I think it is appropriate for the court to take the unusual step of acknowledging publicly the role played by defence counsel. It may have been tempting for counsel, given the fact that he had a client who had very limited understanding of the English and Tongan languages, to perhaps take an easier course, particularly when the prosecution appeared on the face of it to have ample corroboration, but, in the finest traditions of the Bar, Mr Niu persevered and through his diligence and a prolonged and painstaking cross-examination of each of the key prosecution witnesses he was able to ensure that truth and justice prevailed.

[59] The accused is acquitted on all counts.

Sa'ili v Police

Supreme Court, Nuku'alofa
Shuster J
AM 25/2009

15 December 2009; 15 December 2009

Criminal law – appeal against conviction – no evidence of one element of offence – Crown conceded – conviction quashed

On 14 May 2009 police executed a search warrant at the Appellant's home in Ma'ufanga and said they found 45 gallons of home brew. On 11 August 2009 the appellant was convicted of possession or control of intoxicating liquor with no licence. The appellant appealed on the grounds that the prosecution failed to prove that the appellant had no licence under the Act.

Held:

1. There was no evidence from the prosecution from the beginning to the end of its case that the appellant had no licence. The Court asked the Crown whether on the facts they had before them whether they conceded the appeal. The Crown conceded.
2. The conviction against the appellant was set aside and quashed.

Case considered:

Mafi v Police [1995] Tonga LR 177

Statute considered:

Intoxicating Liquor Act (Cap 85)

Counsel for the appellant : Mr Fifita
Counsel for the defendant : Ms Tui'tupu

Judgment on Appeal from the Magistrate's Court

This appeal from the Magistrates Court, concerns a decision in criminal case no. 236- of 2009 where the Presiding Magistrate - Latu Mohenoa convicted the appellant on 11th August 2009 after a trial, on a charge of Possession or Control of Intoxicating Liquor namely home brew alleged to have been committed on the 14th May 2009 at the Appellants home in Ma'ufanga when police executed a search warrant and said they found 45 gallons of home brew.

Counsel Mr Fifita was present at the trial in the Lower Court and he made a formal submission of No Case to Answer. The Magistrate convicted the Appellant, indicating and according to Mr Fifita he wanted to impose a long prison sentence on the Appellant.

Notice of Appeal

The Appellant's Formal Notice of Appeal was signed and dated 11th August 2009 and was duly filed in the Supreme Court

- Summons 237/2009 alleges against the appellant a charge of - Possession and Control of Intoxicating Liquor - namely home brew.
- This offence is contrary to section 3[a] & 9 of the Intoxicating Liquor Act (Cap 85) of the Laws of Tonga 1998 Volume 3 in which on or about the 14th day of May 2009 at Ma'ufanga you did make one large bucket of intoxicating liquid, namely home brew, but you have no licence to make such intoxication

There were Five Grounds of Appeal

1. Finding the appellant guilty despite the fact that the prosecution failed to prove that the appellant had no licence under the Act. There was no evidence from the prosecution from the beginning to the end of its case that the appellant had no licence.
2. Fail to follow the Supreme Court decision and reasoning in the case of *Mafi v Police* [1995] Tonga LR 177. It is fundamental that the decision of the higher courts must be binding on the lower courts. A copy of the decision was handed to the presiding magistrate when the counsel made his submission that there was no case to answer as he referred to the *Mafi* case.
3. The case on appeal falls squarely on the *Mafi* case cited
4. The appellant had no record of interview to admit the offence as it is the allowable hearsay in criminal laws.
5. The prosecution failed to prove its case beyond reasonable doubt.

The Court of its own volition ascertained from the court translator whether the charge shown in the summons 236/09 had been correctly translated and from his reply - it appears the translation of the Lower Courts record, was quote 'literal.'

Before Mr Fifita began his submissions, the court asked the Crown whether on the facts they had before them whether they conceded the appeal - **which they did**.

Accordingly

The Crown having conceded this case:-

Ruling and Order

1. The Conviction against the Appellant Viliami SA'ILI is set aside and is quashed.
2. The Appellant is entitled to his costs - if they are not agreed they are to be assessed and Taxed by the Chief
80 Registrar
3. The Home brew seized by the Police is to be destroyed in the presence of a Magistrate.
4. To this extent the Appeal is allowed.

Maka v Kainga anor

Supreme Court, Nuku'alofa
Shuster J
CV 11/0

6 and 7 July 2008; 17 December 2009

Licence to occupy land – terms of licence – breached through rental agreement – licence terminated

The plaintiff was the legal owner of an allotment on which a shop was situated. The defendant was a licensee of the building, with permission to occupy the building, until such time her license was terminated. The defendant was not consistent in making payments of rent to the plaintiff on time however, the plaintiff continued to accept her late rental payments. The defendant entered into a rental agreement with herself as landlord and with Mr Wen Jie, the second defendant, as tenant for a period of two years from May 2007. The plaintiff sought to remove the first defendant (the defendant) as the occupier of the shop premises, situated on the plaintiff's land, at the intersection of Taufa'ahau Road and Laifone Road, Nuku'alofa. The plaintiff sought vacant possession of the land and of the building. The first defendant filed a defence and a counterclaim. The defendant had occupied the shop premises since 1998/1999 pursuant to an oral agreement made between the plaintiff's late husband and the defendant and her late husband. Both the plaintiff's and defendant's husbands were deceased. The plaintiff previously sought to remove the defendant from her occupation of the premises on two separate occasions.

Held:

1. Two main questions to determine: first, did the plaintiff know of, and agree to, the arrangement between the defendant and the second defendant, thus waiving her right to rely on that arrangement to terminate the license, and was the plaintiff estopped from evicting the defendant from the shop; second, had the defendant, by entering into an arrangement with the second defendant and by permitting the second defendant to occupy the shop, evinced an intention that she had enough of running her business from the shop, thus terminating her license to occupy the shop within the terms of the oral agreement found by the Land Court in 2006?
2. The defendant had no right to lease the premises as a landlord to any other people who were or may be invited to occupy the premises to rent either as tenants or as sub-tenants because the defendant could have no interest in

the land. Evidence indicated the defendant created a Rental Agreement on 20 February 2007.

3. The Court found that the defendant knew she only had a license to use the building premises until she had had enough of running that business and the agreement was that when that time occurred, then the building would become the property of the plaintiff's husband who was deceased.
4. The defendant did not prove to the Court's satisfaction that she had consistently run a business and, in particular the defendant did not prove that she has run a keke business from the plaintiff's premises, more especially during the short tenancy period of Huang Wen Jie from his occupation in 2007, as she said she had.
5. The Court found that the defendant had evinced an intention to give up the premises by entering into a rental agreement when she should not. This allowed the plaintiff to formally terminate the defendant's license.
6. The defendant had 28 days to vacate the premises.

Counsel for the plaintiff : Mr Stanton
Counsel for the defendant : Ms Stephenson

Judgment

1. Background

By this suit, commenced on the 13th February 2008 the plaintiff seeks to remove the first defendant (the defendant) as the occupier of the shop premises, situated on the plaintiff's land, at the intersection of Taufa'ahau Road and Laifone Road, Nuku'alofa. The plaintiff seeks vacant possession of the land and of the building on which the store referred to in the judgment of the Land Court in case LA 01-05 is located.

The first defendant filed a defence and a counterclaim, on the 1st April 2008. The plaintiff filed her reply and defence to the counterclaim on the 9th May 2008. The second defendant's have taken no part in these proceedings the Company has never filed a defence.

The defendant has occupied the shop premises since 1998/1999 - pursuant to an oral agreement made between the plaintiff's late husband and the defendant and her late husband. Both the plaintiff and defendant's husbands are deceased.

Exhibits were tendered by consent. The court studied the written submissions supplied by counsel and has had sight of the relevant case law recently submitted. This Court apologises for not being able to deliver its judgment on Friday 11th December 2009 as it had previously indicated - this was because the Court was hearing another matter which had been reassigned and which trial overran its allotted time.

2. Prior Litigation Cases

Both parties accept the plaintiff previously sought to remove the defendant from her occupation of the premises on two separate occasions as detailed in cases number CV474 - 02 and LA01 - 05.

[a] Case CV 474/02 - July 2002

In the first case CV 474/02 the plaintiff claimed $4,800 in rental arrears from the defendant, together with an order restraining the defendant from occupying or carrying on a business from the shop located on the plaintiff's premises. However CV474/02 was settled, by consent. Court records reveal a consent order was made on 13th December 02. The defendant paid the full rental arrears due and owing, and as a result of the payment the plaintiff agreed not to remove the defendant from her occupation of the shop and, the oral arrangement continued as before.

[b] Case Number LA 01/05 –January 2005

In the second case the plaintiff filed a claim in the Land Court for an order to evict the defendant from her land. The matter was heard by Webster CJ and Land Assessor George Blake on the 05 October 05. In case LA 01/05, the plaintiff claimed an oral agreement between herself and the defendant and the defendant's husband as follows - the defendant and her husband would continue to occupy the shop building, until the plaintiff and her husband wanted the defendant to vacate the land, at which point the building constructed by the defendant and her husband - would remain fast on the land. THAT IS THEORY 1.

Conversely, the defendant said the agreement was this - that she and her husband would build a store on the land, and they would remain there as long as they liked; until the defendant herself felt that they had had enough, at which point the store would become the property of the plaintiff's husband.[now deceased] THAT IS THEORY 2.

It was left by the parties - to the Land Court - to determine the terms of the agreement based on the evidence presented by both the plaintiff and defendant, on which evidence the Land Court would ultimately accept.

The defendant says the following points are relevant and arise from the judgment in LA01/05: The Land Court accepted the structure erected on the property by the defendant and her husband was a *permanent building*. The Land Court accepted the structure had been built at a cost of $30,000 which had been paid for by the defendant.

In case LA01/05 the Court rejected the plaintiff's claim that the structure was only intended to be a temporary structure. The Land Court said the plaintiff provided no evidence to the court that when the plaintiff and her husband saw the building that they remonstrated with the defendant, or that they said the building was to be one only, of a temporary structure.

The Land Court found the plaintiff's claim that the agreement that the defendant and her husband could occupy the building - until the plaintiff and her husband wanted her to vacate the land, and that the building structure would remain - *to be a very "implausible and an unlikely arrangement for any business person - to accept." I also agree*. The defendant argued the trial judge specifically noted the defendant's evidence *"Why would the defendant construct a $30,000.00 building - if the plaintiff's husband could evict them at any time?"*

The defendant says the Land Court, found the oral agreement between the plaintiff's husband and the defendant and her husband in 1998/1999 was as follows-

- *That the defendant and her husband could build a store on the corner of the plaintiff's allotment and could remain*

there, until they had had enough of running their business there, when the building would become the property of the plaintiff's husband.

- *The Land Court also found at that time, the defendant had not [as of then] had enough of running her business, which she conducted from the building: -so the plaintiff's claim was dismissed.*
- *The defendant has also said that - interestingly the decision of the Land Court in case LA 01/05 - was never appealed.*

3. Matters not in Dispute

The defendant by her counsel, states she does not dispute the plaintiff is the legal owner of the allotment on which the shop is situated. According to the evidence [and counsel's submissions] the defendant also accepts she is simply a licensee of the building, with permission to occupy the building; until such time her license is terminated - in accordance with the original terms of the license agreement made between her, the plaintiff and their respective husbands [now deceased] covering such an agreement - as endorsed by the Land Court back in 2005.

The defendant readily accepts these facts were made quite clear in the Judgment of Webster CJ. The defendant accepts, she holds a mere licence to occupy the land and that she is able to engage in a business. A Court would further say that she could only engage in a legal business.

The defendant readily acknowledges since entering into the agreement with the plaintiff's husband in 1998/1999, she has not been consistent in making agreed payments of rent to the plaintiff on time, however the defendant testified all rental arrears had eventually been paid to the plaintiff or her counsel.

The defendant also says the plaintiff continued to accept her late rental payments, and as such the defendant argues the oral arrangement to occupy the shop premises has continued, and she argues that agreement still remains in force.

The plaintiff also conceded in her evidence, that the defendant is currently up to date with her rental payments as of the date of hearing.

4. The Nature of the Defendant's - Business

The plaintiff argued the defendant accepts it was made clear to her in the judgment in case LA01/05 that the defendant has a license to operate her business in a building, constructed and financed by the defendant [and her husband] and, that she only has a license to use that building, with the added caveat, until she had had enough of running the business when at which point then the building would become the property of the plaintiff's husband [who is now deceased].

On the other hand, the plaintiff says the defendant had no right to lease the shop premises as a landlord to any other person or persons who were or might be invited to occupy or rent the premises either as tenants or as sub-tenants. The plaintiff says, this is because the defendant had and she could have no interest in the land as per the decision of the Land Court in LA01/05.

The plaintiff produced evidence to this court of a Rental Agreement which was signed, dated and witnessed on the 20th February 2007. The said Rental Agreement

was made between the defendant FOLOLA KAINGA as "the Landlord" and Mr. HUANG WEN JIE who is described in the document as "the Tenant."

The agreement states the tenancy was due to come into effect sometime in May 2007 and the Rental Agreement EXHIBIT A was admitted in evidence by consent. The plaintiff argues the terms of any agreement to rent out the shop premises more especially when looking at paragraph 4 of the agreement - THAT the Agreement

- Indicates the said tenancy would provide exclusive use of the premises, to the tenant Mr. Huang Wen Jie for a period of two-years, and
- As a result of this signed tenancy agreement; the plaintiff says the defendant has given up her possession of the shop for at least two-years, thus
- The plaintiff argued the oral licence previously made in 1998/1999 could be terminated, by the plaintiff upon her giving the defendant
- Proper written notice of termination of the agreement.

The plaintiff says A FORMAL NOTICE TO TERMINATE the oral agreement, was served on the defendant, on or about the 8th February 2008 [EXHIBIT C].

Defendant's Arguments

However the defendant argued, there was no determination in case LA01/05 as to the permitted nature, or any restriction put on the type of business which could be run from the building on the plaintiff's land which had been imposed or, agreed to by the Land Court.

The defendant argues in the absence of any such determination in this regard or, of any evidence of an agreement between the parties as to the type of business which the defendant herself could engage in; then a reasonable inference must be that the defendant could run any type of business from the building, provided the business itself was a lawful business.

The defendant gave evidence, after the death of her husband; she had regularly arranged to rent part of the shop premises to third parties. The defendant said she did this to ensure that rent would be paid to the plaintiff more especially after the destruction, caused during the 16/11 riots.

The defendant in her evidence listed four parties, who over the period from 2003 to 2006, with whom she claimed she had shared / rented the shop. The defendant said in her evidence that at all material times, the plaintiff was made fully aware of the arrangements. The defendant also said in her evidence the plaintiff was happy with the arrangement.

In support of her proposition, the defendant argues at the same time as the plaintiff issued court proceedings in LA 01 /05 to evict the defendant, and because the defendant testified the plaintiff was well aware that other people running *a money transfer business* from the shop - then the defendant argued surely if the plaintiff genuinely objected to such an arrangement, then why had the plaintiff not raised her objection - as a substantive ground for the termination of the oral agreement in the Land case LA01/05

I would tend to agree - this court must ask itself - why not. I would also comment further- because Nukualofa is such a small town in area - it might be reasonable to assume the plaintiff would not have known what the plaintiff's land was being used for. On the other hand would she as a prudent landlord, not have visited or passed by the premises from time to time - more especially during troubled times - post 16/11? I have heard no evidence to that effect.

5. November 16, 2006

The defendant gave evidence the shop building on the plaintiff's land, had been badly damaged and had been looted during the riots of 16 November 2006. The defendant testified the shop was closed as a direct result of serious riot damage, by the officials from the various Government authorities.

Clearly if that proposition is true, then defendant should not be held to be at fault by this court for the authorities' action closing down damaged business premises, even for a protracted period and a contract would or might possibly have been frustrated.

The defendant also told the court, that she had no insurance to cover the premises at the time of the riots in 16/11 and she testified because the shop was so extensively damaged and, looted that she just could not afford to carry out the necessary repairs.

The defendant said early in 2007, she was approached by a Chinese man who offered to repair the shop in exchange for rented space in her shop. The defendant told the court she accepted that offer, and the store was repaired by the man. The defendant told him the man could move in, in exchange for the work which she said he had carried out. The defendant described there was a storeroom inside the shop where she kept her personal belongings, and from where she said she ran her *keke* business.

Further the defendant testified; since the repairs to the shop premises in 2007 the defendant said she has continually remained in physical occupation of the shop premises - using only one room - in which she told the court she kept her personal items and she cooked, and from where she testified she sold *keke*.

No photographic evidence was provided to the court evidencing the defendants cooking establishment or, photographs of her running the keke business and no customer[s] testified on her behalf. Also I heard no evidence the defendant spoke to the plaintiff of the events of 16/11 and visa versa.

6. The Defendant's Continued Physical Presence in the Shop

This case turns upon whether the defendant did in fact continually occupy the plaintiff's shop premises, or not, and upon whether the defendant has actually given up her occupation of the shop premises? The defendant testified that she does still maintain a business at the premises, and she told the court in her evidence she maintains the small room at the back of her shop and sells her keke.

The defendant quite forcefully told this court, that she has never given up the premises - at all. On the other hand the plaintiff says - the Court must take a very careful look at Exhibit 2 - [document 3] signed by Mr. Jie and Mrs. Huang. The plaintiff says this document is clear evidence which indicates the terms of the written agreement with the first defendant - and those terms are as follows:-

Terms Document 3

> *".....To solely operate my own business in the whole shop or premises located at your land property at the corner of Taufa'ahau and Laifole Roads.*
>
> *During the times of my possession and honouring of our agreements Mrs Folola Kainga has never come back and - operate any business of her own in the same building.*
>
> *I operated my own business and I was the sole operator within the business.*
>
> *We never shared any portion of the building with Mrs Folola Kainga during our tenancy period. All Mrs Folola Kainga wanted is for us to pay her the monthly rental of $1,000.00 to $1,200.00 Pa'anga."*

The plaintiff says in her opinion this court needs no further evidence other than the evidence of what the second defendant had written down, and that is evidence which the plaintiff said was admitted by consent, it was also evidence admitted without objection, and evidence which was not cross-examined upon in these proceedings.

The plaintiff says the court must carefully study Exhibit 2. She says the document is a clear admission, and it is an admission, which totally contradicted the first defendant's evidence concerning her "proposed involvement" in either running her *keke* business from the store, or that the document itself readily contradicts the defendant's assertion of her being in constant occupation of the shop premises as she asserted in court, and she has done throughout these proceedings.

7. The Oral Evidence of Angela Kainga

The defendant's daughter in law Angela Kainga from New Zealand, gave evidence concerning the contents of a half–hour telephone conversation which she said she had with the plaintiff, she said the conversation took place sometime in March 2007.

- Angela Kainga's testimony was this – The witness said the following matters were discussed, sometime in March 2007 on the telephone:
- Angela was familiar with the disputed Land case between the parties in January 2006 – she told the court she was aware of the defendant's history and of her problem making rental payments to the plaintiff on time.
- Angela told the Court, she wanted to help the defendant make sure the rent for the shop would be paid regularly. She said she spoke to the plaintiff by phone sometime in March 2007 just after she had return to New Zealand from a holiday in Tonga.
- Angela agreed the defendant owed the plaintiff - $10,000 TOP in rental arrears and that was in March 2007.

- The witness said she told the plaintiff, on the phone that the full amount of the rental arrears had been paid into court in October 2006 – just over 5 months before the alleged phone conversation between the plaintiff and the witness.
- The witness said the plaintiff told her she was unaware the defendant had paid the rental arrears- Angela told the court the plaintiff was pleased or/rather that she seemed pleased in receiving this information.
- The witness said the plaintiff asked her if there were any Chinese people renting the store she confirmed Chinese people were in fact renting the store
- They were renting the store because the defendant had no money and she needed the Chinese persons to rent the store for the defendant get her business up and running again post events 16/11.
- Angela said she told the plaintiff that the defendant still wished to continue running her business from the store.
- The witness said she told her she was pleased the rental arrears had been paid; she further testified the plaintiff said so long as the defendant paid her rent on time in the future then the plaintiff had no problem with the arrangement with the Chinese people.

On the other hand, when Angela was cross-examined concerning the substance of the alleged telephone conservation, the defendant pointed out the witness responded with only single word denials. Of significant importance the defendant argued was the fact the plaintiff denied that any such conversation with Angela Kainga had taken place?

Angela Kainga admitted also in evidence she assisted in the completion of a Rental Agreement [EXHIBIT A] – made between FOLOLA KIANGA and HUANG WEN JIE and that she signed document as a witness on the 20th February 2007 and her hand writing is shown on that documentation.

FINDING OF FACTS. It would be logical for this court to assume, in hard times the plaintiff would need to chase up the issue of non-payment of outstanding rent - hence the need for the plaintiff to constantly bring the defendant to task - by using the court system as her proper means of redress.

8. Alleged Meeting on June 15, 2007

The defendant said in evidence in June 2007, she received a summons from the plaintiff claiming payment of back rent outstanding on the shop. The defendant gave detailed testimony about a meeting which the defendant said took place on 15 June 2007 between herself and the plaintiff.

The defendant said her meeting with the plaintiff took place in front of the Magistrate's Court at Fasi on 15 June 2007. She told the court the plaintiff suggesting they go to the plaintiff's lawyer's office - Lesina Tonga - to make arrangements for the rent arrears to be paid rather than go back into court. In other words the defendant said the two parties agreed to settle the matter amicably.

The defendant told the Court they agreed the defendant would make a partial payment of $3,500 that day, with the balance owed to be paid in two equal sums of $2,000 in July and in August. The defendant told the court they went together to the defendant's bank (Mbf Bank) to withdraw cash which was paid directly to the plaintiff's lawyer and a receipt was issued covering that payment (Defendant's exhibit B). I fully accept that evidence.

Following the defendants payment of $3,500 on 15 June 2007, the defendant gave a detailed account of a meeting which she said took place between the plaintiff and the defendant in the park opposite the Dateline Hotel in Nuku'alofa. During the meeting, the defendant said - the following matters were discussed:

- The plaintiff and the defendant talked about the Defendant's business - and in particular they discussed the shop and its use.
- The plaintiff told the defendant - the plaintiff had heard there were Chinese people renting the shop and she specifically asked the defendant "How is the Chinese business?"
- The defendant testified that Chinese people were in fact renting the shops;
- The plaintiff asked the defendant how much rent the Chinese people were paying and the defendant confirmed a payment of $1,000 per month;
- The defendant said the plaintiff asked the defendant to ask the Chinese people to pay the outstanding amount of $ 4,000 the balance of the rental arrears owed by the defendant – to the plaintiff;
- The defendant said she refused the plaintiff's request to ask the Chinese people to pay $4,000 because they had already paid money in kind to fix the store after the 16/11 riots;
- The defendant said – the plaintiff told the defendant so long as the rent was being paid, then the plaintiff was very happy.
- The defendant told the Court she and the plaintiff left the meeting in a happy mood – and she said they were glad to have resolved their differences.

On the other hand the plaintiff denies the existence of these alleged conversations. The plaintiff says her proposition concerning the non payment of the rent and disobedience to the terms and obligations of agreements is evidenced by:-

- [1] The issuance of court proceedings in February 2008, which the plaintiff says was in order to remove the defendant from the premises, and
- [2] That in fact legal process was issued by the plaintiff in February – 2008 in order to remove the defendant.

FINDING OF FACT –This court fully accepts that a face to face meeting between the plaintiff and the defendant took place outside the Dateline Hotel on the 15th June 2007 but the evidence of what they discussed is and was completely contradictory.

9. Questions for Determination

The defendant says two critical questions for determination in the present case are:

(a) Did the plaintiff know of, and agree to, the arrangement between the defendant and the second defendant, thus waiving her right to rely on that arrangement to terminate the license, and is the plaintiff now estopped from evicting the defendant from the shop?

(b) Has the defendant, by entering into an arrangement with the second defendant and by permitting the second defendant to occupy the shop, evinced an intention that she has had enough of running her business from the shop, thus terminating her license to occupy the shop within the terms of the oral agreement found by the Land court in 2006?

With respect to the first question, the defendant says the plaintiff was fully aware of, and she agreed to, the arrangements made between the defendant and the second defendant regarding the second defendant's occupation of the shop.

The defendant says the plaintiff asked about and was advised of the arrangements with the second defendant on two separate and distinct occasions. The first was via the telephone conversation with the defendant's daughter in law, Angela, in March 2007; and secondly, during the defendant's meeting with the plaintiff, at the Dateline Hotel Park on 15th June 2007.

According to the defendant's evidence the plaintiff indicated she was happy with, and that she agreed to the arrangements with the Chinese tenant on both occasions.

The defendant argued that it was reasonable to believe that the plaintiff would have been happy with the arrangement given that it was likely to ensure that the plaintiff would receive regular rental payments as a result of the arrangement on time and in the sum of $ 1,000.00 PA each calendar month.

The plaintiff argues the first defendant's arrangement with the second defendant amounted to a variation of the terms of the oral agreement between the plaintiff and the defendant to allow her to continue to occupy the shop premises.

The defendant argues she was entitled to rely on that variation and, the plaintiff, having been advised of and she had accepted that arrangement for a period of nine months, then the defendant says the plaintiff is estopped from using it as a basis to terminate the defendant's license to occupy the shop in these present proceedings.

The defendant argues if the plaintiff was unhappy with the arrangements between the first and the second defendant regarding the sub rental of the shop, why did she not remonstrate with Angela and the defendant when they first advised her of the arrangements? However the contrary argument is that the Rental Agreement dated 20th February 2007 does not use the word [or words] sub–lease.

Just as Chief Justice Webster noted in LA 01/05 – the plaintiff did not remonstrate with the defendant when the defendant built a permanent building rather than the temporary one in 1999. The defendant argues the plaintiff did not object to the arrangement with her Chinese tenants when she was told about it by both the defendant and by her witness Angela Kainga.

The defendant argued the plaintiff fully agreed to the arrangement, and she allowed it to happen because it meant that the plaintiff would receive her rental payments on time. The defendants said she thought it did not matter to the plaintiff at that time how the defendant was going to be able to make the rental payments, so long as those payments were being made and were being on time. The defendant argued strongly that receiving her rent – was the plaintiff's sole concern at that material time.

The defendant's counsel, argued the plaintiff has attempted to block the defendant's defence of waiver and estoppel on the basis that it has not been pleaded and thus is inadmissible paragraph 36 of the plaintiff's submissions filed on 14 September 2009. This is incorrect the defence say, because the defence was specifically pleaded in detail in response to the plaintiff's request for further particulars and they were filed with the Court on 23 May 2008.

They argue, if the Court accepts the evidence of the defendant and her witness Angela that the plaintiff was aware of, and, that she agreed to, the arrangements with the second defendant, then that is fatal to the plaintiff's case since no further consideration of the matter is required and the Plaintiff's claim must fail.

Furthermore, if it was accepted that the plaintiff was aware of and the plaintiff agreed to the arrangements between the defendant and the second defendant, then the plaintiff's letter of 8 February 2008 to the second defendant by which she procured the second defendant's vacation of the shop premises amounts to a direct, deliberate and a wilful interference with the defendant's contract with the second defendant, as pleaded in the counterclaim, for which the plaintiff is clearly liable.

If it is not accepted that the plaintiff knew about and agreed to the defendant's arrangements with the second defendant, then the question becomes has the defendant, by permitting the second defendant to occupy the shop, evinced an intention that she had enough of running her business from the shop, thus terminating her license to occupy the shop within the terms of the oral agreement as found by the Land Court in 2006?

The defendant says the answer to this question turns on the nature of the defendant's business and if it was genuine. The defendant gave evidence since 2003, she has had various people renting space in the shop and that the plaintiff has been fully aware of such arrangements. The plaintiff says that by entering into a " lease in writing" with the second defendant, the defendant has (i) attempted to grant an interest in the plaintiff's land to which she is not entitled and (ii) in doing so has breached the terms of the oral agreements as found by the Land Court in 2006.

The defendant argued with respect, the plaintiff's arguments in this regard were specious and ill–founded. The defendant, as licensee of the shop, cannot possibly pass on any legal interest in the plaintiff's land since she had no legal interest in the land herself. As such, the arrangement between the defendant and the second defendant is clearly a sub–license since it was simply not possible, in law, for it to be a lease.

So it follows; was the sub-licence to the second defendant a part of the defendant's business? For the period from 2003 to the present, the defendant had

granted sub-licenses to at least four parties by allowing them to share the shop. The defendants says this arrangement has been accepted by the plaintiff over this time and in the many claims that have been filed by the plaintiff against the defendant for eviction of the defendant for non payment of rental arrears, and not once has the plaintiff pleaded or raised an objection to the defendant's sub-license arrangements with any third parties.

The defendants says it is, and it has clearly has been evident for a period of six years, a normal part of the defendant's business operations was to sub-license the shop premises to third parties and once again, the defendant says the plaintiff has had full knowledge and acquiesced to such arrangements to secure payment of rent.

Finally, the defendant questions the plaintiff's motives in bringing the present action and they say these motives must be questioned. The defendant testified that the plaintiff attempted to buy the defendant out of the shop for the sum $30,000 in November 2007. When the defendant refused the monetary offer, the plaintiff has proceeded to develop the site and she now wants out of her previous arrangement with the defendant.

The defendant says it's common knowledge the plaintiff committed herself to a hotel development in 2008 in order that the hotel would be finished in time for HM the King's coronation in August and they say that it is clearly why the plaintiff attempted, in November 2007, to buy the defendant out of the shop for $30,000 which the defendant also says in coincidentally the same precise figure accepted by the Land Court in January 2006 as the price for the construction costs of the shop.

Simply put, the defendant says, a better deal has came along for the plaintiff and, a result, the plaintiff is now asking this Court to release the plaintiff from her prior agreement with the defendant even though she has no legal basis to do so.

The defendant asks the simple question, if the proposed hotel development project on the plaintiff's land had not eventuated, would the plaintiff have issued these proceedings they say the answer in all likelihood, would be emphatic no.

10. Analysis

On the evidence: -

- This court accepts the oral agreement between the two parties to be as follows: the defendant accepted that it was made patently clear to her in the judgment of the Land Court in case LA01/05 that the defendant had a license to operate a business within the shop constructed and financed by the defendant and her husband at their own expense some years ago.
- This court accepts the building constructed on the plaintiff's land, was as the Land Court said a permanent building and fixture, and that it was constructed for the sum of $30,000 PA which was not an insignificant sum of money at that time.
- This court recognises the defendant's shop was repaired, post 16/11 as a necessity to continue in business and that the renovation has ultimately benefited both parties to this case.

- This court accepts the plaintiff has readily accepted all late rental payments and that the plaintiff directly benefited from the rent paid by the defendant over a period of at least six years even in a sluggish economy.
- This court recognises the problems encountered by all sides during the period around 16/11, with the destruction of the premises and also during the downturn in the world's economic climate.
- This court accepts the evidence that in breach of her oral agreement to operate her own business on the shop premises the defendant entered into a Rental Agreement between herself - Fola Kainga as the landlord, and Mr. Huang Wen Jie as the tenant; as evidenced by a written Rental Agreement dated 20th February 2007 and the court recognises that Rental Agreement was signed in the presence of Angela Kainga and Bin Huang who both signed as witnesses.
- The term[s] of the Rental Agreement made between Fola Kainga as the landlord, and Mr. Huang Wen Jie as the tenant was the rental was for a period of two years from May 2007.
- This court particularly notes clause four of the said Rental agreement which granted exclusive use to the Tenant HUANG WEN JIE. The rental document stands in evidence on its own. Clause three of the agreement indicates that there is no legal impediment whatsoever to the Landlord renting the property to the tenant, when in fact there was such an impediment.
- This court accepts the plaintiff's argument that the defendant had no right to lease the premises as a landlord to any other people who were or may be invited to occupy the premises to rent either as tenants or as sub-tenants because the defendant could have no interest in the land, and that evidence indicates the defendant did in fact create a Rental Agreement on the 20th February 2007.
- This court accepts the defendant fully knew she only had a license to use the building premises until she had had enough of running that business and the agreement was that when that time occurred, then the building would become the property of the plaintiff's husband who is now deceased.
- This court accepts the defendant's argument that there was no determination made in case LA01/05 as to the permitted nature, and it also accepts that no restriction was placed upon the type of business being / or, to be run from the building on the plaintiffs land, which had been imposed on it, or which had been agreed to by the Land Court, or indeed the parties by mutual consent.

- This court does accept the defendant's proposition when she said in the absence of any such determination in this regard or, of any evidence of an agreement between the parties as to the type of business in which the defendant herself could engage in, then a reasonable inference must be that the defendant could run any type of business from that building provided the business itself was in fact a lawful business and it was lawfully run.
- This court also accepts the plaintiffs assertion, that the defendant in this case has not proved to this courts complete satisfaction that she has consistently over the past number of years run a business and, in particular this court says the defendant has not proved to this courts satisfaction that she has run a keke business from the plaintiff's premises, more especially during the short tenancy period of Huang Wen Jie from his occupation in 2007, as she said she had.
- In this court's view a simple photograph could or should have been produced to the court showing photographs of the exterior of the premises, its interior, and or the defendant should have brought customers to court to testify as to the existence of that keke business at the material time. I question why the defendant did not ask the court for a site visit to the locus in quo? Why did the plaintiff not do likewise, the court is not entitled to go on a visit to a locus in quo unless it is asked.
- I have merely the defendant's assertion that she does in fact operate a food business and that she has remained in occupation of the premises throughout and 1 cannot on the evidence before me be certain that she was.
- In answer to the defendant when she says the two critical questions for determination in the present case are: Did the plaintiff know of, and did she agree to the arrangement between the defendant and the second defendant, thus waiving her right to rely on that arrangement to terminate the license and is the plaintiff now estopped from evicting the defendant from the shop?
- The answer to this question must be, that this court may conclude the plaintiff must have know the nature of the usage of the shop premises at all material times as any prudent landlord would, more especially so in a very small tight knit community in Nuku'alofa but I heard no evidence to that effect.
- Secondly, has the defendant, by entering into an arrangement with the second defendant, and by her permitting the second defendant to occupy the shop, and accepting rent has she evinced an intention that she has had enough of running her business from the shop, thus

terminating her license to occupy the shop, within the terms of the oral agreement, found by the Land court in 2006?

- This court's answer to the second question upon hearing all the evidence in this case MUST be an emphatic yes. This court fully believes the defendant has evinced an intention to give up the premises by her entering into a rental agreement when she should not.

Conclusion

From the evidence put before me it is clear that sometime in 1998 / 1999 an oral agreement was made between these parties, and as a result of that oral agreement, the defendant built a quite substantial property on the plaintiff land, from which the defendant operated her own business venture, for a number of years.

At a point in time a dispute arose which required two court determinations, as has been freely discussed above.

The Land court case - LA01/05 determined the terms of the oral agreement between the parties - as discussed above.

I have to say post the Land court's decision I do not know why the parties did not take further legal advice, then agree to meet together and to formally put into writing and agree on the terms and conditions of a subsequent agreement. In my view, this would have been what any reasonable and prudent man would have done, and it would have been a much better way of conducting any form of business arrangement for any prudent business person as these parties no doubt are and produce certainty.

This court fully accepts the defendant paid rent to the plaintiff in this case, and that albeit on certain occasions the defendant admitted she has been late in making her rental payments, but the evidence also revealed the late rental payments were always accepted by the plaintiff.

It is also clear that both parties for a long time, have secretly wanted to either; terminate the oral agreement of 1998 /1999 or, to substantially alter that oral agreement each for their own benefit, I say this because there have been two court cases in the past, where the plaintiff sought to remove the defendant, for the reasons explained above.

It is also clear the plaintiff and defendant's oral agreement made in 1989 / 1999 made between the parties [and their respective husbands now deceased] benefited each of the parties for many years and the agreement benefited them, until the events of 16/11 and until the subsequent downturn in both Tonga, and the world's economy.

It is clear to the court, that the plaintiff collected and has pocketed a quite substantial amount of rent for her property as is her right, from the defendant's use of the property which had been constructed and had been developed by the defendant over the past years at a not insignificant cost of $30,000.00 PA.

The defendant came over to me as a person who I have no doubt has worked extremely hard to support herself, and her family, and a person who has served her community as a shopkeeper day in and day out, even through the more difficult and traumatic times, such as the events of 16/11 and the economic downturn.

It was also made very clear to the parties by the Land Court that the defendant and her late husband had built a substantial and a permanent property from which to operate her business, and it appears to this court the arrangement worked well until

the plaintiff received a better offer in that she has literally jumped at the chance of constructing a hotel on that property and, the plaintiff clearly for that reason wanted to move or to evict the defendant. She even offering the plaintiff $30,000.00 to move that offer was declined. That indicates to me the defendant did not want to give up her business, or alternatively the defendant wanted more than $30,000.00 to move.

It is also clear to me the defendant post 16/11 wanted and she needed in order to survive to install Mr HUANG WEN JIE in exclusive and peaceable possession of the property, as "the tenant" for two years evidenced per the signed rental Agreement dated 20th February 2007.

Thus, with that signed Rental agreement before it, the court the court must conclude the defendant has willingly given up all her rights under the oral agreement made in 1998/1999 because she cannot enter into that type of agreement, and she should not have done that particularly as a landlord.

Further on all the evidence before me, I just simply do not believe the defendant ran a keke business from the premises. I say this because of [1] terms of the purported Rental Agreement dated 20th February 2007 - and [2] because of the evidence of Mr HUANG WEN JIE.

Accordingly, I find for the plaintiff in this case.

- The defendant, by permitting the second defendant to occupy the shop as a tenant, evinced an intention that she has had enough of running her business, thus, allowing the plaintiff to formally terminate the defendant's license to occupy the shop which was done in writing.
- The defendant has 28 days to vacate the premises - from today
- The building will revert to the plaintiff's husband as per the terms of the oral agreement, and that net gain may be subject to any death duties and / or taxes.
- I will hear the parties on the issue of costs as I have in mind ordering each party to pay its own costs.
- I should also like to say both the plaintiff and the defendant in this case should have in my view mediated a settlement to this case a long time ago.

Salt v R

Supreme Court, Nuku'alofa
Shuster J
AC 30/2009

14 December 2009; 17 December 2009

Bail – application for bail pending appeal – only where reasonable prospect of appeal success – application refused

On the 8 September 2009 the Appellant pleaded guilty to the theft of a quantity of cigarettes valued at $36,390 and was sentenced to a period of imprisonment for two-years for his part in the crime. The Supreme Court declined to suspend any part of that sentence of imprisonment as a deterrent to other employees. The Appellant appealed that sentence of imprisonment and he requested bail pending appeal.

Held:

1. On an application for bail pending appeal, there was a reversal of the usual onus of proof obligation in criminal cases. The onus was on the applicant to show cause, by reference to the relevant statutory criteria, why bail should be granted.
2. The Court was not satisfied that there was a reasonable prospect of the appeal against sentence succeeding. Further, the appeal would be heard before a substantial portion of the sentence had been served.
3. The applicant failed to persuade the Court that there was a reasonable prospect of the appeal succeeding, and accordingly the application for bail pending appeal was refused.

Cases considered:

Giordano, Application by - 6 A Crim R 397
Mahera, ex parte [1986]1 Qd R 303
R v Filipo Taufa Cr 129-2009
R v Hartstone (CA 261/87, 6 January 1988)
Sefo anor v Rex [2004] Tonga LR 366

Statute considered:

Bail Act 1990

Counsel for the appellant : Mr Fifita
Counsel for the respondent : Ms Puloka

Ruling on the issue of bail pending appeal

Introduction

This is a formal request for the Appellant to be released on bail; pending the determination of his Appeal against a sentence of two-years imprisonment imposed by the Supreme Court on the 8th September 2009 - for an offence of theft of property from the Queen Salote Wharf.

On the 8th September 2009 for the offence of theft involving the loss of a substantial quantity of goods stored in a bonded container at HM Governments Wharf - the Appellant on pleading guilty to the theft of a quantity of cigarettes, valued at $36,390.00 - was sentenced to a period of imprisonment for two-years - for his part in the crime.

The Supreme Court declined to suspend any part of that two-year sentence of imprisonment – as a deterrent to other employees. Today the Appellant appeals that sentence of imprisonment and he requests bail pending appeal. At his original hearing the Appellant was represented by Mr. S Tu'utafaiva, today he is represented by Mr. Fifita.

The Charge

The charge relates to an offence alleging - that on or about the 9th January 2009, the Appellant together with another employee of the Ports Authority who were based at the Queen Salote Wharf, Nukualofa - dishonestly stole cigarettes valued at $36,390.00 from a sealed container at the Wharf. The goods belonged to American Tobacco Company. The facts revealed the Appellant also helped dispose of the stolen goods.

None of the stolen property was recovered by police, and other persons have been arrested in connection with this offending. The police record indicates the Appellant **is not** a first time offender. The Appellant feels his sentence should have been suspended.

The facts of this case are as follows:-

- On the 31st December 2008 a tobacco container belonging to the British American Tobacco Company arrived at Queen Salote Wharf - from abroad.
- On the 14th January 2009, the complainant Mr. Manoa Tu'itupou went to release the container, when he noticed certain high value goods inside the shipping container were missing. As a result he lodged a complaint with the police who commenced an investigation together with HM customs and Port officials.
- The police subsequently arrested the Appellant and another person by the name of Viliami 'Otutoa - both

arrested persons worked at the Wharf- more importantly the Appellant Salt worked in a position of trust and the Appellant outranked his co-accused.

- According to the police reports both persons admitted to the police - stealing from the bonded container - and they admitted stealing the following items- 07 cartons of Winfield Blue cigarettes worth $17,640.00 and 15 cartons of Pall Mall Blue cigarettes worth $18,750.00 together stealing a total value of $36,390.00 in cigarettes.
- These two Port employees told the police in interview - they sold 06 cartons of Winfield Blue to shop owners Shen Fu Fen and Qian Xi Yun.
- They then gave 15 cartons of Pall Mall Blues to - Solomone Payne to keep safe at his residence in Fanga.
- Viliami 'Otutoa and Solomone Payne later sold 75 sleeves of Pall Mall Blues to Guo Chen Ben, 14 sleeves to Lin Huan and 10 sleeves to Sony Lin.
- The remaining tobacco was kept at Solomone Payne's home- according to the suspects apparently Solomone Payne's home was broken into and - all the remaining tobacco was stolen.

Notice of Appeal

The appellant issued and filed his Notice of Appeal - against sentence on the theft charge - on the 09th November 2009 and, at the same time the appellant applies for **BAIL** pending the final determination of his appeal. This appeal will most likely be heard during the July 2010 session of Tonga's Court of Appeal.

The Court record notes the appellant was arraigned on the 27th August 2009 and at arraignment, the Appellant pleaded Not Guilty to the first count in the indictment - which alleged a charge of Unauthorized Movement of Goods - subject to Customs Control.

The appellant - to his credit pleaded guilty, to a second count - alleging theft of $36,390.00 worth of bonded cigarettes, from his employer's premises, the offence was committed in January 2009. Upon pleading guilty and having fully admitting the prosecution facts, the matter was adjourned for a Pre Sentence Report - to the 8th September 2009 at the same time the court indicated it wished to sentence the appellant together with his co-accused and on the same date - despite the appellant maintaining his not guilty plea to count one so as to ensure no disparity arose in sentencing the offenders.

The court also indicated at that time - if the Crown wished to purse the first count of Unauthorized Movement of Goods subject to Customs Control, then that would be their legal right. In due course, and post sentence, the Crown chose not to proceed on the first count and the Crown informed the Court of its decision on the 13th October 2009 [post sentence]

Oral Hearing on the Application for Bail

The oral hearing upon the merits of his application for bail pending appeal was first set for the 11th December 2009 and the Court ordered the appellant be produced and be present in court. However the case had of necessity to be adjourned from the 11th December to the 14th December because of another pressing commitment which had been reallocated for - an urgent hearing. On the 14th December 2009 Mr Fifita made an oral submission for his client to be released on bail pending appeal along the following grounds indicating his client expects a suspended sentence.

The Grounds of Appeal

1. The accused is sentenced to 2 years imprisonment. The Prison Marks system will deduct one quarter of the accused's sentence. Therefore he would serve only one year and six months.
2. There is a reasonable prospect of the appeal succeeding or
3. The Appeal is unlikely to be heard before the whole or substantial portion of the sentence has been served and
4. There is substantial grounds for believing that if released on bail he will surrender to custody, without committing further offences and,
5. This is a purely property offence and the judgment in *Mo'unga - v -Rex* [1998] Tonga LR at 154 applies
6. The accused would suffer injustice if his bail application is refused, he appeals against his sentence only.

The case was adjourned for a written Ruling on the question of bail pending appeal to the 17th December 2009.

The Granting of Bail Pending Appeal - Post Conviction

The granting of bail after - or - post conviction- is a totally different proposition from the granting of bail pending trial, at which point the presumption of innocence still prevails - because a convicted person's right of appeal does not revive the pre-conviction presumption of innocence.

In most jurisdictions, admission to bail pending appeal is unusual, and - ***exceptional circumstances*** must be shown to exist, before bail will be granted. In those jurisdictions, as is noted in Halsbury - volume 11(2), paragraph 904 ***"It is a power - which is rarely exercised."***

The common-law principle has been considered in a number of cases and is probably best summed up in the following extract from Hall's Sentencing, LexisNexis NZ Ltd, 2004, paragraph VI. 14.3:

- The inveterate practice in the Court of Criminal Appeal in England, has been to refuse bail unless there are exceptional circumstances.
- The true question is this - are there exceptional circumstances, which would drive this Court to the

> conclusion that justice can only be done by the granting of bail.

The High Court of Australia has adopted a similar approach... In that country the Court of Appeal observed in *R v Hartstone* (CA 261/87, 6 January 1988) 11 TCL 2/5 that different considerations apply to the granting of bail to a person who has been found guilty of an offence, than those that apply where it is sought pending the trial.

- In the first case, a determination of guilt has been reached.
- In the second, the presumption of innocence still applies.

For these reasons, the Court said (per McMullin J.) that, while the issue: whether bail
170 is granted will depend on the circumstances of the particular case,

- The grant of bail to convicted persons should be regarded as very much the exception rather than the rule.

Moreover, if bail is granted - pending the outcome of an appeal - which proves to be unsuccessful then the appellant has to be recalled from the community, possibly months after his/her conviction, to serve the sentence imposed. *Sefo anor v Rex* [2004] Tonga LR 366.

In *Application by Giordano* - 6 A. Crim. R 397 at 398, the Court of Criminal Appeal of South Australia speculated on what the situation might be if a more relaxed approach was taken to applications for bail pending appeal:

180 > *"There is then the serious risk of availability of bail pending appeal leading to a proliferation of unmeritorious appeals, thereby adding to the strains on the system of justice.*
>
> *Persons undergoing punishment in custody are prone to seize any opportunity to secure release, perhaps leave the future to take care of itself.*
>
> *Appeals would be launched irrespective of the prospects of success simply in order to secure release, or perhaps with a view to creating situations which would tend to frustrate justice by making it difficult to return the appellant to prison."*

190 In *ex parte Mahera* [1986]1 Qd R 303, 310, Thomas J. observed:

> *"The spectacle of a recently sentenced man walking free maybe seen by the public as equivocation by the courts, and it does not tend to foster respect for the system."*

IN TONGA-

The position is governed by section 4B of the Bail Act 1990 - which reads as follows: Section 4B(1) - A person who has been convicted of and sentenced to imprisonment for a criminal offence and who has appealed or applied for leave to appeal against that conviction or sentence SHALL be granted bail IF the Court is satisfied that-

200 (a) There is a reasonable prospect of the appeal succeeding; or

(b) The appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; and
(c) There are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will surrender to custody without committing any offence while on bail.

In taking the decision required by subsection (1), the Court shall have regard to all the relevant circumstances - and in particular-

(a) The nature of the offence and length of the sentence;
(b) The grounds of appeal;
(c) The character, antecedents, associations and community ties of the person; and
(d) His record in surrendering to custody at the trial and on other occasions.

Although, with reservation, some guidance can no doubt be obtained from decisions in other jurisdictions, section 4B really contains a quite comprehensive code for dealing with applications for bail - pending appeal.

I must ask myself the following question, does this particular application today - come within the *Sefo anor v R* at 371 category of case envisaged in subsection (1)(b) where the appeal is unlikely to be heard before a substantial part of the sentence has been served.

In this particular case the Court of Appeal sits on the 5th July 2010 for three weeks, and that is by my calculation in 201 days or in just twenty nine weeks time.

The present application is made - pursuant to subsection 1(a) which requires the Court to have regard to the prospects of the appeal succeeding. This Court needs to be satisfied that there are ***reasonable prospects*** of the appeal succeeding and that element in turn requires a consideration of the grounds of appeal.

The Court's obligation under the Bail Act is less equivocal. As I see it, I am obliged by the statutory provisions of the Bail Act to give proper consideration to the grounds of appeal - and to give consideration as to the prospects of the appeal succeeding.

In dealing with a bail application pending appeal, the judge has to consider the force of a ground of appeal, which alleged he should have been given a suspended sentence.

With some diffidence, therefore, I now turn to consider the grounds and the merits of the appeal. On an application for bail pending appeal, there is a reversal of the usual onus of proof obligation in criminal cases. The onus is on the applicant to show cause, by reference to the relevant statutory criteria, why bail should be granted.

At the bail hearing, Counsel Mr. Fifita was given the opportunity to present any submissions he wished to make - over and above the information that was already before the Court. Mr. Fifita addressed the court briefly on the merits of his application.

I stress that I do not wish to be seen in any way as appearing to pre-empt the ultimate decision the Court of Appeal will need to make - after it has heard the full arguments in July next year.

Under the Bail Act, however, I am clearly required to make an assessment of the merits of the appeal at this stage based upon the material I have before me - see the case of *Sefo anor v R.*

I was told the Appellant did co-operate with the police when he was subsequently arrested by the police, and that is to his credit, as is of course is his early guilty plea to the theft charge which involved a substantial breach of public trust by someone working in a supervisory capacity.

Having carried out that exercise - and having made my assessment - all I can say is that, for this appeal - the applicant can in my view have only a very limited prospect or chance of success on Appeal - particularly when one considers and bears in mind the recent decision of Ford CJ in case *Cr 129-2009 R v Filipo Taufa* where in that case the Judge sentenced a 31 year old male to 2½ years in prison on a guilty plea.

The facts of case CR129-09 reveal the defendant had by various means obtained $970 from his employer. That is an amount far less than this appellant has stolen. TAUFA was of good character - he received two and a half years in prison as a deterrent sentence, whereas the appellant in this case has a previous conviction, and he with another person also an employee of the Ports Authority, stole 37 times the amount taken in TAUFA's case.

Conclusion

Although the Bail Act says: The court shall grant Bail if the court is satisfied-

(a) There is a reasonable prospect of the appeal succeeding; *Well, my answer to that question is that I am not satisfied that there is a reasonable prospect of this appeal against sentence succeeding.*

(b) The appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; *Well my answer to that is the appeal will be heard in 201 days time and the Appellant will have served just 40% of that sentence.*

(c) There are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will surrender to custody without committing any offence while on bail: I make no determination on that point.

In taking the decision required by subsection (1), the Court shall have regard to all the relevant circumstances - and in particular-

(a) The nature of the offence and length of the sentence; *Well this offence is one of the most serious breaches of trust - because it involved a clear breach of a public trust by an employee holding a senior office at the Wharf and he was a man who was in charge of other staff*

(b) The grounds of appeal; *That the Court of Appeal should impose a suspended sentence - well this is entirely a matter for the Court of Appeal. It was considered and was*

rejected by me applying proper sentencing guidelines for serious Breach of Trust cases

(c) The character, antecedents, associations and community ties of the person; *Well my answer is the Appellant is not a first time offender and according to the PSR he is a moderate risk as an offender*

(d) His record in surrendering to custody at the trial and on other occasions." *Well my answer is the Appellant did not attend for his arraignment of the 10th July 2009and a warrant was issued for his arrest but he did surrender later to the court*

Having reached the conclusion, would this appeal succeed - it would in my respectful view be quite inappropriate for me to grant bail to this Appellant - at this time.

Accordingly on the evidence before me - the applicant and his counsel have failed to persuade me that there is a reasonable prospect of this appeal succeeding, and accordingly this application for bail - pending appeal is- **REFUSED**