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Flyniu Airlines Ltd anor v Faletau anor

Supreme Court, Nuku'alofa
Webster CJ
CV 575/2004

20 August 2004

Practice and procedure – leave to apply for judicial review – granted

The plaintiffs who had been operating domestic airline services within the Kingdom since 16 June 2004 sought judicial review of a decision by the Minister for Civil Aviation to revoke the Foreign Air Operator's Certificate of the second plaintiff with effect from 16 August 2004. An interlocutory injunction was also sought to quash the revocation.

Held:

1. Sufficient interest was the first and foremost consideration in relation to an application for leave to apply for judicial review and that was a broad flexible concept. The applicant needed only to show that he had a prima facie or arguable case or reasonable grounds for believing that there had been a breach of a public duty. The court should not go into the matter in depth but should consider on a quick perusal of the material then available whether it disclosed what might on further consideration turn out to be an arguable case for the grant of the relief claimed. Leave to apply for judicial review was granted.
2. The test to be applied in determining whether or not to grant an interlocutory injunction in an application for judicial review was broadly similar to that applied in private law proceedings -- see *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504.
3. Leave to apply for judicial review was granted together with an injunction quashing the order of the Minister.

Cases considered:

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 (HL)
Attorney-General v Guardian Newspapers Ltd [1987] 3 All ER 316 (HL)
Cayne v Global Natural Resources plc [1984] 1 All ER 225 (CA)
IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93 (HL)

Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 140 (CA)
Primary Produce Exports Ltd v Lauti 1995 TLR 162

Counsel for plaintiffs	:	Mr Edwards
Counsel for first defendants	:	Mr Havea
Counsel for second defendants	:	Mrs Taumoepeau

Ruling

The Plaintiffs, in particular the 2nd Plaintiff, have since 16 June 2004 been authorised to operate domestic airline services within the Kingdom of Tonga. This case concerns an application for judicial review by them in relation to matters surrounding the revocation on 13 August 2004 of the 2nd Plaintiff's Foreign Air Operator's Certificate [FAOC] by the Minister for Civil Aviation with effect from 16 August. The application was accompanied by lengthy affidavits with extensive productions in their annexes.

This particular ruling is on the Plaintiffs' application for leave to apply for judicial review and for an interlocutory injunction to quash that revocation.

I first saw Mr Edwards, Counsel for the Plaintiffs, on his own at short notice late on the afternoon of 16 August. After hearing his submissions I decided that, as the Plaintiffs had already stopped operating flights in terms of the revocation, there was not the appropriate urgency to grant an interlocutory injunction ex parte there and then, but that I would hold a hearing for all parties on the morning of 17 August.

That hearing duly took place on 17 August, when the 1st Defendant, who was present in person and assisted in relation to some aspects of the factual situation, was represented by Mr Havea; and the 2nd Defendant was represented by the Solicitor General and Miss Fukofuka. I was most grateful to all Counsel for the assistance they gave the Court, especially at such short notice.

By way of background, while it was not easy to ascertain readily the statutory and legal basis for the actions of the 1st Plaintiff and the Minister, Mr Havea submitted that the FAOC was granted to the 2nd Plaintiff under Regulation 175 (Restriction on Carriage for Hire or Reward by Foreign Aircraft or Foreign Controlled Aircraft) of the Civil Aviation Regulations 1992 (although it does not state that on its face) and revoked under Regulation 165 (Revocation, Suspension and Variation of Certificates, Licences and Other Documents) in accordance with the recently amended Government of the Kingdom of Tonga Policy on Domestic Operations dated 30 July 2004 and "the non submission of a bid by Fly Niu Airlines". While unusually there appears to be no legislative provision for appeal against the Minister's decision in the body of the Regulations, a right of appeal within 14 days is provided in Civil Aviation Notice No 16 by the Director of Civil Aviation on Appeal Procedures Issue 2 dated 12 June 2003. That right of appeal is to the Board of Appeal appointed by the Minister.

However I must make it clear that I am not considering the substantive merits of the application at this stage. An interlocutory (or interim) injunction is one granted before trial for the purpose of preventing any change in the status quo from taking place until the final determination of the merits of the case: Judicial Review of Administrative Action para 17-008 (5th Ed 1995) by de Smith, Woolf & Jowell.

Sufficient interest is the first and foremost consideration in relation to an application for leave to apply for judicial review; and it is a broad flexible concept. At that stage the applicant need only show that he has a prima facie or arguable case or reasonable grounds for believing that there has been a breach of a public duty: the court should not go into the matter in depth but should consider on a quick perusal of the material then available whether it discloses what might on further consideration turn out to be an arguable case for the grant of the relief claimed: *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 105, 106 (HL). On that basis I was satisfied on the material available to me, involving an early revocation of a certificate before its expiry, that it disclosed what may turn out to be an arguable case: and so I exercised my discretion to grant leave to apply for judicial review.

The law on the matter of interlocutory injunctions is set out at Halsbury Vol 1(1); Vol 24 paras 953-956; and Vol 37 at paras 570-572; and is encapsulated in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (HL) and *Attorney-General v Guardian Newspapers Ltd* [1987] 3 All ER 316 (HL); and also in Judicial Review of Administrative Action paras 17-008 - 17-015 (5th Ed 1995) by de Smith, Woolf & Jowell. It is also usefully summarised in *Primary Produce Exports Ltd v Lauti* 1995 TLR 162, in which reference is made to *Cayne v Global Natural Resources plc* [1984] 1 All ER 225, 237 (CA).

The test applied in determining whether or not to grant an interlocutory injunction in an application for judicial review is said to be broadly similar to that now applied in private law proceedings: de Smith para 17-009. In *American Cyanamid* it was said that the correct approach was to ask the following questions:

1. Has the plaintiff shown a serious issue to be tried, ie one for which there is some supporting material, of which the outcome is uncertain: per Cayne. The claim must not be frivolous or vexatious; and the plaintiff must have a real/reasonable prospect of success. The aim is to avoid the court having to consider difficult questions of law or fact at the interlocutory stage.
2. The plaintiff must also show that damages would not be an adequate remedy or that the defendant could not pay damages.
3. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.
4. The plaintiff must show either that damages would adequately compensate the defendant for any loss he may sustain by reason of the injunction being granted and that he can pay damages, or if he cannot show that, that the damage he himself would sustain if an injunction were not granted would exceed the damage that the defendant will sustain, or if the damage each sustains is equally balanced, that the defendant's conduct involves a change in the status quo.

The House of Lords emphasised that it would be a fruitless exercise for a judge to try and decide a case on incomplete evidence. In serious cases the balance of convenience between the parties is a more important consideration than the establishment of a prima facie case.

In relation to the question of an injunction, on the material before me I believe there is a serious issue to be tried, ie the claim is not frivolous or vexatious and discloses a reasonable prospect of success / a substantial question to be investigated.

I then have to decide whether there is an adequate alternative remedy in damages. It has been submitted that there is a doubt about that, as the 1st Plaintiff's business will have to close, there will be loss of employment, the aircraft will have to be returned to New Zealand, and there may be damage to the tourism industry (though that is a side effect in relation to this case).

If there is doubt the court then has to consider the test of the balance of convenience (or the balance of the risk of doing an injustice, per *Cayne v Global Natural Resources* plc [1984] 1 All ER 225, 237 (CA)), looked at widely.

The 1st Defendant considers that there will be no hardship to the Ministry if an injunction is granted.

I consider that, given the relatively short notice given to the Plaintiffs of the decision to revoke the licence, that the balance of convenience lies in granting the injunction and quashing the revocation of it, albeit only to the date of expiry of the licence on 15 September. If the injunction is not granted there will be a substantially greater risk of injustice to the Plaintiffs. An injunction will at least permit the Plaintiffs to work towards the expiry of the licence on an orderly basis, and, although it is a side issue in this case, it will ease any difficulties caused to their present customers.

It will also give the Plaintiffs time to consider whether to appeal formally against the revocation.

In every case the judge has finally to stand back and ask himself where overall justice lies: *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 (CA).

I gave these reasons in outline on 17 August in view of the importance of doing so at the time in all the circumstances.

I therefore grant the injunction sought and with immediate effect quash the order of the Minister revoking the 2nd Plaintiff's FAOC as follows:

THE COURT ORDERS THAT:

1. It grants leave to the Plaintiffs to apply for judicial review.
2. It grants the injunction sought by the Plaintiffs and with immediate effect quashes the order of the Minister dated 13 August 2004 which with effect from 16 August 2004 revoked the 2nd Plaintiff's Foreign Air Operator Certificate No FAOC57567.

Note: A further chambers hearing was then fixed for 9.00 am on Monday 6 September to consider further procedure.

Flyniu Airlines Ltd anor v HRH Prince 'Ulukalala Lavaka Ata anors

Supreme Court, Nuku'alofa
Webster CJ
CV 575/2004

8 September 2004

Practice and procedure – review of injunction – injunction rescinded

The plaintiffs applied for a review of the injunction granted on 17 August 2004 in view of the Court's decision earlier that day to join the other domestic airline, Peau 'o Vava'u Ltd as third defendant. The injunction had quashed the order of the Minister revoking the second plaintiff's Foreign Air Operators Certificate. The defendants challenged whether there was a serious issue to be tried.

Held:

1. A serious question to be tried was one for which there is some supporting material, of which the outcome is uncertain -- see *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 (CA) 237.
2. The aim of the serious issue test was to avoid the court having to consider difficult questions of law or fact at the interlocutory stage. It was no part of the court's function at the interlocutory stage of litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which called for detailed argument and mature considerations -- *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (HL).
3. The intervention of Peau 'o Vava'u had made a material difference and had changed the overall picture. Peau 'o Vava'u could suffer financial loss if the injunction were continued while the plaintiffs could suffer financial losses (albeit unspecified) if the injunction was to be responded. To decide between those two alternatives was a truly difficult balance for the court to make but there were other factors that had affected the balance of convenience. The second plaintiff had taken no steps to appeal against the Minister's revocation order and the plaintiffs had not provided supporting evidence of the adequacy of their undertakings as to damages.
4. The injunction which had quashed the order of the Minister was rescinded.

Cases considered:

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 (HL)

Cayne v Global Natural Resources plc [1984] 1 All ER 225 (CA)
Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 140 (CA)

Counsel for plaintiffs	:	Mr Edwards
Counsel for first defendant	:	Mr Gudsell, Mr Nielsen and Mr Havea
Counsel for second defendant	:	Miss Fukofuka
Counsel for third defendant	:	Mr Waalkens QC

Ruling

This was a hearing in open court on 6 September 2004 to consider a review of the injunction granted by the Court on 17 August, in view of the Court's decision earlier that day to join the other domestic airline, Peau 'o Vava'u Ltd as 3rd defendant. That injunction quashed the order of the 1st defendant, now the Minister, revoking the 2nd plaintiff's Foreign Air Operators Certificate [FAOC].

The purpose of this hearing was only to review the issue of the injunction in relation to the revocation of the FAOC and not for any wider purpose. In view of the public importance of this whole matter, it has to be understood that this is only an interim or temporary ruling, which does not affect the full hearing of the plaintiffs' case.

There was no suggestion that the applicable law was any different in substance from that set out in the Court's previous written ruling dated 20 August.

Mr Waalkens QC made submissions for Peau 'o Vava'u in relation to the question of whether there is a serious issue to be tried, ie one for which there is some supporting material, of which the outcome is uncertain: per *Cayne v Global Natural Resources plc* [1984] 1 All ER 225, 237 (CA). Mr Gudsell also made detailed submissions for the Minister on the question of whether there was a serious issue to be tried, including a detailed analysis of certain aspects of the history of the matter from a chronological point of view; and Miss Fukofuka for the Kingdom supported these.

While I carefully noted and considered all those submissions and those of Mr Edwards for the plaintiffs in response, I do not consider that it is helpful to set them out here in greater detail nor to express any detailed views on them (even in a preliminary fashion) at this stage, largely because they may involve matters still at issue when the substantive hearing of this application comes before me. The House of Lords was clear in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (HL) that the aim of the serious issue test was to avoid the court having to consider difficult questions of law or fact at the interlocutory stage. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature considerations: *American Cyanamid.*

On the material now before me, which is probably still incomplete, but which has to include the fact that the plaintiffs did not actually apply to be a single operator, I consider that it is now a more open question whether the plaintiffs have a real prospect of success, though I still think that the outcome is uncertain. However I

stress that if that touches on issues which will be before the Court at the substantive hearing, those are still open issues for the Court then and I have an open mind on them.

But in relation to the other factors described in the *American Cyanamid* case and other authorities as having to be considered in an application for an interlocutory injunction, I consider that the intervention of the 3rd plaintiff, Peau 'o Vava'u, has made a material difference and has changed the overall picture.

In respect of damages, the question before the Court is now no longer a simple question of the balance of the risk of doing an injustice, where on the one hand there might be no financial hardship to the Minister and the Kingdom if an injunction were continued, and on the other hand the plaintiffs stand to be seriously affected financially. Now, even leaving aside the positions of the Minister and the Kingdom, Peau 'o Vava'u may suffer financial loss if the injunction were continued, while the plaintiffs may suffer financial losses (albeit unspecified) if the injunction were rescinded. To decide between those 2 alternatives is a truly difficult balance for the Court to make, only moderated by the fact that the period of the injunction (which related to the period of the original FAOC) has only a few more days to run until 15 September. So the financial losses of either the 3rd defendant or the plaintiffs for that remaining period will be readily quantifiable as damages.

However there are also other factors which I believe now affect the assessment of the balance of convenience. There was no evidence that the 2nd plaintiff has taken any steps to appeal against the revocation of the FAOC; and no explanation about this. While the plaintiffs have provided undertakings as to damages, they have not provided evidence supporting the adequacy of those undertakings nor information about their ability to meet damages, nor even detailed information about their joint venture or other business arrangements: in the case of the 1st plaintiff, that has to be set beside the statements in the affidavit of Mr Finau, its Chief Executive Officer, that its business will effectively be closed on revocation of the FAOC and its shareholders will lose their whole investment.

The plaintiffs' Counsel Mr Edwards admitted that there was now no problem with making other arrangements for passengers if the quashing of the revocation is rescinded, particularly if, as the 3rd defendant Peau 'o Vava'u suggested through its Counsel Mr Waalkens QC, a period of grace of 1-2 days is allowed before the rescission takes effect. Mr Edwards also submitted that the real concern of the plaintiffs had been about the dangers to the tourism industry, but as mentioned in my earlier ruling that is a side issue and I do not see that as a relevant factor on this limited issue, particularly in relation to the question of the interim quashing of the revocation of the FAOC, and particularly now that the FAOC only has a few days to run.

Overall I consider that the intervention of Peau 'o Vava'u and all those other factors now tip the balance of convenience against the plaintiffs, so standing back and asking myself where overall justice lies in terms of *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 (CA), I consider that at this interim or interlocutory stage the balance now favours reviewing the injunction which quashed the revocation of the FAOC and rescinding it.

Once again I was grateful to all Counsel for their detailed and helpful legal submissions.

I have given these legal reasons for my decision, but once again I should like to make clear in general terms that at this stage any decision about granting or revoking an injunction is about a temporary or holding operation. It is important that this ruling is understood as a whole for what it is: it is emphatically not any indication of likely success in the full hearing, nor of the way the Court may be thinking about that. The final decision will only come after the Court has heard all the facts and all the submissions for the parties.

In terms of the submissions by Mr Waalkens QC for the 3rd plaintiff, I consider it reasonable that this rescission should take effect 2 days after this decision is intimated to the parties, as follows:

THE COURT ORDERS THAT:

> It rescinds the injunction granted by it on 17 August 2004 (which quashed the order of the Minister dated 13 August 2004, which with effect from 16 August 2004 revoked the 2nd Plaintiff's Foreign Air Operator Certificate No FAOC57567), the rescission to take effect from 6:00 pm on Friday 10 September 2004.

Note: A separate Order has been made in relation to other interlocutory and timetable matters decided on 6 September.

HAVING HEARD Counsel for the parties on 6 September 2004,
IT IS ORDERED THAT:

1. Under Order 9 Rule 2 Peau 'o Vava'u Ltd is joined as 3rd Defendant.
2. HRH Prince 'Ulukalala Lavaka Ata, as Prime Minister and Minister for Civil Aviation, is substituted as 1st Defendant for Mr 'Alovaleamoemapa Faletau, Secretary for Civil Aviation.
3. The Plaintiffs are to file further pleadings and written submissions on its application for leave to apply for judicial review in respect of issues of policy by close of business on Monday 13 September, with copies to the Defendants.
4. The Defendants are to file their responses within 8 days, ie by close of business on Tuesday 21 September, with copies to the Plaintiffs.
5. The Plaintiffs are to file any further response by close of business on Monday 27 September, again with copies to the Defendants.
6. The Defendants will, if appropriate, have 14 days from the issuing by the Court of its ruling on the question of leave to apply for judicial review (in respect of issues of policy) to file defences to that claim.
7. Any timetable issues on the Plaintiffs' application for mandamus will be considered after the ruling on leave referred to in Para 6.

8. In view of the public importance of the issues, it is hoped that it may be possible to hold the substantive hearing of the Plaintiffs' claims (which is expected to take 1 week) in mid-November, or if not then by the end of the year at the very latest. Timetable issues in relation to security for costs and a pre-trial conference about 1 month in advance will be dealt with at a later date.

Flyniu anor v Ata anors

Supreme Court, Nuku'alofa
Webster CJ
CV 575/2004

15 November 2004

Practice and procedure – application for judicial review of Government policy decision – application refused

This was the third ruling on an application for judicial review by the plaintiffs. The previous two rulings had been concerned with the question of leave in relation to an order revoking the second plaintiff's Foreign Air Operator Certificate and an interlocutory injunction in relation to the revocation of the Foreign Air Operator Certificate. This ruling concerned the issue of leave to apply for judicial review as it related to issues of policy. The plaintiffs had claimed that Government's Domestic Civil Aviation Policy dated 30 July 2004 had been arrived at with bias and lacked impartiality and independence. It was alleged that the defendants had allowed the matter to be placed before Privy Council and the Regent at the time, HRH Crown Prince Tupouto'a, had participated in the decision despite having a major pecuniary interest in the competing airline (the third defendant). They had also sought to rely on the Consumer Protection Act 2000 and the doctrine of legitimate expectation. The defendants contended that issues of policy were not reviewable by the court because, unlike the decisions of a decision-maker acting under statute, policy development was a political decision as opposed to the exercise of a statutory power and was therefore non-justiciable.

Held:

1. The courts, like other institutions, including Parliament, were subject to institutional constraints and must take care not to trespass on the decision-making functions best suited to other branches of government. Judicial review permits the courts in some cases to interfere with the substance of the decision itself but courts should avoid interfering with the exercise of official discretion when its aim was the pursuit of policy, as they were not institutionally suited to engage in the task of weighing utilitarian calculations of social, economic or political preference, which tasks were best suited to institutions in the political arena -- Judicial Review of Administrative Action [de Smith] para 1-032.
2. Whether or not an application for judicial review was justiciable depended on the nature and subject matter of the decision which was being

challenged. Certain matters of high policy involving political judgment, as distinct from administrative decisions, were inherently unsuitable for review by the courts because in practical terms the courts were not competent to do so as they would be in a judicial no man's land with no judicial or manageable standards by which to judge the issues. The larger the policy content of the issue, the less likely was it to be suitable for the courts to intervene.

3. A legitimate expectation arose where a person responsible for taking a decision induced in someone who may be affected by the decision a reasonable expectation that he would receive or retain a benefit or that he would be granted a hearing before the decision was taken and in such cases the courts had held that the expectation ought not to be summarily disappointed -- de Smith, para 8-037. The policies had been made by Cabinet and Privy Council under their prerogative powers and not under any statutory powers. The plaintiffs were given no express promise from which a legitimate expectation could be inferred.
4. The Consumer Protection Act had no relevance to the issues of policy.
5. The plaintiffs had not shown that they had a prima facie or arguable case based on legitimate interest in relation to issues of policy and leave to apply for judicial review as it related to issues of policy was refused.

Cases considered:

'Akau'ola v Pohiva [1990] Tonga LR 159 (CA)

Airedale NHS Trust v Bland [1993] 1 All ER 821 (HL)

Burt v Governor-General [1992] 3 NZLR 672 (CA)

Buttes Gas v Hammer [1981] 3 All ER 616 (HL)

Council of Civil Service Unions v Minister for Civil Service [1984] 3 All ER 935 (HL)

CREEDNZ Inc v Governor-General [1981] 1 NZLR 172 (CA)

Glebe Sugar Refining Co Ltd v Greenock Port and Harbours Trustees [1921] 2 AC 66 (HL)

Hayes & anor v The Waitangi Tribunal & ors (High Court, New Zealand, 10 May 2001, CP 111/01, Goddard J)

IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93 (HL)

Laker Airways Ltd v Department of Trade [1977] 2 All ER 182 (CA)

Lau Lava Ltd v Minister of Labour, Commerce & Industries & Ors (CV 599/04)

R v Secretary of State ex p Bentley [1993] 4 All ER 449

R v Secretary of State for Foreign & Commonwealth Affairs ex p Everett [1989] 1 All ER 655 (CA)

Rukutai Watene and Anor v The Minister in Charge of the Treaty of Waitangi and Ors (High Court, New Zealand, 11 May 2001, CP 120/01, Goddard J)

Wellington City Council v Woolworths NZ Ltd (No 2) [1996] 2 NZLR 537 (CA)

Statutes considered:
Civil Aviation Act 1990
Consumer Protection Act 2000

Counsel for plaintiffs	:	Mr Edwards
Counsel for first defendant	:	Mr Gudsell, Mr Nielsen and Mr Havea
Counsel for second defendant	:	The Solicitor-General and Miss Fukofuka
Counsel for third defendant	:	Mr Waalkens QC

Ruling

Preliminary

This is the 3rd ruling in this application for judicial review, the previous 2, dated 17/20 August and 8 September, having concerned the question of leave in relation to the order revoking the 2nd Plaintiff's Foreign Air Operator Certificate [FAOC] and the interlocutory injunction in relation to the revocation of the FAOC. This ruling concerns the issue of leave to apply for judicial review as it relates to issues of policy. Written submissions have been made by Counsel for each party, including a reply by Counsel for the Plaintiffs.

Plaintiffs' claims and remedies sought

In this application in relation to issues of policy the Plaintiffs are claiming that the Government's Domestic Civil Aviation Policy dated 30 July 2004 was arrived at with bias, and lacked impartiality and independence, in that the 1st and 2nd Defendants allowed the matter to be placed before Privy Council when the Regent at the time, HRH Crown Prince Tupouto'a, participated in the decision despite having a major pecuniary interest in the competing airline (the 3rd Defendant); that that decision was predicated on the pre-determination of the monopoly to the 3rd Defendant and the 1st Plaintiff was informed that the licence would be granted in favour of the 3rd Defendant. The Plaintiffs also claim that the 1st Defendant made several representations which in effect encouraged the participation of the 2 operators, without at any time during the course of the Open Meeting on 9 June 2004 disclosing that there would be a grant of an exclusive licence in the near future; and that if they had known that there would be the implementation of a policy allowing for a monopoly and exclusive licence over the domestic service, they would not have expended substantial capital for their application for a licence. The Plaintiffs further claim that the 1st Defendant changed the criteria for the grant of a licence without consultation with them, knowing that they would be severely affected by the changes, and the 1st & 2nd Defendants failed to properly consult with them about the new Policy before its approval and implementation, thereby denying the Plaintiffs a right to fair and just treatment; and that they had a legitimate expectation to have a licence up until the 15 September 2004, and the right of a renewal on the same grounds, but were denied those rights. They seek a review of the approval of the Policy dated 30 July 2004; an order quashing the decision of Privy Council approving that Policy; an

order declaring that Policy as illegal, irrational and unreasonable; and a declaration that the Interim Domestic Civil Aviation Policy dated 8 June 2004 shall remain in place until so ordered.

The Plaintiffs also claim that the Policy dated 30 July 2004 is contrary to the statutory intention of the Constitution and the general purpose and principles of the Consumer Protection Act 2000 (without referring to any specific provisions of that Act). They also seek a review of the Policy itself and challenge it as adversely affecting the interests of their Constitutional rights.

The Plaintiffs also filed an application for further injunctive relief for mandamus to renew the FAOC, but my understanding is that they are not now proceeding with that application.

Order 27

Rule 2 of Order 27 (which deals with Judicial Review) of the Supreme Court Rules 1991 provides:

> "(1) No application shall be made for judicial review unless the leave of the Court has been obtained in accordance with this rule.
> (2) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending that period.
> (3) An application for leave shall be made ex parte by filing
> (a) a summons stating concisely the relief claimed and the grounds therefor;
> (b) a copy of the proposed writ and statement of claim, and
> (c) an affidavit verifying the facts relied on.
> (4) The Court may grant the application without a hearing, but shall not refuse it without hearing the applicant.
> (5) The Court shall not grant leave unless satisfied that the applicant has a sufficient interest in the matter to which the application relates.
> (6) If the Court grants leave,
> (a) it may do so subject to such terms as to costs and to giving security as it thinks fit; and
> (b) it may grant such interim relief as appears necessary and just."

Leave

The law concerning leave has already been referred to in the 1st ruling; and also in McElrea J's written decision dated 6 September 2004 in *Lau Lava Ltd v Minister of Labour, Commerce & Industries & Ors* (CV 599/04).

There is no comprehensive statement of the criteria for determining applications for leave: Judicial Review of Administrative Action para 15-014 (5th Ed 1995) by de

Smith, Woolf & Jowell. However, on the authorities the principal matters to be established by an applicant are those referred to in Order 27 Rule 2, ie:

A. A sufficient interest on the part of the applicant; and
B. an application made promptly and in any event within three months (or longer if there is good reason to extend such period); and
C. an arguable case for the grant of one or more of the extraordinary remedies listed in Order 27 Rule 1; and
D. a proper case for the exercise of the discretion, looking at any other relevant factors in the particular case.

Sufficient interest is the first and foremost consideration in relation to an application for leave to apply for judicial review; and it is a broad flexible concept. At this stage the applicant need only show that he has a prima facie or arguable case or reasonable grounds for believing that there has been a breach of a public duty: the Court should not go into the matter in depth but should consider on a quick perusal of the material then available whether it discloses what might on further consideration turn out to be an arguable case for the grant of the relief claimed. A decision at the initial stage on sufficient interest is not, except in simple cases where it is obvious that the applicant has no sufficient interest, a matter to be determined as a jurisdictional or preliminary issue in isolation on the applicant's ex parte application for leave to apply. Instead it is properly to be treated as a possible reason for the exercise of the Court's discretion to refuse the application when the application itself had been heard and the evidence of both parties presented, since it is necessary to identify 'the matter' to which the application relates before it is possible to decide whether the applicant has a sufficient interest in it. The decision does not preclude subsequent re-assessment on the facts as ultimately determined. The House of Lords was very clear that the question of sufficient interest was not to be treated as a preliminary issue: *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 (HL).

In The Supreme Court Practice (1997) para 53/1-14/30 it is said that the Court has to consider whether there is a case fit for further investigation at a full hearing. Leave should be granted if, without going in to the matter in depth, there is an arguable case for granting relief.

The Court will be loathe to take a "short cut" by finding against an applicant on the topic of sufficient interest, or of standing: cf *'Akau'ola v Pohiva* [1990] Tonga LR 159 (CA) at 165, where this was referred to as a "draconian" step which should only rarely be taken.

The opinions of the judges in the Small Businesses case illustrate the Court's task at this stage. Lord Diplock said (pp 105-6):

> " ... this is a 'threshold' question in the sense that the court must direct its mind to it and form a prima facie view about it on the material that is available at the first stage. The prima facie view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage the hearing of the application for judicial review itself.

> The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.
>
> .....
>
> ... The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply far that relief. The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

Lord Wilberforce said in the same case (p 96):

> "There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application, then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest *in the matter to which the application relates*."

and Lord Scarman said in the same Small Businesses case (p 109-113):

> "The sufficiency of the applicant's interest has to be judged in relation to the subject matter of his application.
>
> .....
>
> The question is far from easy to answer, raising some complicated issues as to the rights of the private citizen to invoke the aid of the

> courts in compelling the performance of public duty or in righting public wrongs, rights whose scope and effect derive not from RSC Ord 53 but from the common law developed by the judges.
>
> .....
>
> The sufficiency of the interest is, as I understand all your Lordships agree, a mixed question of law and fact. The legal element in the mixture is less than the matters of fact and degree, but it is important, as setting the limits within which, and the principles by which, the discretion is to be exercised.
>
> .....
>
> The one legal principle, which is implicit in the case law and accurately reflected in the rules of court, is that in determining the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates. It is wrong in law, as I understand the cases, for the court to attempt an assessment of the sufficiency of an applicant's interest without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busybodies, cranks and other mischief makers. I do not see any further purpose served by the requirements for leave."

and Lord Roskill also said (p 117):

> "The learned editor [of the White Book, Master Sir Jack Jacob QC] stated that that which was a 'sufficient interest appears to be a mixed question of fact and law, a question of fact and degree and the relationship between the applicant and the matter to which the application relates, having regard to all the circumstances of the case'. With this admirably concise statement, I respectfully agree."

Submissions

The Solicitor-General for the 2nd Defendant submitted that in so far as the Plaintiffs' pleadings relate to issues of policy, the underlying cause of action is non-justiciable, as the development of policy is a political decision as opposed to the exercise of a statutory power and is not reviewable by the Court, unlike the decisions of a decision-maker acting under statute. She submitted that it is well recognised that decisions to develop, adopt and implement policy are part of the political process and are not amenable to the supervision of the Courts, as there is no justiciable basis on which the Court can intervene. In doing so she referred to 1 unreported New Zealand case, *Rukutai Watene and Anor v The Minister in Charge of the Treaty of Waitangi and Ors* (High Court, New Zealand, 11 May 2001, CP 120/01, Goddard J), but no

copy was provided to the Court. The Solicitor-General's submissions were in effect supported by Counsel for the other 2 Defendants.

In response Counsel for the Plaintiffs submitted that that was not entirely correct at all, with reference to similar circumstances where the Department of Trade in England changed a policy to exclude/revoke the licence of Laker Airways in England and the Court allowed a review and relief to be granted (*Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182 (CA)). He submitted that the change of the Government's Policy from an open competition policy with more than one domestic airline to a monopoly policy, resulting in the 2nd Plaintiff's FAOC being revoked early and denying it the right of renewal amounted to sufficient grounds for review, especially as the Policy was, in itself, not a justifiable reason for allowing for a revocation of the licence. In light of the judgment in *Laker Airways* he submitted that there are sufficient grounds set out in the pleadings to entitle the Plaintiffs to a right to review the Policy, in particular the manner in which it was changed, the time in which it was implemented and the manner in which the 2nd Plaintiff's FAOC was revoked. In his submissions Counsel for the Plaintiffs also submitted that it was quite clear from para 31 of the Statement of Claim that the Policy itself, in terms of its content, is not the specific subject of the challenge, rather the manner in which it was approved and the denial of the right to be heard in respect of the Policy.

Beyond those brief statements of the legal position I regret that there were no submissions on the legal position with regard to justiciability, yet when I refer to de Smith's Judicial Review of Administrative Action I find that it is a developed subject with a wealth of legal authority on it, as mentioned below, although those authorities are only the principal ones bearing on the subject. I wish to make it clear that Counsel have a duty to bring all relevant authorities to the attention of the Court, whether or not they assist the party for whom he or she appears, and I shall expect that to happen in future: Halsbury's Laws (4th Ed) Vol 3(1) paras 415,470; *Glebe Sugar Refining Co Ltd v Greenock Port and Harbours Trustees* [1921] 2 AC 66 (HL). While skeleton references to a single case may be adequate in matters of urgency, that was not the position in this instance and there was ample time for proper citation of authority to be made. It is also important that, if an unreported case is being cited (and particularly one from another jurisdiction), a copy is made available to the Court and other parties with the submissions: in this instance that would have disclosed that the case of *Watene* itself gave little assistance and to reach reported authority it was necessary to consult another case referred to in it (*Hayes & anor v The Waitangi Tribunal & ors* (High Court, New Zealand, 10 May 2001, CP 111/01, Goddard J), also unreported).

Justiciability

The best starting point on justiciability is Judicial Review of Administrative Action [de Smith] para 1-032, where it is said that courts, like other institutions, including Parliament, are subject to institutional constraints and must take care not to trespass on the decision-making functions best suited to other branches of government. Judicial review permits the courts in some cases to interfere with the substance of a decision itself: but courts should avoid interfering with the exercise of official discretion when its aim is the pursuit of policy, as they are not institutionally suited to engage in the task of weighing utilitarian calculations of social, economic or political preference, which tasks are best suited to institutions in the political arena.

Decisions which the courts are ill-equipped to review are those which are not justiciable – ie not amenable to the judicial process - either because they admit of no objective justification or because the issues they determine are polycentric in effect (in the sense that an alteration or quashing of the decision will require a rearrangement of other decisions, each of which have interacting points of influence). Such decisions include those that necessitate the evaluation of social and economic policy, or the allocation of scarce resources among competing claims. (de Smith para 6-031)

One of the early occasions when the exercise of a prerogative power was examined by the courts was in the case cited for the Plaintiffs, Laker Airways Ltd v Department of Trade [1977] 2 All ER 182,193 (CA), where Lord Denning MR said:

> "Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive. ... when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers, so as to see that they are used properly, and not improperly or mistakenly. By mistakenly, I mean under the influence of a misdirection in fact or in law. Likewise, it seems to me that, when discretionary powers are entrusted to the executive by the prerogative - in pursuance of the treaty-making power - the courts can examine the exercise of them so as to see that they are not used improperly or mistakenly."

Although that was subsequently criticised as being obiter and "far too wide" (by Lord Roskill in *Council of Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935 (HL) at 955 (the GCHQ *c*ase), and see de Smith para 28-009:

> "Judicial review is not now simply excluded because the act in issue involves exercise of prerogative power. The question is whether the subject matter to which use of the prerogative has been directed is justiciable and how far judicial investigation of those issues may extend."

Then in the New Zealand case of *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 197-8 (referred to in Hayes) it was said by Richardson J:

> "The willingness of the Courts to interfere with the exercise of discretionary decisions must be affected by the nature and subject-matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of the power. Thus the larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene."

Around the same time, in a case involving relations with a foreign state, Lord Wilberforce said that:

> "... the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, on an appreciation of the nature and limits of the judicial function."

and – in memorable words – he said that there are "no judicial or manageable standards by which to judge these issues", and if the court tried it would be "in a judicial no-man's land": *Buttes Gas v Hammer* [1981] 3 All ER 616 (HL) at 632-3; de Smith para 8-031 n 71.

The question of whether or not prerogative powers (ie common law powers of the Crown which have no statutory source, de Smith para 6-038) could be reviewed was authoritatively determined, in favour of their being reviewable, by the House of Lords in *Council of Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935 (HL) (the *GCHQ* case), where the majority were of the opinion that the exercise of powers authorised by the prerogative may be reviewable when their exercise is open to judicial review, depending on the subject-matter: but on the other hand may relate to areas which because of their nature are not justiciable (de Smith para 6-042). As Lord Roskill said in the *GCHQ* case (p 954, 956):

> "It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair.
>
> .....
>
> Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of Ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to judicial process."

Lord Scarman considered (p 948) that:

> " ... the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."

and Lord Diplock stated (p 951):

> "Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another, a balancing exercise which judges by their upbringing and experience are ill-qualified to perform. So I leave this as an open

> question to be dealt with on a case to case basis if, indeed, the case should ever arise."

Taylor LJ distinguished those acts at "the top of the scale of executive functions under the prerogative" involving "high policy", which were not justiciable, from "administrative decisions, affecting the rights of individuals and their freedom of travel", which are justiciable: *R v Secretary of State for Foreign & Commonwealth Affairs ex p Everett* [1989] 1 All ER 655 (CA) at 660; de Smith para 6-043.

In *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 681, it was held that the mere fact that a decision had been made under the prerogative did not exempt it from review in the courts. The test was rather whether the subject-matter of the decision was justiciable; and a challenge in the courts would be permitted in so far as issues arose of a kind with which the Courts were competent to deal: de Smith para 6-046. The court in *R v Secretary of State ex p Bentley* [1993] 4 All ER 449 (QBD DC) at 452-3 held that the powers of the court could not any longer be ousted simply by invoking the word 'prerogative':

> "The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so?"

It is stated in de Smith para 6-047:

> "Like other discretionary powers, it all depends upon whether the impugned decision is "justiciable". The courts, in assessing this question, must be sensitive to their own limits to evaluate questions of high policy and questions involving the allocation of scarce social and economic resources. Yet the courts should also take a realistic view of the distinction between an act of the "Crown-as-monarch" and that of "Crown-as-executive". The New Zealand Court of Appeal [in *Burt*] was surely right to point out the need, in the interest of the rule of law, for challenge to be permitted to issues on which the courts are competent to pronounce."

In Wellington City Council v Woolworths NZ Ltd (No 2) [1996] 2 NZLR 537 (CA) at 545-6 it was said:

> "... there are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision-making is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene."

In *Airedale NHS Trust v Bland* [1993] 1 All ER 821 (HL) at 886-7 Lord Mustill said:

> "If the criteria for the legitimacy of the proposed conduct are essentially factual, a decision upon them is one which the court is well accustomed to perform ... "

The conclusion to be drawn from all these authorities is quite simply that whether or not an application for judicial review is justiciable depends on the nature and subject matter of the decision which is being challenged, and that certain matters of high policy involving political judgment – as distinct from administrative decisions - are inherently unsuitable for review by the courts because in practical terms the courts are not competent to do so as they would be in a judicial no man's land with no judicial or manageable standards by which to judge the issues. The larger the policy content of the issue, the less likely is it to be suitable for the courts to intervene. This is where the law comes into the question of sufficient interest.

Legitimate expectation

A legitimate expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken; and in such cases the courts have held that the expectation ought not to be summarily disappointed: de Smith para 8-037.

In the *GCHQ* case Lord Diplock considered (p 949) that a prerogative power may be subject to judicial review if its exercise will have consequences for some person either:

> "(a) by altering the rights or obligations of that person which are enforceable by or against him in private law; or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurances from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

Lord Diplock went on to state (p 951):

> "As respects 'procedural propriety', I see no reason why it should not be a ground for judicial review of a decision made under powers of which the ultimate source is the prerogative. ... Indeed, where the decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations, 'procedural impropriety' will normally provide the only ground on which the decision is open to judicial review. But in any event what procedure will satisfy the public law requirement of procedural propriety depends on the subject matter of the decision, the executive functions of the decision-

> maker ... and the particular circumstances in which the decision came to be made."

In that same case Lord Fraser said (p 944):

> "Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

Government Policies on Domestic Civil Aviation

The Government's Interim Policy on Domestic Civil Aviation Operations, after Royal Tongan Airline had ceased operation, was:

> *"Interim Government Policy on Domestic Operations*

Preamble:
In order to meet the social and economic needs of the peoples of the Kingdom of Tonga, His Majesty's Government has set the following as interim policy for domestic operations.

Policy:

1. The Ministry of Civil Aviation shall be responsible for the issuance of safety and economic approval for all air transport operations within the Kingdom;
2. Safety and Security Conventions and associated legislation shall be paramount in the consideration and assessment of applications for domestic operations;
3. There will be no restrictions on the number of operators approved, unless in the interests of 2 above it is considered by the Ministry of Civil Aviation, that Safety and Security of the air transport system will be compromised;
4. That until such time the Ministry of Civil Aviation has reviewed the state of the domestic air transport operations and a substantive policy or regulations developed (expected by the 1st November, 2004), this policy shall remain in force; and
5. Nothing in this Policy exonerates a domestic operator from the laws of Tonga pertaining to trade and taxation.

by Approval of His Majesty's Cabinet
8th June, 2004."

The Government's new Policy, approved by the Privy Council on 30 July 2004, is:

"Government of the Kingdom of Tonga

Policy on Domestic Operations

Preamble:

Whereas the Government of the Kingdom of Tonga recognising the importance of a sustained safe and secure domestic air transport system as a catalyst and essential service for the socio economic development of the peoples of the Kingdom of Tonga: and

Whereas the Government of the Kingdom of Tonga realising the limited financial and human resources with appropriate technical capabilities in aviation and the limited market size to sustain economic operations based on free market forces:

Therefore have approved that only one operator will be licensed for the provision of scheduled air transport services within the Kingdom.

Policy:

1. The Ministry of Civil Aviation shall be responsible for the issuance of safety and economic approval for all air transport operations within the Kingdom:
2. Safety and Security Conventions and associated legislation shall be paramount in the consideration and assessment of applications for domestic operations:
3. That for a period of 24 months from the date of effect of this policy only one operator will be approved to provide scheduled domestic air services within the Kingdom:
4. That selection of the single operator will be based upon a competitive, transparent and even handed manner based upon the criteria detailed in *schedule 1* to this policy: and
5. That short term non-scheduled charter operations will be considered by the Ministry of Civil Aviation based upon the needs of the market, due to unforeseen traffic demands and the inability of the approved scheduled operator, providing the service."

Civil Aviation Act 1990

Section 3(1) of the Civil Aviation Act 1990 provides:

"Minister of Civil Aviation

3. (1) There shall be a Minister of Civil Aviation whose functions shall be -

(a) To exercise a general superintendence and control over all matters relating to Civil Aviation in Tonga;

(b) to control the use of the airspace over Tonga and the waters adjacent thereto and to regulate both civil and military operations in such airspace in the interest of the safety and efficiency of both;

(c) to administer this Act, the regulations made thereunder and any other enactment the administration of which is assigned to him;

(d) to exercise such other functions as may from time to time be lawfully conferred upon him."

Therefore the Cabinet and Privy Council made the Domestic Civil Aviation Policies under their prerogative powers, and not under any statutory powers.

Consumer Protection Act 2000

The long title of this Act, from which its scope can be ascertained, is "An Act to make provision for the protection of the consumer and for the establishment of fair trade practices and for other matters connected therewith or incidental thereto". In section 2 "consumer is defined as "a person who acquires goods or services from a manufacturer or trader". While I note that section 24 covers exclusive dealing and section 27 covers monopolisation, in the whole circumstances I cannot see that this Act has any relevance to the issues of policy in this claim.

Grounds of decision

In relation to the question of review as it relates to issues of policy, the Plaintiffs' Counsel submits that it is quite clear from paragraph 31 of the Statement of Claim that the Policy itself, in terms of its content, is not the specific subject of the challenge, rather the manner in which it was approved and the denial of the right to be heard in respect of the Policy. However that is not entirely clear from the wide terms of Para 31 and other paras of the Statement of Claim, such as Paras 33 and 34. Indeed the same submissions indicate later in para 2.4 that:

> "2.4 The policy itself is challenged upon the grounds that it was contrary to the terms and conditions that were the subject of the original policy advocating open and fair competition. As it affects the rights of the Plaintiffs the Plaintiffs had a legitimate expectation that they would be heard on the design and content of the Policy. No such right was afforded to the Plaintiffs. This is pleaded at paragraph 33 of the Statement of Claim. It is also stated and re-stated in the letters of the First Plaintiff to the Secretary of Civil Aviation and the First Defendant."

In any event I have come to the conclusion that the matter to which the application relates, the Domestic Civil Aviation Policy of the Kingdom of Tonga, as decided at the level of the Cabinet and the Privy Council, is inherently unsuitable for review by the Supreme Court because in practical terms the Court would not be competent to do that. A review of that Policy would depend almost entirely on policy, economic and political considerations – for example the very question of whether to proceed by way of a monopoly service as opposed to open competition – and not on straight factual criteria which would be amenable to judgment by the Court. The Court would indeed be in a judicial no man's land, with no judicial or manageable standards by which to judge the issues. Those issues of policy are thus not justiciable in terms of the authorities, so there is not an arguable case for the grant of the relief claimed in relation to issues of policy, nor a case fit for further investigation at a full hearing.

It is quite clear that high policy as such, which I consider is involved here, is not justiciable and so not reviewable - although as already decided, the administrative type decisions concerning the FAOC, arising from policy, are reviewable and leave has already been given for that. This is not a situation where there is a clear and extreme case inhibiting the Court from deferring to the 2nd Defendant's decision (in terms of the *Wellington City Council* decision).

In relation to the Plaintiffs' applications for review of the manner in which the policy was approved, I consider the Court must again take a practical approach. As Lord Roskill has said, it is not for the Court to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. If the substance of the policy is not justiciable, it is illogical to review the manner in which it is arrived at - ie even if the policy may have been arrived at irregularly, that cannot affect the justiciability of the policy. Further, it is difficult to understand what the purpose of a review would be, or what it would achieve: the Court cannot look at a Wednesbury question, as that would bring it into the field of making value judgments on the factors to be taken into account or not in making policy. Even if the Court were to uphold the Plaintiffs' challenge, it cannot enter into the field of making this policy or

even telling the Government what factors it should or should not take into account in deciding on the particular policy.

In other words if a matter is not justiciable, that is a blanket which prevents review on any ground (except that of legitimate expectation, referred to below). The refusal of leave at this stage is justified, particularly as it will remove uncertainty in relation to the standing of the Domestic Civil Aviation Policy. The Plaintiffs' constitutional rights are being respected by this judicial consideration of their application, but no specific grounds under the Constitution were raised by their Counsel and beyond that I am not aware of any specific grounds for constitutional challenge.

I have also considered whether the Plaintiffs are entitled to a review of the policy issues because they had legitimate expectations as defined in the authorities referred to above. I have studied their statement of claim and affidavits, but I cannot see the basis on which they can claim that they were given an express promise by or on behalf of the Defendants about the previous interim Policy continuing. The Plaintiffs' own affidavits show that the Interim Policy dated 8 June was specifically that – ie an interim policy – and it states in terms that it will remain in force until a review has been carried out, which was expected by 1 November. In other words it was clear that it was not a permanent policy and changes might occur within months. In addition, even the 2nd Plaintiff's FAOC stated on its face that it would remain in force until 15 September "unless otherwise suspended or revoked", so no legitimate expectation could necessarily be inferred from that. This is therefore not a proper case for the exercise of judicial discretion by granting leave. The circumstances were such that there was no regular practice which the Plaintiffs could reasonably expect to continue.

In relation to the case of *Laker Airways* referred to by the Plaintiffs, while that was indeed one of the cases which led the way forward for review of prerogative powers and it did concern airline licences, it concerned a very different situation (a conflict between the use of prerogative powers as against statutory powers), so cannot help the Plaintiffs beyond what it did in relation to development of the law as a whole.

I very much appreciate that on an application for leave the decision on sufficient interest is not to be treated as a jurisdictional or preliminary matter; and that the Court should not go into the matter in depth but should consider on a quick perusal of the material available whether it discloses what might on further consideration turn out to be an arguable case for the grant of the relief claimed in relation to legitimate expectations as regards issues of policy. Nevertheless in these circumstances, for the reasons given above I find that the Plaintiffs have not shown that they have a prima facie or arguable case based on legitimate interest in relation to issues of policy.

I therefore refuse leave to the Plaintiffs to apply for judicial review as it relates to issues of policy.

However the Plaintiffs are not left entirely without the opportunity to state their grievance, as I have already given leave for a judicial review of the decision to revoke the FAOC. Further issues in respect to procedure etc for the full hearing of that review should now be taken up by Counsel, by fax to the Court in the first place.

Delay

I much regret the delay in issuing the decision, but in addition to commitments in other important cases I found I had to spend a considerable amount of time seeking out authorities on the questions of justiciability and legitimate expectation, for the
710 reasons referred to above.

THE COURT THEREFORE ORDERS THAT:

1. The Plaintiffs are refused leave to apply for judicial review as it relates to issues of policy.
2. Further issues in respect to procedure etc for the full hearing of the judicial review of the decision to revoke the 2nd Plaintiff's FAOC should now be taken up by Counsel, by fax to the Court in the first place.

FC Nichols (Proprietary) Ltd v Bloomfield

Supreme Court, Nuku'alofa
Webster CJ
CV 514/2003

12, 13, 16, and 17 August 2004; 4 January 2005

Contract law – money allegedly owing for goods – not proved to be owing personally – claim dismissed
Practice and procedure – issue raised – should not be excluded because of technicality of pleadings

The claim arose out of a business relationship between the plaintiff, a meat importer, and the defendant, a senior officer in Customs. The plaintiff claimed $14,120.14 alleged to be owing for meat sold to the defendant in January and February 2003 and shipped to Vava'u. The meat was for a store operated by the defendant's parents. The plaintiff had also claimed $2000 in respect of money it had allegedly spent on repairs and upkeep of a motor vehicle belonging to the defendant's wife. The defendant disputed the quantity of meat purchased and counterclaimed for hire charges in respect of the vehicle at the rate of $60 per day for three months, $10,000 for services he allegedly gave to the plaintiff and $2000 for damages to his reputation. The plaintiff denied the counterclaims. The plaintiff accepted that the defendant had been acting as agent for an undisclosed principal, namely his mother, but submitted that the agency arrangement had never been pleaded.

Held:

1. If, despite inadequate pleadings, an issue was clearly raised and was understood by the opposing party to be raised and then dealt with, it should not be excluded because of technicality of pleadings -- *Prasad v Morris Hedstrom (Tonga) Ltd (No 2)* [1993] Tonga LR 69 (CA) at 73.
2. The court could not make any order or a decree against the defendants disclosed principals as they were not parties to the case but as it had not been established that the amount claimed in respect of the meat supplied was owing by the defendant personally, that part of the claim was dismissed.
3. In relation to the claim for money spent on the motor vehicle, it was held that the wrong defendant had been sued and it should have been the owner of the car, i.e. the defendant's wife. That claim was dismissed.
4. In relation to the counterclaim for alleged damage to the defendant's reputation, the court held that a long established form of liability in tort

was damage to reputation but judicial proceedings were absolutely privileged. Therefore, as the alleged damage to reputation counterclaim related only to the allegations made in the plaintiff's claim, it could not succeed and it, along with the other counterclaims, was accordingly dismissed.

4. The final result was that both claims by the plaintiff were dismissed and all four counterclaims by the defendant were also dismissed.

Case considered:

Prasad v Morris Hedstrom (Tonga) Ltd (No 2) [1993] Tonga LR 69 (CA)

Rules considered:

Supreme Court Rules 1991

Counsel for plaintiff	:	Mr Kaufusi
Counsel for defendant	:	Mr Fakahua

Judgment

Preliminary

This case arises out of a business relationship between the Plaintiff, which trades in Tonga in imported meat from the Small Industries Centre at Ma'ufanga, under the name of Ozy Quality Meat, and the Defendant, a senior officer in Customs, and General Manager of Customs Freight Management Ltd [CFM], which provided clearance services for importers.

The basic claim in this case by the Plaintiff was for the balance of $14,120.14 alleged to be owing for meat sold in January and February 2003 to the Defendant and shipped to Vava'u. The Defendant admitted that some meat had been sold and shipped to Vava'u, but claimed that the quantity of meat alleged by the Plaintiff had not been sold and shipped and that more payments for it had been made than accepted by the Plaintiff. It also emerged in the course of evidence that the Plaintiff knew that the meat was for the store of the Defendant's parents in Vava'u.

The Plaintiff also claimed $2,000 from the Defendant in respect of money allegedly spent on the repair and upkeep of the Defendant's wife's car when it was lent to the Plaintiff's General Manager Mr Kevin Hunt. That followed the Defendant taking back the car on 22 August 2003, which the Plaintiff said was in breach of a 'gentleman's agreement' that it would retain the car in security for the Defendant's debt for the meat. The Defendant denied that claim, saying that the car had been hired to the Plaintiff (for Mr Hunt) at a rate of $40 per day from the last week of January 2003 to 20 August 2003; and counterclaimed for the hire charges, against which he accepted that there should be set off appropriate elements of the sums expended on the car by Mr Hunt.

The Defendant also counterclaimed for the charges for the hire of his truck to the Plaintiff at $60 per day from 18 January to 20 April 2003. The Plaintiff denied that counterclaim.

The Defendant further counterclaimed for $10,000 for the services he allegedly gave to the Plaintiff in preparing all documents for customs entries, including setting

up a computer program. The Plaintiff also denied that counterclaim and said that the Defendant was paid $500 for every container released.

Finally the Defendant said that he was a person of good character and he also counterclaimed for $2,000 for damages to his good reputation, which he said had been ruined by the claim, so that public believes that he is a bad, irresponsible & unreliable person. The Plaintiff also denied that counterclaim.

Evidence and submissions

The Plaintiff led evidence from Mr Kevin P J Hunt, its General Manager in Tonga; Mr Fred C Nichols, its Managing Director and part owner (along with his brother); Ms Moala Fifita, Supervisor at Sitani Mafi Co Ltd; Mr Viliami 'Alipate Tupou, Operations Manager of CFM; and Miss Diana 'Eseta 'Ofa, now the Plaintiff's Secretary and Accounts Clerk. The Defendant gave evidence himself; and led evidence from Mr Takitui Fine, Supervisor Electrician with Kooline Bayside Services. Both parties also submitted productions. After conclusion of the evidence written submissions were submitted in the following days for each party in support of their case.

I very much regretted that I was unable to accept the Defendant as an entirely credible and reliable witness, principally because in cross-examination he repeatedly avoided answering the question and denied apparently obvious matters. While Mr Hunt was somewhat didactic and given to exaggeration, I considered that he was telling the truth as he saw it, and so was generally a credible witness, if not always reliable. I found Mr Nichols a good, credible and reliable witness, as was Miss 'Ofa, who had obtained school certificates in accounting. I had no reason to doubt the credibility and reliability of the other witnesses.

Claim for the meat sent to Vava'u

During the period in question from January to April 2003 the Defendant installed the Plaintiff's computer, showed them how to use it, and did their bookwork by either making the various bookkeeping and accounting entries, or giving the information to Miss 'Ofa for her to do so. Mr Hunt accepted that he would sign to authorise an entry, but he could not use the computer and the Defendant would make out the sheet. There was an entry in one of the Plaintiff's productions showing the purchase of a PC on 14 February for $1,759.14, which Mr Hunt accepted was all done by the Defendant.

The detailed evidence of the records and accounts for this matter was muddled and confusing. The Plaintiff's accounting and bookkeeping system at the relevant time appeared to leave something to be desired, as both Mr Hunt and Mr Nichols are butchers who readily admitted to not understanding accounting. It was difficult to know what records the Plaintiff did have on computer before they were allegedly deleted by the Defendant, or before the Defendant allegedly removed the book in which the entries were when he went back to his own company [CFM]. There was no acceptable evidence that the Plaintiff kept a separate stock book record of any kind, as Mr Hunt's evidence on the matter was contradictory; and Miss 'Ofa said that when a container arrived the contents were simply noted on the stock on the computer and the Customs entry forms and shipping documents were added to a big file or folder in the office. Mr Hunt was also unsure whether any individual debtor cards were kept,

even in computer files, but Miss 'Ofa said they used an accounting system on the computer and produced a debtor list every week. But Mr Hunt had to approve all receipts.

The Defendant said that the Plaintiff had no stock book or debtor records, although it proposed to use Mind Your Own Business software for that. But he had always had a disagreement with Mr Hunt about how the system worked and it had been he who had entered the stock and the credits. There had been a lady recording all the sales, and a book used for recording salaries because of the requirement of the Inland Revenue.

The Defendant said that after he had prepared the weekly sheets of income and expenditure, Mr Hunt checked them before signing them, and they were then sent to Mr Nichols in Australia.

Mr Nichols visited Tonga every 3 months, but Mr Hunt reported to him what was happening on a daily basis. Mr Nichols said he relied on the daily sales sheets, records of banking (cash and cheques), and records of expenses. He said the stock book had been removed, but he did not know who by (although he said he knew that Mr Hunt could not turn on the computer); and the main documents the Plaintiff would rely on had been removed from the computer, so it had to rely on the information they could find.

In relation to the weekly statements of income and expenditure, the Defendant acknowledged that he prepared those documents on the computer, or that Miss 'Ofa did so under information provided by him. But in relation to other documents among the productions, the Defendant virtually refused to acknowledge any faxes or notes, as he said he usually signed faxes, but I regret that I was unable to accept that denial and found that they were duly sent by or to him.

However I accepted that after the Defendant left the Plaintiff in April 2003, some or all of that information and the documents were found to be missing. Miss 'Ofa said that when she had gone to work for the Plaintiff, the information on its computer was not complete as bits and pieces were missing, such as the records for weeks 1 & 2. On the balance of probabilities I accepted the evidence for the Plaintiff that Mr Hunt believed that the Defendant himself, as the principal person with access to the computer, removed the information.

The Defendant said a relationship between his mother and the Plaintiff had begun when Mr Nichols had still been dealing with Mr Maka'afi Fainga before Ozy Quality Meats was started and Mr Hunt had said it was OK to continue it. But I was unable to accept that evidence of the Defendant that the Plaintiff had been trading with his mother even before it set up business in Tonga, as that was never put to the Plaintiff's witnesses.

The Defendant had asked Mr Hunt if he would be interested in sending some meat to Vava'u as his mother and father had a shop there and Mr Hunt said he had readily accepted the opportunity as a chance to grow a bit. However he said the Defendant was always in touch with his parents from his home. Mr Nichols knew of that situation from Mr Hunt, and that the Defendant had made the arrangements and had given a purchase order from his parents. Mr Nichols had considered the Defendant to be in a position of trust and had taken his word that the order would be paid for.

Therefore, essentially at the Defendant's request, 2 consignments of meat, prepared by the Defendant (and I did not accept his evidence that he did not order the

products to be sent to Vava'u), were sent on credit to Bloomfield Retail Store, Vava'u as follows:

29 January 74 cartons	$14,360.50
13 February 22 cartons	$2,259.64
	$16,620.14

I accepted Mr Hunt's evidence that he himself had seen the 74 cartons loaded in the first consignment; and that he believed that the Defendant had taken away the documents about the Vava'u consignments.

I was unable to accept the Defendant's evidence that only a lesser quantity of 36 cartons at a cost of $3,365.96 was sent in the first consignment, he said as other goods had been loaded into the container (particularly as he later said that the container had not been loaded under his direction), which had been consigned to his mother Nau Bloomfield; nor that the cost of the second consignment of 22 cartons was only $2,048.10. Although the Defendant's evidence tallied with entries in his diary for 30 January and 13 February, there was no other evidence to corroborate these and in view of my assessment of his credibility I was unable to accept that evidence or those entries.

Although that might appear to be a large order to provide on credit on first dealings with a party, I accepted the evidence of Mr Hunt that it was not a large amount of credit in their business. The Defendant said, and I accepted, that at the start of the Plaintiff's venture in Tonga it had been desperate to sell its products, which were very expensive to sell, and at that time it had been very keen to market its meat and open up a new market in Vava'u, as at that stage it did not have a cool room to store them and the cost of power for reefers [refrigerated containers] was going up.

Miss 'Ofa said that as far as she knew the account kept for the meat sent to Vava'u was in the Defendant's name, and not in the name of his mother, Mrs Nau Bloomfield.

The oral evidence for the Plaintiff was that payments totalling $2,500 ($400 in cash shown to Mr Hunt (who said he never touched money), $400 in cash given to Mr Nichols, and a further $1,700 in cash) were made by the Defendant to it fairly soon after the first shipment, on or around 30 January and, in accordance with the Plaintiff's normal practice, banked as soon as possible. However the Plaintiff's own productions showed that a cash payment of $2,760 was made on 30 January and recorded on a sheet signed by Mr Hunt at the time.

The problem for both the Plaintiff and the Court was that the bookkeeping entries were written by the Defendant. According to the records made by the Defendant, the Plaintiff's expenditure on 31 January 2003 had been $2,354.93. The Plaintiff's bank deposit book showed no record of any substantial payment of cash around that time, except for a cash pay-in of $3,144.16 on 7 February, which Mr Nichols accepted might or might not include the payment of $2,700: again according to the records made by the Defendant, the Plaintiff's expenditure on 7 February had been $1,380.88.

Miss 'Ofa had worked for CFM, doing bookkeeping and looking after the accounts until the 2nd week in April 2003, when she had moved to work full-time for the Plaintiff doing the same job. Prior to that under the Defendant's instructions she had also done the banking for the Plaintiff at the same time as she did the banking for CFM, using the bank deposit book already referred to, the entries in which were in

her handwriting. Miss 'Ofa said that as far as she knew no cash had been given to her to bank on 30 January (the date when $2,760 from Vava'u had allegedly been paid in); nor did she think a cash pay-in of $3,144 on 7 February related to the $2,760, as normally she did not hold cash and paid it in daily.

The Defendant himself accepted that it was the normal practice to lodge cash if possible on the day it was received, but said that would also depend on the operating expenditure, which could be taken from cash received. So he said the $2,760 could have been used for the payment of expenditure, though as already mentioned there was really no accounting evidence to support that.

Overall on the evidence, on the balance of probabilities, there was simply insufficient evidence to draw any conclusions about whether 2 large payments had been made. I was thus unable to accept the Defendant's evidence that further cash payments had been made around the same time, but slightly later. I therefore accepted the contemporaneous written record signed by Mr Hunt as the best evidence before the Court, in face of all the other confused oral and written evidence.

The Defendant said he had never received any invoices for the meat sent to Vava'u, and none were produced to the Court.

The Defendant said that his mother had had problems selling the meat at Vava'u; and he admitted having a discussion with Mr Nichols and arranging to have returned from Vava'u whatever cartons of meat were left over, ie 29 cartons. Mr Hunt said that the Defendant had said to him that his mother and father had a problem and had had trouble selling the meat. On 14 May the Defendant faxed to Mr Nichols from CFM:

> "Good Morning Fred,
>
> This is to update you with the Meat with were shipped to Vava'u, currently my mother is still working on collecting credits, and working on the STOCK, which she still have in the Freezer today. This is not an easy job for her cos she have to get boys to do the shifting of stock for stocktaking, plus that she was sick during the past few days.
>
> She has stated that she will try her best to send all related information as soon as she finish with the work, secondly she has to hire a Blast Freezer to freeze whatever shock she has on hand before she shipped the leftover stock to Tongatapu.
>
> Apologize for any inconvenient that this may have caused. I will keep you up date.
>
> Thanks & Regards
> Kulu [the Defendant]"

Although the Defendant for a variety of reasons denied sending that fax, I was unable to accept his denial and found that he had sent it.

In response, by fax also dated 14 May 2003 Mr Nichols had asked the Defendant to arrange for all unopened cartons to be sent back from Vava'u, and that had been done:

> "Good morning

> Thank you for your update
>
> Could you please arrange for all unopened cartons to be sent back to sic asap this will make the stock take for your mother much easier.
>
> Could you also advise the arrival time at the wharf so as my truck can be on hand to bring it back to the factory.
>
> When I last spoke to you you said your mother had banked some of the money owing to us into the wrong account. Have you sorted this problem out and when will that money be paid to me. This account is long overdue and I need it fixed up immediately
>
> Regards
> Fred"

The Defendant did accept that that fax from Mr Nichols of 14 May to him referred to his arrangement with Mr Nichols to arrange for the unopened cartons to be sent back from Vava'u, but denied discussing with Mr Nichols that his mother had banked some of the money in the wrong account. Again I was unable to accept the Defendant's evidence denying that.

The witnesses accepted that 29 unsold cartons of meat were eventually returned by the Defendant's mother from Vava'u to the Plaintiff in Nuku'alofa around 16 May, but I preferred the evidence of Mr Hunt and Mr Nichols (who had been in Tongatapu at the time) as experienced butchers of 50 years standing with Quality Assurance certification, to that of the Defendant that when the Plaintiff received the cartons they were defrosted and unfit for human consumption, so that no credit could be given for them. I was unable to accept the Defendant's evidence that the cartons could have become defrosted at a later date.

The Defendant had also told Mr Nichols in the middle of May that his figures for the Vava'u debt were wrong, but despite Mr Nichols asking for what the Defendant considered to be the correct figures, the Defendant had never provided these and had made no further attempt to make any payments. Prior to that, as already mentioned, the Defendant had told Mr Nichols that his mother had banked some of the money owing to the Plaintiff into the wrong account under the family's control, but the Defendant had never sorted out that alleged problem, although Mr Nichols felt all the Defendant had to do was to take it out and pay it into the Plaintiff's account, nor had he or his parents paid the Plaintiff any more money.

Later on 30 May Mr Nichols again faxed the Defendant:

> "It is now more than 2 weeks since you told me that our account was wrong and you would fax me the correction.
>
> If you recall your mother sent back 29 cartons of meat out of the total order of 96 cartons and when we received it, it was all defrosted. Some we had to dump as it was to far gone and bacteria was starting to show.

> We have been paid 3 payments off the original total leaving a substantial amount owing. You told me some money had been banked into the wrong account under your family's control.
>
> I want to get this matter cleared up so we can both get on with our respective business. Could you please pay the outstanding amount of $10,049.51.
>
> Please respond by Wednesday the 4/6/03 as after this date it will be about 4 months since the order was delivered and it will be placed in the hands of our debt collection solicitor.
>
> As you know our terms are not more than 28 days for accounts that have been operating for some time and we have had a pattern of regular payments.
>
> Yours faithfully
> Fred Nichols"

There was no reference at all in evidence to the figure of $10,049.51 claimed by Mr Nichols in that fax to be outstanding, though he does mention the 3 payments made through the Defendant. Perhaps the figure took into account some credit for the returned meat. But as this was a document produced by the Plaintiff and was the only one specifically referring to the amount outstanding, I believe, in view of the very confused oral evidence, it is proper to take that figure as the amount outstanding by Bloomfield Retail Store.

No further payments were made to the Plaintiff for those 2 consignments. I therefore found that the debt outstanding in respect of them was $10,049.51.

As already mentioned the evidence showed that the Defendant was not acting for himself in ordering the meat to be sent to Vava'u, but that he was ordering for the Bloomfield Retail Store there, which was run by his mother and father, and that both Mr Hunt and Mr Nichols were fully aware of that, although they had not met the Defendant's parents. The Defendant had said that his mother was going to pay, but she did not do so, beyond the payments already mentioned. As a result the Defendant's name had appeared on the Plaintiff's list of debtors for a substantial amount of money. Mr Hunt said that the Defendant was the organiser of the arrangement and it was the Defendant who received payments from his mother.

Mr Nichols very fairly accepted in evidence that the Defendant was in the position of an agent acting for a disclosed principal and therefore would not normally be personally liable for debts incurred for the disclosed principal, but considered the circumstances special as at that time the Defendant himself was in a close business relationship with the Plaintiff, which was the reason for granting the credit.

Although the Plaintiff correctly submitted that the Defendant had never pled as a defence (in terms of Order 8 Rule 2(2) of the Supreme Court Rules) that the Defendant was not personally liable as he was acting for a disclosed principal, it would be absurd for the court to grant a decree against the Defendant where the evidence had established on the balance of probabilities that that was the case. If, despite inadequate pleadings, an issue is clearly raised and is understood by the opposing party to be raised and then dealt with, it should not be excluded because of technicality of pleadings: *Prasad v Morris Hedstrom (Tonga) Ltd (No 2)* [1993]

Tonga LR 69, 73 (CA). While the Court cannot make any order or a decree against the Defendant's disclosed principals in this action as they are not parties to the case, it clearly has not been established on the balance of probabilities that the sum of $10,049.51 was owing by the Defendant personally to the Plaintiff, so no order is made in that respect and this claim is dismissed.

Claim for money spent on car

In relation to this claim I accepted that the car in question, C6626 which the Plaintiff accepted as being a car belonging to the Defendant's wife, Mrs Bloomfield, who was in a post at Vava'u, was offered by the Defendant to Mr Hunt for use (to employ a neutral term at this stage) for his time in Tonga to help him out, provided he paid for having it resprayed to allow him to use it. Mr Hunt did use the car from around 21 February (when he got an advance on personal account from the Plaintiff of $1,100 to pay for the respray of the car, which he later repaid to the Plaintiff) to 20 August 2003. But while in loose terms the arrangement may have come about because of the then business relationship between the parties, on the evidence I did not consider that the arrangement was part of any contractual consideration for a business deal. I accepted Mr Hunt's evidence that there was never any mention of the car being hired to him. Nor was there any evidence that the car was eventually to become Mr Hunt's property.

Mr Nichols said he had not liked the idea of the car right from the start, but it had been a deal between Mr Hunt and the Defendant. He said it had been nothing to do with him as Mr Hunt had been managing the business and had wanted a vehicle. Mr Nichols understanding had been that it had been agreed that Mr Hunt would pay for the car to be painted, and if there were breakdowns when Mr Hunt was driving it Mr Hunt would pay for them. Mr Nichols said the payments had been made out of the Plaintiff's account and then paid back to it by Mr Hunt, though that conflicted with Mr Hunt's own evidence, which was that the Plaintiff paid for the repairs. I preferred Mr Nichol's evidence on that.

Once again the paperwork purporting to establish the claim was muddled and unsatisfactory, but I accepted on the evidence that, as Mr Hunt was using the car, he paid $1000 for the respray; but it was the Plaintiff who paid for the repairs, made up as follows:

20.3.03	$510.65
21.3.03	$335.65
21.4.03	$858.00
23.4.03	$57.45
20.5.03	$135.90
16.6.03	$90.60
	$1,988.25

I could not accept on the balance of probabilities 3 other repair bills, which appeared to me to be more likely to be attributable to the accident which occurred to the car (referred to below) and were met in an insurance claim.

Mr Hunt said in evidence that the car never stopped breaking down and the Defendant asked him to have it fixed as he did not have the money himself. Mr Hunt paid those sums, and he said more than $3,000 in all, which must have made the car a

most expensive gratuitous lending, but that was the arrangement I found that the parties had come to.

The Defendant's evidence was that he had told Mr Hunt that the car was available if he wanted to use it, and that whatever he paid for the respray would be deducted until Mr Hunt had his own car, which was the reason why the Defendant had never asked Mr Hunt to pay any money until he found his own transport. He felt that as Mr Hunt was using the vehicle he should pay for the wear and tear on it.

I accepted that the accident to the car (with damage to the front mudguard) had not been the fault of the Plaintiff or Mr Hunt as a truck had backed into it and broken the driver's side headlight and mudguard (not the driver hitting an electric post, as claimed by the Defendant). I also accepted that the repairs following that had been covered by insurance and were not being claimed by the Plaintiff in this action. I also accepted Mr Hunt's evidence that the Defendant had seen and been aware of the accident shortly after it happened; and I was unable to accept the Defendant's evidence that he had been disappointed because he had been unaware of it and Mr Hunt had not advised him of it. I accepted that Mr Hunt had thus had all the damage to the car fixed.

But it must also be recorded that there was no evidence that either the Plaintiff or Mr Hunt took any steps at all to recover any of these amounts until the Defendant took back the car on or around 20 August 2003; and Mr Hunt said he had never seen the Defendant from the time he left the Plaintiff until he had come to pick up the car. I therefore concluded that, whatever other arrangement there was between the parties, in exchange for use of the car Mr Hunt (who must have been aware of the condition of the car when he entered into the arrangement) was to be responsible for its upkeep and cannot now sue to recover sums so expended.

Mr Hunt's evidence that the car was eventually sold by the Defendant for $3,000 was unchallenged.

Mr Hunt and Mr Nichols also gave evidence that there was a "gentleman's agreement", made when the Defendant left the Plaintiff in April 2003, that Mr Hunt would keep the car as some kind of security for the Vava'u debt to the Plaintiff, which I accepted, although the Defendant denied that also. The question therefore was what the legal effect of any such agreement was. First, there was no evidence that the Defendant was authorised to pledge his wife's car in this way, especially for a debt which was not his but his parents'. Secondly, a gentleman's agreement is defined in Curzon's Dictionary of Law (and in Chambers Dictionary) as a colloquial term used to describe an agreement resting on the honour of the parties, not law, and not usually enforceable at law. But thirdly, I cannot see that any such agreement is relevant to the Plaintiff's claim of $2,000, which is a claim for the money expended on the car, not for the value of the car or the car itself to set against the sum still owed for the meat, nor indeed for the return of the car. So I cannot see that any such gentleman's agreement is relevant to this part of the Plaintiff's claim, except of course that the evidence for the Plaintiff about it, which I accepted, cast further doubt on the probity of the Defendant.

Once again in this claim therefore, I consider that the wrong Defendant (who should have been the owner of the car, i.e. Mrs Bloomfield) has been sued; and in addition the Plaintiff is also the wrong party to make this claim, so while I sympathise with Mr Hunt, I find this claim has not been established on the balance of probabilities and it is dismissed.

Counterclaim for alleged hire of car

I had no hesitation in rejecting the Defendant's evidence that a hire charge of $40 per day had been agreed, as there had been no mention at all of such a charge from the time the car was originally given to Mr Hunt in January 2003 right up until the Defendant very belatedly lodged his statement of defence and counterclaim in November 2003. However Mr Hunt did agree in evidence that EM Jones would have charged a hire rate of $40 per day. Nor was there any other evidence substantiating a hire or ongoing rental payments; and Mr Hunt said there was never any talk of hiring the car, he had never agreed to any renting arrangement and no hire invoices whatsoever were given to him by the Defendant.

As I have already found, whatever other arrangement there was between the parties, the principal arrangement about the car was that in exchange for its use Mr Hunt (who must have been aware of the condition of the car when he entered into the arrangement) was to be responsible for its upkeep, without any additional hire charge.

The Defendant accepted that, although he had said in evidence that he had told Mr Hunt that he understood he was paying $75 per day for the taxi with a driver he was hiring, that figure had never been put to Mr Hunt. The Defendant accepted in evidence that in his affidavit dated 23 March 2004 he had stated:

> "That I do not intend to claim the hire of my wife's car which was used by the Plaintiff and not only that but my services rendered to the Plaintiff but because they claim to me various matters which is completely untrue I therefore propose to file a Counterclaim against the Plaintiff."

but said he changed his mind after Mr Hunt said he had to leave the company.

The Defendant said that in August 2003 he had found out that the car had been in an accident but Mr Hunt should have informed him of the damage and it had had not been reported to him and he knew he would not be able to sell the car.

The Defendant accepted that the cost of expenditure by Mr Hunt on the car would have to be set against any hire charges, he said except for the repairs following the accident (which have been excluded from the list above).

Mr Hunt acknowledged that, as the car was still registered in name of the Defendant's wife, the Defendant had every right to take it. I also have to say that in legal terms (not taking into account the gentleman's agreement) I cannot see that the Defendant, presumably as his wife's agent, was in the wrong in taking back the car.

The Defendant therefore failed to establish this head of the counterclaim in terms of the arrangement between him and Mr Hunt which I found established.

Again in this counterclaim, in any event, both parties are the wrong parties. The Defendant was not the owner of the car, and the arrangement he had, presumably on behalf of his wife, was with Mr Hunt, not the Plaintiff.

Counterclaim for alleged hire of truck

In relation to this claim, I accepted that the Defendant's truck (although in cross-examination he admitted that the truck belonged to CFM, of which he was 1 of the major shareholders, with a 30-35% shareholding) had been used gratuitously by the Plaintiff on occasion, but also Mr Hunt's denial that the truck had been formally hired to the Plaintiff. I accepted Mr Hunt's evidence that the Defendant had filled the truck

with petrol (until Mr Hunt instructed the petrol station to the contrary) and had had fitted a new battery and new tyres, all on the Plaintiff's account and all without asking Mr Hunt: the Defendant accepted that the Plaintiff would fill up the 4-ton truck with petrol, but pointed out that even with a hire car the hirer had to fill it up with petrol and pay the hire rate. Mr Hunt said that the Defendant used the truck to travel to and from work, which Miss 'Ofa confirmed, but she did not know whether the Defendant's truck had been used by the Plaintiff before she worked for the Plaintiff, but said that by the time she moved the Plaintiff had its own truck for delivering meat to its customers. Once again there was no evidence, apart from the Defendant's oral evidence, which I was unable to accept, substantiating a hire or ongoing rental payments. Mr Hunt said he had never seen any such invoice. Once again, there was no evidence that hire charges for the truck were either mentioned or claimed until the Defendant lodged his belated statement of defence and counterclaim in November 2003.

The Defendant said that because the Plaintiff had no transport his truck was used by it to deliver meat, from the time he started working for the Plaintiff until he had been told by Mr Hunt in April that his services were no longer required. He claimed $5,400 for that.

Once again, I therefore found that on the balance of probabilities this head of the counterclaim was not established.

Counterclaim for Defendant's services to Plaintiff

Mr Nichols said that he had met the Defendant at CFM when the latter was its General Manager and had spoken to him a few times. CFM had been doing the work to release the Plaintiff's 20' refrigerated containers (reefers) and presented it with a bill each time. The Defendant said that a relationship had started to develop and Mr Nichols said that on one occasion when the Defendant had been there he had offered to do the release of the containers, but had also established with Mr Nichols the opportunity to have someone in Tonga who knew what he was doing with computer work, as they had no support. The Defendant had told Mr Nichols that he had previously been in Customs (where he is now No 2). Mr Nichols had offered the Defendant a job to do the work in the Plaintiff's office and the Defendant had offered to get it a computer; Mr Nichols accepted in evidence that as the boss of the Plaintiff he had employed the Defendant to do the work on the computer for the Plaintiff, based on a payment per container, and so based on the number of containers released.

Mr Nichols said that the Defendant was to be paid an agreed figure of $500 on the release of each container. The Defendant said that $500 had been the figure proposed by Mr Nichols, but he had told him that was not enough as his salary at CFM was $450 and so the figure per container had risen to $850 and Mr Nichols had said on the phone that he would have a look at it and at the last discussion with him Mr Nichols had said yes to that. Both agreed that whatever was arranged had been between them and not with Mr Hunt, and there had been no written agreement about a figure. The Defendant accepted that during Mr Nichols' evidence his figure of $500 had never been contested in cross-examination, which was the case.

I accepted Mr Nichols' evidence that the Defendant was to be paid $500 per container cleared from the wharf; and Mr Hunt agreed that was the basis of the Defendant's work for the Plaintiff. Mr Hunt said the Defendant took $500 in cash

every time a container was cleared by CFM, and denied that the figure was $850 per container. Miss 'Ofa confirmed the figure of $500, which was taken by the Defendant from cash. The Customs entries were prepared separately for the Plaintiff by CFM Ltd. Although Mr Hunt had signed some statements of expenditure which were produced by the Plaintiff and which included at least 1 entry of $500 as "Part Payment of Commission for 'Anisi Bloomfield", on the evidence overall I considered that that entry was probably put in by the Defendant himself and not picked up by Mr Hunt, who appeared not to have been greatly interested in the financial and accounting side of the business and claimed that he could not remember such details.

The Defendant said that when the Plaintiff started at the Small Industries Centre there had been no freezer to store the meat and no transport to deliver it, so it was like starting from scratch and there was a lot of work to be done locally, which was why he thought he had been asked to assist. The Defendant said he had been doing the marketing for the Plaintiff, arranged for their computer to be set up, and arranged for the renovation of the building; and that he normally worked after hours. But he said that the payment of $500 or $850 related to the selling of the products in the container and was a commission on how they sold. Mr Fine confirmed that when he had been working for Kooline it had been the Defendant who had made the arrangements for the installation of 2 freezer rooms for the Plaintiff. On this matter I preferred the evidence for the Plaintiff and did not accept the Defendant's evidence that the agreed rate was $850 per container.

The Defendant said that when he was working for the Plaintiff CFM were still clearing containers for it. There was also evidence from Mr 'Alipate Tupou said that at CFM he had handled customs matters for the Plaintiff in 2003, filling in forms and preparing customs documents. The service CFM offered was a whole service up to delivery to the customer's premises. When Mr Tupou worked there he had worked under the instructions of the Defendant, who had been General Manager of CFM. To Mr Tupou's recollection the rate charged by CFM was a fixed rate (which was confirmed by Miss 'Ofa although she did not recollect the amounts) of $150 for the paperwork and $20 for services, paid by the Plaintiff, and he did not know about any charges to the Plaintiff beyond that, apart from the Customs fees themselves. Mr Tupou and Miss 'Ofa confirmed that for a time the Defendant had left CFM and had gone to work for the Plaintiff (while remaining General Manager of CFM), helping out with its computer work according to Miss 'Ofa, during which time Mr Tupou thought maybe 5 containers had been cleared for the Plaintiff (or maybe 2 per month).

Mr Hunt said that 3 containers were cleared while the Defendant was helping him, but accepted that others were cleared by CFM, though he could not put a number on that. But he denied that the Defendant had cleared 8 or more containers.

The Defendant's claim for the money he was due for working for the Plaintiff was $10,000, as it had only paid him $500. He also said he had a salary from the Plaintiff, but was not able to produce any documents about that. He believed that approximately 8 containers had been cleared in the time he worked (after he had entered into his arrangement with Mr Nichols) - ie 10 weeks, which even at $850 per container would only come to $6,800, ie much short of his claim for $10,000. The Defendant admitted that he had not made out any invoice to the Plaintiff for that sum and that there was no reason for that. Later in his evidence he said that the claim was for 11 containers at $850, plus other after hours duties.

In light of my view on the defendant's general credibility and reliability as a witness, I was unable to accept his evidence that any money was due by the Plaintiff to him under this head of the counterclaim, particularly as (a) there was evidence that he had taken at least 1 payment of $500 from cash and if other payments had been due to him it is probable that he would have done likewise; (b) he had never submitted any invoice or bill to the Plaintiff for the amounts claimed, and was unable to give a reason for that in evidence; (c) perhaps most forcefully, he had never until the filing of the statement of defence and counterclaim in November 2003 mentioned that the plaintiff owed him money, not even in April/May 2003 when he personally was being pressed by Mr Nichols for payment for the meat sent to Vava'u.

I therefore did not accept that this head of counterclaim was established on the balance of probabilities and it is dismissed.

Counterclaim for alleged damage to Defendant's reputation

Finally the Defendant said that he was a person of good character and he also counterclaimed for $2,000 for damages to his good reputation, which he said had been ruined by the claim, so that the public believes that he is a bad, irresponsible & unreliable person.

The only evidence about this head of the counterclaim was given very briefly by the defendant himself, and in light of my view of his credibility and reliability as a witness I found it unconvincing. However, due to the law on the matter, that is not really relevant.

While a long established form of liability in tort is damage to reputation (Clerk & Lindsell on Torts (16th Ed) Para 1-47), judicial proceedings are absolutely privileged (Clerk & Lindsell Para 21-68 - 70). Therefore as this head of the counterclaim related only to the allegations in the Plaintiff's claim, it cannot succeed and is dismissed.

While the evidence and submissions on this head were scanty, they did not raise that aspect of the law. I found it very surprising that neither Counsel appeared to have taken the trouble to look up the law on this subject before the hearing commenced.

Conclusion

The final result is thus that:

(1) both claims by the Plaintiff are dismissed; and
(2) all 4 counterclaims by the Defendant are also dismissed.

Costs

As neither side has been entirely successful, but each side has been partially successful in their claims, defences and counterclaims respectively, I shall meantime make no order as to costs, but I shall leave it open to the parties to make further submissions on costs if they wish, either orally or in writing.

Delay in giving judgment

This was the first case which I heard on my return to Tonga and I very much regret that it has taken so long to give this written decision. As the parties and

Counsel are aware, I have been very much occupied in my early months here with other litigation, which unfortunately has had to be given priority.

Maka v Kainga

Land Court, Nuku'alofa
Webster CJ and Assessor Blake
LA 1/2005

5 October and 2 November 2005; 4 January 2006

Land law – licence to operate business not a lease – Land Court had no jurisdiction

The plaintiff, who had inherited an allotment in Navosa, Nuku'alofa, as widow of her husband, sought an order evicting the defendant from a building on the allotment which the defendant and her then husband had erected. The plaintiff claimed that it had been orally agreed that the tenancy of the building would continue until she and her late husband wanted the land vacated but the building itself would remain. The defendant claimed that the oral agreement was that the tenancy would continue until such time as she and her husband felt that they had had enough of running their business from it and that point in time had not yet been reached. She agreed that when the building was vacated it would become the property of the plaintiff. As an alternative defence, it was claimed by the defendant that the Land Court had no jurisdiction in the matter because the question to be determined was not a dispute, claim or question of title affecting the plaintiff's land or her interest in it.

Held:

1. Whatever the details of the contract, it was not a lease. It conferred a permission or licence to operate a business in the building constructed by the defendant and her husband at their own expense and a licence to use the building. The agreement did not confer an interest of any kind in land and the Land Court had no jurisdiction to hear and determine the plaintiff's claim.
2. The court also found that the oral agreement was that the defendant and her husband could build a store and could remain there until they had had enough of running their business when the building would become the property of the plaintiff's husband.
3. An alternative submission by the defendant of illegality in terms of section 13 of the Land Act was not accepted, substantially for the reasons given in *Tonga Industries Traders Ltd v Shell Company Pacific Islands Ltd* (LA 2/05, 15 June 2005).

Cases considered:

Kolo v Bank of Tonga (CA unreported, 7 August 1998)

Mangisi v Koloamatangi [1999] TOCA 9 (CA)

Piukala v Fonohema [2002] TOCA 3 (CA)

Tonga Industries Traders Ltd v Shell Co Pacific Islands Ltd (LA 2/05, 15 June 2005)

Statute considered:

Land Act (Cap 132)

Counsel for plaintiff	:	Mr Kaufusi
Counsel for defendant	:	Mr Tu'utafaiva

Expanded written reasons for decision given orally on 3 November 2005

Preliminary

The Plaintiff Mrs Kololia Opra Maka sought to evict the Defendant Mrs Folola Kainga from a building on the allotment Navosa in Nuku'alofa. The Plaintiff inherited that allotment as widow of her husband Lisiate Maka. She says that it was agreed orally that the tenancy of the building was to continue until she and Lisiate Maka wanted the Defendant and her then husband Sione Kainga to vacate the land, when the building the Defendant and her husband had built would remain.

The Defendant says that she and her husband Sione Kainga built the building on the oral agreement that the tenancy would continue until she and her husband felt that they had had enough of running their business from it, when the building would become the property of the Plaintiff. The Defendant said that she had not yet had enough of running the business and so wished the tenancy to continue.

Evidence and submissions

Each party gave evidence on her own behalf. The Plaintiff also submitted documentary productions.

On conclusion of the evidence submissions were made for the parties in support of their cases.

Jurisdiction

As an alternative ground of defence, it was submitted for the Defendant that the question to be determined by the Court is not a dispute, claim or question of title affecting the Plaintiff's land or her interest in it, so that the Land Court has no jurisdiction in the matter.

Section 149(1) of the Land Act (Cap 132), which lays down the jurisdiction of the Land Court, was amended by Act 3 of 1997 by the addition of a further paragraph:

> "149. (1) The Court shall have jurisdiction –
> (a) ...

> (e) to hear and determine any question or amount of damages, loss, compensation, mesne profit, rent or claim in respect of any allotment, lease or sub-lease, permit or interests of any kind in any land."

The question thus arises of the proper characterisation of the claims made by the Plaintiff, to be ascertained on an analysis of the nature of the claims made in the Statement of Claim: *Piukala v Fonohema* [2002] TOCA 3 (CA) (23 July 2002), which case related to an entire town allotment. In *Mangisi v Koloamatangi* [1999] TOCA 9 (CA) (23 July 1999), to which Counsel for the Defendant referred, the Court said:

> "The contract was not and did not involve a lease. It conferred a permission or licence to operate a business in the building constructed by the appellant at her own expense. ...
>
> It is essential to keep in mind that the contract conferred no interest of any kind in land. It conferred on the appellant a licence to use the building. In Tonga, a building may be severed from the land on which it stands, so as not to constitute a fixture: *Kolo v Bank of Tonga* (CA unreported, 7 August 1998)."

The present case, in which the Plaintiff seeks to evict the Defendant from a building on her land, concerns very similar circumstances to the *Mangisi* case. It is clear that in this case also, whatever the details of the contract, it was not a lease. It conferred a permission or licence to operate a business in the building constructed by the Defendant and her husband at their own expense, and a licence to use that building. This Court therefore considers that the agreement between the respective husbands of the Plaintiff and the Defendant did not confer an interest of any kind in land. This Court is bound by the decision of the Court of Appeal in the *Mangisi* case.

This is therefore not a case where the Court is asked to hear and determine a question or a claim in respect of an interest of some kind in land, so the Land Court has no jurisdiction. This case falls to be distinguished from *Piukala v Fonohema*; and from the recent decision of this Court in *Tonga Industries Traders Ltd v Shell Co Pacific Islands Ltd* (LA 2/05, 15 June 2005), where, as well as a building, an interest in land was clearly involved.

Substantive claim

In case I am wrong in that view, and as I have heard all the evidence in the substantive action, I reached a decision on the substantive position also.

The substantive case turns on what the arrangements were between the parties and their respective husbands (both now deceased). For simplicity when I refer to the Plaintiff or the Defendant, that should if relevant be taken to include their deceased husbands also.

The key issue is what was agreed between the parties as to when the tenancy agreement would terminate. The Plaintiff said that the tenancy was to continue until she and her then husband Lisiate Maka wanted the Defendant and her then husband Sione Kainga to vacate the land, when the store the Defendant and her then husband had built would remain. On the other hand the Defendant said that the tenancy would

continue until she and her then husband felt that they had had enough of running the business, when the store would become the property of the Plaintiff.

The background was that the Defendant and her then husband had previously had a store on the allotment Navosa at the corner of Taufa'ahau Road and Laifone Road, owned by the Plaintiff's now deceased husband Lisiate Maka. That store had been burned down in a fire in 1997 and the Defendant and her husband had moved to a store further down Taufa'ahau Road opposite the Nuku'alofa GPS.

Then in 1999 after the Plaintiff and the Defendant had met by chance, the Plaintiff's husband had asked if the Defendant and her then husband could get $2,000 for him to go to Australia for his sister's funeral (which the Plaintiff accepted in evidence). The Defendant's husband had said yes and asked if they could build a store on Navosa, to which Lisiate Maka had agreed. The Defendant and her then husband had built the store later that year, they said at a cost of $30,000.

There is no written agreement and the Plaintiff and Defendant each gave evidence on what the agreement was. The case therefore turns on the respective credibility of these 2 witnesses.

The Defendant came over as much more credible and reliable, occasionally conceding points in her evidence, and her side of the story seems more feasible and probable. I have to say that while the Defendant did seem to get muddled with dates and details in cross-examination, her evidence overall had a ring of truth about it and I found her generally a credible and reliable witness.

On the other hand the Plaintiff did not seem as straightforward and seldom gave a simple answer to a question, particularly in cross-examination. I therefore regret that I was unable to accept her as an entirely credible and reliable witness.

Overall therefore, where there was a conflict of evidence I tended to prefer the evidence of the Defendant.

The Defendant said that the agreement was that she and her husband would build their store on the corner of the allotment and they could remain there as long as they liked until she and her then husband felt that they had had enough, when the store would become the property of the Plaintiff's husband.

On the other hand the Plaintiff said that the agreement was that the Defendant and her husband could continue to occupy the building until the Plaintiff and her then husband wanted her to vacate the land, when the store building by the Defendant and her husband would remain. It has to be said that the Court found that a very implausible and unlikely arrangement for any business person to accept. As the Defendant said in evidence, why would they construct a building if the Plaintiff's husband could evict them at any time?

The Plaintiff claimed that the Defendant and her husband had been asking them to rebuild their store (after it was burned down) but the Plaintiff's husband did not accept that, as he wanted to develop the site. When the Plaintiff's husband eventually accepted, she said he made it clear that it could only be on a temporary basis which could be terminated on short notice.

But the store which the Defendant built is a permanent building, not a temporary structure, and the Court accepted the Defendant's figure of $30,000 for its cost, rather than the $8,000 stated by the Plaintiff. There was no evidence that when the Plaintiff or her husband saw the building, they remonstrated with the Defendant and said it was only to be a temporary structure. The Court therefore inferred that the Plaintiff's

evidence about repeated visits by the Defendant to obtain the tenancy (which the Defendant denied) did not support her claim.

It was important that the Court found that at the meeting when the arrangement was reached (which took place at the invitation of the Plaintiff) the Plaintiff's husband sought and received agreement from the Defendant's husband for an immediate payment to the Plaintiff's husband of $2,000 so that he could go to Australia for the funeral of a close relative. It appeared to the Court that, in light of this payment, the Plaintiff's husband would not have imposed strict conditions on the Defendant and would have been much more likely to allow them tenure on the basis put forward by the Defendant ie as long as they wished, provided the building eventually reverted to the Plaintiff's husband.

In addition the Court found that the Defendant and her husband would have been unlikely to leave the shop they were then operating opposite the Government Primary School at Nuku'alofa for an arrangement which would have been only temporary and indefinite at the whim of the Plaintiff and her husband.

These are the principal reasons on which, on the balance of probabilities, the Court therefore accepted the Defendant's account of the agreement between the parties.

The Court therefore finds that the oral agreement between the Plaintiff's husband and the Defendant and her husband in 1998/1999 was that the Defendant and her husband could build a store on a corner of Navosa 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 rent is now $500 per month.

Illegality

The further alternative submission by the Defendant's Counsel of illegality in terms of section 13 of the Land Act is not accepted, substantially for the reasons given in *Tonga Industries Traders Ltd v Shell Co Pacific Islands Ltd* (LA 2/05, 15 June 2005).

Conclusion

The Land Court has no jurisdiction to hear and determine the Plaintiff's claim to evict the Defendant, which therefore fails and is dismissed with costs to the Defendant as agreed or taxed.

Even if that is wrong, in terms of the agreement for the tenancy the Defendant has not yet had enough of running the business which is conducted from the building which is the subject of the tenancy, so in any event the Plaintiff's claim fails and is dismissed with costs to the Defendant as agreed or taxed.

Pekipaki v Tonga Development Bank anors

Supreme Court, Ha'apai
Webster C J
CV 308/2004

28 and 29 November, 1 December 2005; 4 January 2006

Civil claim – defendant declined loan application – plaintiff must establish case on balance of probabilities – plaintiff failed

The plaintiff claimed that the Tongan Development Bank and some of its officers had led him to believe in late 2003 that if he repaid his existing loan the bank would give him a new loan for the purchase of a fishing boat. He contended that he repaid the loan but the bank refused his new loan thus breaching its agreement with him. He claimed damages of $10,000 for the loss of the fishing boat along with certain other expenses and $2000 for loss of reputation and future profit. The defendants claimed that the plaintiff's decision to clear his loan balance was his decision alone but they admitted declining the plaintiff's loan application in December 2003. They claimed that subsequently the bank did approve a loan of $30,000 to finance handicraft and weaving of mats but after dispersing $10,000 they found that progress reports on the status of the handicraft project was unsatisfactory and further disbursement of the loan funds was cancelled. In issue were the merits of the plaintiff's claim.

Held:

1. The plaintiff's claim was lacking in merit with more of an air of wishful thinking than reality and it was not established.
2. In a civil claim it was up to the plaintiff to establish his case on the balance of probabilities and he could not rely on the defendants to do so for him. That in turn depended on credible and reliable evidence to establish the essential facts of the claim.
3. The plaintiff had the burden of proving both the fact and the amount of damage before he could recover substantial damages. This followed from the general rule that the burden of proving a fact was upon the person who alleged it and not upon him who denied it, so that where a given allegation forms an essential part of a person's case the proof of such fell on him. Even if the defendant failed to deny the allegations of damage or suffered default, the plaintiff must still prove his loss -- **MacGregor on Damages** (15th edition 1988) para 1779.

Case considered:
Makoni v Koloamatangi & Filipe [1990] TLR 50 (PC)

Statute considered:
Evidence Act (Cap 15)

Counsel for plaintiff	:	Mr Kengike
Counsel for defendants	:	Mrs Vaihu

Expanded Written Reasons for Oral Decision given on 2 December 2005

Preliminary

The Plaintiff, Mr Siosaia Pekipaki of 'Uiha, Ha'apai, claimed that the Defendants, the Tonga Development Bank and some of its officers, led him to believe in late 2003 that if he repaid his existing loan the 1st Defendant would give him a loan for the purchase of a fishing boat. He said he did that, but the 1st Defendant then refused his new loan on 3 December 2003, thus breaching its agreement with him. He claimed that the 2nd, 3rd, and 4th Defendants, on behalf of the 1st Defendant, had by their words or conduct wilfully endeavoured to cause him to believe in that state of things, which they knew to be false, and he had believed and acted on that belief. He therefore claimed under section 103 of the Evidence Act that the Defendants were now estopped from averring that such a state of things had not in fact existed. The Plaintiff claimed that he suffered loss and damage in the loss of the fishing boat ($10,000.00); expenses for lifting the boat out of the water and leaving it on land ($139.00 + $391.00); loss of deposit for boat engine ($400.00) and loss of reputation and future profit ($2,000.00).

The Defendants denied the Plaintiff's principal allegations and said that the loan application by him and a co-borrower for $74,550.00 was for fishing and weaving purposes. They said that he was advised of the Bank's policy of requiring existing loan balances to be cleared, which would assist in the overall deliberation of whether to decline or approve an application for a further loan; but the Plaintiff's decision to clear his loan balance was his decision alone. They admitted that the Plaintiff's loan application was declined on 3 December 2003, but said that subsequently, in relation to the same loan application and after discussion with him, the 1st Defendant decided to approve a loan of $30,000.00 to finance handicraft and weaving of mats. After disbursing $10,000.00 or so of that loan, further disbursements awaited a progress report on the status of the handicraft project, which was unsatisfactory and the 1st Defendant decided to cancel further disbursement of the loan funds.

Evidence and submissions

The Plaintiff gave evidence himself (for a whole day); and led evidence from Mr Siaosi Hurrell, Fasi, owner of the fishing boat the Plaintiff wished to buy; his brother Mr Tevita U Pekipaki; and his sister Ms 'Ofa Pekipaki. The Defendants led evidence from Mr Hiva Tatila, the 1st Defendant's Legal Officer; the 2nd Defendant Mr Sailosi Tupou, now Senior Loan Officer in the 1st Defendant's Risk Management

Division; and Mr Simione Sefanaia, the 1st Defendant's Deputy Managing Director. Both sides also filed exhibits.

On conclusion of the evidence oral submissions were made for both sides in support of their cases.

The Plaintiff was evasive in evidence and seldom gave a straight answer to a question in cross-examination. He was also vague about some aspects, especially dates, and changed his evidence when confronted with his own productions. Therefore I regret that I found him not entirely credible and reliable. The evidence of his brother Tevita had the appearance of making it up as he went along to suit the questions; and his sister 'Ofa's evidence was also incredible and unreliable, for similar reasons. In particular they contradicted each other, especially about dates. In any event 'Ofa's evidence was not relevant to much of the claim, except about searching for the boat engine.

Mr Hurrell is now 73 and unfortunately his recollection of details, especially dates, was not good, so in certain respects I could not find him a reliable witness.

By contrast I found the Defendant's witnesses generally credible and reliable, so where there was a conflict of evidence I preferred the evidence for the Defendant.

Grounds of decision

Essentially the documents exhibited by the Plaintiff and the documents exhibited by the Defendants, together with the evidence of the Defendants' witnesses, did not support the Plaintiff's account, which was confused and particularly vague in relation to dates (which were of importance in this case), so I therefore found that Plaintiff had not established his case on the balance of probabilities.

In a civil claim it is up to the Plaintiff to establish his case on the balance of probabilities and he cannot rely on the Defendants to do so for him. That in turn depends on credible and reliable evidence to establish the essential facts of the claim:

> "The plaintiff has the burden of proving both the fact and the amount of damage before he can recover substantial damages. This follows from the general rule that the burden of proving a fact is upon who alleges it and not upon him who denies it, so that where a given allegation forms an essential part of a person's case the proof of such allegation falls on him. Even if the defendant fails to deny the allegations of damage or suffers default, the plaintiff must still prove his loss."
>
> *McGregor on Damages (15th ed 1988) para 1779*

This passage underlines the legal position that it is for a plaintiff to establish his case – and a plaintiff cannot expect a defendant to cooperate and give evidence to assist the plaintiff's case.

Any counsel for a plaintiff must take that as the starting point in a civil claim.

To go into some more detail about the reasons for the Court's decision, it was clear from the evidence that in business terms the Plaintiff had set about the whole process of establishing a fishing business, or a better fishing business, back to front.

He started with the engine and paid a deposit of $400 for that in July 2003 [Exhibit A4]. Then he looked for a boat and settled on Mr Hurrell's fishing boat in August/September 2003. The Plaintiff wanted to get the boat out of water to change

the engine, but Mr Hurrell said 'No' until the 1st Defendant had approved the loan. Mr Hurrell understood that he was phoned by a Bank officer in Ha'apai to say the loan was approved, but given the 1st Defendant's procedure it is extremely unlikely that a Bank officer would tell him that, and Mr Hurrell accepted in evidence that it could have been someone else who phoned him.

It is clear from the invoice and receipt [Exhibit A3] (although the numbering of the Plaintiff's exhibits was confused) that the boat was taken out of the water on 15 September 2003, so the Plaintiff may well have spoken to the Bank in Ha'apai by then. But his own evidence was contradictory, as, if he was told he had to repay his existing loan first, it was even more unlikely that someone from the Bank would say the loan was approved at that stage.

But it seems likely that the Plaintiff did have discussions with the 1st Defendant at Ha'apai at that stage and a loan form may have been completed, as according to Sailosi Tupou by the time the Plaintiff came to see him at Nuku'alofa in September 2003, the Ha'apai Branch already had a loan form for the Plaintiff.

The Plaintiff was obviously very keen to progress with the boat and it is probable he got ahead of himself and with wishful thinking imagined a loan was approved, when it was not. Given the way he did not listen to questions in cross-examination, it would not be surprising if he misunderstood the position about his loan.

It was very clear that the Plaintiff then got the Ha'apai Branch to submit the loan application form [Exhibit D1] to Head Office at the end of November 2003, but without even basic supporting documents such as quotations for the boat and engine and a business plan [Exhibits D2 & D3].

It is clear from the comments by the 1st Defendant's Managing Director on the Plaintiff's letter of complaint dated 5 December 2003 [Exhibit D4] that he considered the handling of the loan request was a complete mess, but that has to be viewed against the undoubted pressure which I inferred that the Plaintiff was placing on the 1st Defendant's officers such as Uesi, and going to other people in the 1st Defendant's Head Office such as Sailosi Tupou.

But I do not find it established that at that stage or any other stage the Plaintiff was told that his loan was approved. His own letter of 5 December 2003 [Exhibit D4] is very important as it was written at the time, immediately after the loan was refused, and so did not contain subsequent afterthoughts. In the letter he was clear that the loan had not been approved because there is no record of his trading store, nor of his fishing, that at $75,000 it was too much, and that the market for his handicrafts was uncertain. That letter does not say that he had been told earlier that the loan had been approved, as he says now. It is also important that the letter does not include the unsustainable allegation that he had been told that if his existing loan was repaid he could get any loan he needed – what it says is that he was told that his existing loan balance of $18,000 "has got to be cleared before my loan for a fishing boat can be released and any other loan I may need", which is quite a different thing: even if that had been said, clearly general words such as that were not intended to bind the 1st Defendant without it having all the details. The letter also refers to the Plaintiff being "very hopeful" about the loan he was seeking, which is inconsistent with the assurance of that loan he now alleges. In the letter the Plaintiff does not say he was told he would get the loan, but he says he was told that the work would take to 2 December, which is not the same as he said in his evidence.

So in terms of section 103 of the Evidence Act, it was not established that any of the Defendants wilfully or by culpable negligence led the Plaintiff to believe in a state of things which did not exist, so the Plaintiff's claim of estoppel cannot succeed. In any event estoppel is a shield and not a sword: *Makoni v Koloamatangi & Filipe* [1990] TLR 50 (PC).

The Plaintiff must have known from previous loans that a loan is not finalised until all the documents are signed. This was to be a loan for a large amount and I found that the 1st Defendant's officers would not lightly say it had been approved.

It is also relevant to the Plaintiff's general credibility that later, when he had the chance to use the loan approved for handicrafts to purchase the boat [Exhibits D10 & D11] after the Bank had subsequently approved that, on 6 February 2004 he informed the Bank [Exhibit D12] that he had changed his mind regarding his situation and did not wish to take up the loan for the fishing boat. The boat was not put back into the water until March 2004 [Exhibit A2], ie after the Plaintiff had in February declined that subsequent offer of loan, at which time he could still have progressed matters if he had taken the loan.

Overall I believe that to a large extent what happened was the result of the Plaintiff rushing to push the loan and misunderstanding the words said to him as approval of the loan (mirrored in cross-examination when he did not listen to the questions). He thought he heard what he wanted to hear. Also the shortcomings in the initial application arose because he was trying to push things along too fast.

So on the balance of probabilities the Plaintiff has not established his claim.

Even if the Plaintiff's claim had been established, his consequent claim for damages was not made out. I am not satisfied that the amount claimed of $10,000 is the right measure for what turned out to be the loss of the chance to buy the fishing boat, especially as, with the way things turned out, the Plaintiff did not pay Mr Hurrell anything for it.

The deposit for the boat engine was clearly made in July 2003 [Exhibit A4], long before any transaction or approach to the 1st Defendant (which on his own pleadings and evidence was in September 2003 at the earliest – while his letter of 5 December [Exhibit D4] refers to him talking to Sailosi Tupou in July 2003, that was not supported by the evidence of the Plaintiff or Sailosi), so it was not established that the deposit was paid in reliance of what any of the Defendants had said to him.

There was no evidence of any loss of reputation of the Plaintiff; and any loss of future profit was not sufficiently established.

But in any event the Plaintiff had the chance to mitigate his loss by accepting the subsequent offer of loan on 12 January for the fishing boat [Exhibit D10] but turned it down on 6 February [Exhibit D12], only 2 months after the initial declinature on 3 December, so he did not mitigate his losses, so would not have been awarded any damages.

I regret to record that in general I found that the Plaintiff's claim in this action was lacking in merit, with more of an air of wishful thinking than reality, and it was not established.

As the Plaintiff's claim has not succeeded it is therefore dismissed, with costs as agreed or taxed to the Defendants.

Taulanga v Kama anors

Supreme Court, Nuku'alofa
Webster CJ
CV 690/2003

26 – 29 April 2005; 29 April 2005; 5 January 2006

Tort – false imprisonment – initial lawful arrest – dismissed

On 9 May 2002 Miss Haitelenisia Hoko of Pea made a complaint to the police about another lady Tapensia Pola who told her son allegedly defamatory comments conveyed to her by the 15 year old plaintiff and her younger sister. The first defendant was the police officer who had the task of investigating the case. He saw the plaintiff on three different occasions in relation to the investigation. The plaintiff brought a claim for false imprisonment arising out of her alleged arrest by the first defendant on the three different occasions she was taken to the police station. She claimed that all three arrests were made without telling her the reason for the arrest at the time of the arrest and she was not taken before a magistrate. She claimed damages of $8,500 for unlawful imprisonment; $2000 for aggravated damages; $500 for assault and unlawful break-in to her home; $1000 for reputation and $8,000 for exemplary damages. The defendants denied the claims and contended that what the first defendant had done was lawful; that the plaintiff had not been arrested on the first two occasions because the police officer was still in the process of investigating the case and on the third occasion she had been lawfully arrested and charged. The court reviewed the relevant law before turning to the evidence.

Held:

1. It was part of the obligations and duties of a police constable to take all steps which appeared to him necessary for keeping the peace, for preventing crime and for protecting property from criminal injury. There was no exhaustive definition of the powers and obligations of the police but they were at least those and they would further include a duty to detect crime and to bring an offender to justice. Although it was the general duty of the police to obtain all possible information regarding criminal offences which have been committed, they have in general no power to compel any person to disclose facts within his or her knowledge or to answer questions put to him or her.
2. When a police officer was trying to discover whether, or by whom, an offence had been committed, he was entitled to question any person, whether suspected or not, from whom he thought useful information may

be obtained. That was so whether or not the person has been taken into custody. All citizens have a duty to help police officers to discover and catch criminals. But apart from arresting him, the police cannot compel any person against his will to come to or remain in a police station.

3. An arrest consisted in the seizure or touching of a person's body with a view to his or her restraint; words may however amount to arrest if, in the circumstances of the case, they were calculated to bring, and do bring, to a person's notice that he or she was under compulsion and he or she thereafter submitted to the compulsion -- *Alderson v Booth* [1969] 2 All ER 271.
4. A false imprisonment was a complete deprivation of liberty for any time, however short, without lawful cause. But an initially lawful arrest did not become unlawful if the arresting person relented or matters were not taken further.
5. The law drew a distinction between an assault and a battery, both forms of trespass to the person. Battery was the intentional and direct application of force to another person. Assault was an act of the defendant which caused to the plaintiff reasonable apprehension of the infliction of a battery on her or him by the defendant. But a necessary ingredient of the tort of trespass to the person was hostility.
6. The criminal offence of housebreaking was not applicable in the civil law and the plaintiff would have to establish a trespass to land or a nuisance to succeed under the unlawful break-in claim, neither of which had been pleaded.
7. After reviewing the evidence, the court held that none of the plaintiff's claims had succeeded and they were accordingly dismissed with costs awarded to the defendants.

Cases considered:

Alderson v Booth [1969] 2 All ER 271 (DC)
Arthur Yates & Co (Property) Ltd v Vegetable Seeds Committee (1975) 72 CLR 37
Collins v Wilcock [1984] 3 All ER 374 (DC)
Dallison v Caffrey [1964] 2 All ER 610 (CA)
Donnelly v Jackman [1970] 1 All ER 987 (QBD)
Fainga'a v Lelea [2005] TOSC 6
Kaufusi v Lasa [1990] Tonga LR 139 (CA)
Ludlow v Burgess [1971] Crim LR 283; 75 Cr App Rep 227 (DC)
R v Inwood [1973] 2 All ER 645 (CA)
R v Vaiangina [1990] Tonga LR 118
Rice v Connolly [1966] 2 All ER 649 (DC)
Shaaban bin Hussien v Chong Fook Kam [I969] 3 All ER 1626 (PC)
Wilson v Pringle [1986] 2 All ER 440,444-6 (CA)

Statute considered:

Police Act (Cap 35)

Counsel for plaintiff : Mr Fifita
Counsel for defendants : Ms Simiki

Reserved Decision given on 5 January 2006

Preliminary

The Plaintiff Miss Finau Taulanga of Pea claims for false imprisonment arising out of her alleged arrest by the 1st Defendant, PC Niua Kama, on 3 different occasions on 18 & 25 June & 27 July 2002 (although she gave different dates for all 3 occasions), when she was aged around 16. The claims arose from what the Plaintiff said were 3 different arrests arising from the same complaint by her near neighbour Miss Haitelenisia Hoko, who was then aged around 18. The Plaintiff said that all 3 arrests were made without telling her the reason for the arrest at the time of arrest, and she was not taken before a Magistrate during the 3 arrests. She said that at all 3 incidents she was not given a choice whether to go to the Police Station or not, but said she submitted to the authority of the Defendants.

The Plaintiff claimed that the actions of the 1st Defendant were oppressive, arbitrary, and unconstitutional; that she suffered damages (including damages to her reputation) and at material times suffered fear, emotional distress, inconvenience and homesickness. She claimed for damages of $8,500 for unlawful imprisonment including fear, distress, homesickness, inconvenience and harassment; $2,000 for aggravated damages; $500 for assault and unlawful break-in to the house; $1,000 for reputation; and $8,000 for exemplary damages.

The Defendants denied those claims and said that what the 1st Defendant did was lawful as in these instances the Plaintiff was not arrested on the first 2 occasions because the 1st Defendant was still in the process of investigating the case, but was lawfully arrested and charged on the third occasion.

Evidence and submissions

The Plaintiff gave evidence herself; and led evidence from her mother Mrs 'Ana Taulanga, Pea; and her sisters Mrs Losana Fifita, Kolofo'ou and Miss Tae Taulanga, Pea.

The Defendants led evidence from PC Ualosi Kailea; the 1st Defendant PC Niua Kama; Ms Haitelenisia Hoko, Pea; Inspector Soane Vaka'uta; PC Siaosi Tu'ivailala; and Det Sgt Lolesio Hausia. The Defendants also produced one exhibit, the Investigation Diary.

After the evidence had been heard over 4 days written submissions were made for both sides in support of their cases. These were received by the Court on 9 and 16 May respectively.

I regret that I found that the Plaintiff and her sister Tae were not entirely credible nor reliable witnesses in giving evidence; and they had admitted to the Police that they had made up the original story about Haitelenisia Hoko, which caused all these incidents. In addition to their evidence being very confused about dates and incidents, so that the whole sequence of events was difficult to get clear, in evidence the Plaintiff admitted lying to the Police about her sister being at Longolongo on the third occasion. Their evidence also contradicted each other and the evidence of their

mother Mrs Taulanga, whose evidence and that of their sister Mrs Losana Fifita I accepted as generally credible and reliable.

I also accepted the evidence of the Defendants' witnesses as generally credible and reliable, so that where there was a conflict of evidence between the Plaintiff and her sister Tae and the evidence for the Defendants I preferred the evidence for the Defendants.

Relevant law

I must begin by stating once again that in a civil claim the legal position is that it is for a plaintiff to establish his or her case on the balance of probabilities, which in turn depends on credible and reliable evidence to establish the essential facts of the claim:

> "The plaintiff has the burden of proving both the fact and the amount of damage before he can recover substantial damages. This follows from the general rule that the burden of proving a fact is upon who alleges it and not upon him who denies it, so that where a given allegation forms an essential part of a person's case the proof of such allegation falls on him. Even if the defendant fails to deny the allegations of damage or suffers default, the plaintiff must still prove his loss."
> *McGregor on Damages (15th ed 1988) para 1779*

Any counsel for a plaintiff must take that as the starting point in a civil claim.

Police duties

The Police Act (Cap 35) in section 20(e)-(g) states:

> "Every police officer shall –
> ....
> (e) prevent the commission of offences and public nuisance;
> (f) detect offenders and bring them to justice;
> (g) apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient grounds exits."

It is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime and for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice. (*Rice v Connolly* [1966] 2 All ER 649,651 (DC); Halsbury's Laws (4th Ed reissue) Vol 11(1), para 320 n3))

Although it is the general duty of the Police to obtain all possible information regarding criminal offences which have been committed, they have in general no power to compel any person to disclose facts within his or her knowledge or to answer questions put to him or her: Halsbury's Laws (4th Ed reissue) Vol 11(1) para 692; (4th Ed) Vol 36, para 320.

However a constable is himself subject to the law and whether or not the conduct of a constable is inconsistent with his acting in the execution of his duty is

very much a matter of degree: eg, touching a person on the shoulder for the purpose of attracting his attention may be an assault in law, but such a trivial interference with a citizen's liberty would not be sufficient to take a constable out of the course of his duties: *Donnelly v Jackman* [1970] 1 All ER 987 (QBD); *Ludlow v Burgess* [1971] Crim LR 283, 75 Cr App Rep 227 (DC); Halsbury's Laws (4th Ed) Vol 36, para 320.

The cardinal principle is that which is officially done must be accordance with the law: *Arthur Yates & Co (Property) Ltd v Vegetable Seeds Committee* (1975) 72 CLR 37 at 66 per Sir John Latham CJ. A constable who detains a person against his will without arresting him is acting outside the course of his duty: *Ludlow v Burgess*; Halsbury's Laws (4th Ed reissue) Vol 11(1), para 320 n3).

For completeness I also mention again what I set out in *R v Vaiangina* [1990] Tonga LR 118 at 119:

> "When a police officer is trying to discover whether, or by whom, an offence has been committed, he is entitled to question any person, whether suspected or not, from whom he thinks useful information may be obtained. This is so whether or not the person has been taken into custody.
>
> All citizens have a duty to help police officers to discover and catch criminals.
>
> But apart from arresting him, the police cannot compel any person against his will to come to or remain in a police station."

What amounts to arrest

I have previously set out the law about arrests in *Fainga'a v Lelea* [2005] TOSC 6. In law arrest consists in the seizure or touching of a person's body with a view to his or her restraint; words may however amount to arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he or she is under compulsion and he or she thereafter submits to the compulsion: *Alderson v Booth* [1969] 2 All ER 271 (DC). In 2 of the classic statements of the law, in *Shaaban bin Hussien v Chong Fook Kam* [1969] 3 All ER 1626 (PC) at 1629, Lord Devlin said in the Privy Council in London:

> "An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when, by words or conduct, he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go."

and in Spicer v Holt [1976] 3 All ER 71,79 (HL), Viscount Dilhorne said:

> "'Arrest' is an ordinary English word. ... Whether or not a person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases."

Whether on the facts of a particular case it has been made clear to a person that he or she is under arrest is a matter of fact: *R v Inwood* [1973] 2 All ER 645 (CA); Halsbury's Laws (4th Ed) Vol 11(1) para 693.

False imprisonment

A false imprisonment is a complete deprivation of liberty for any time, however short, without lawful cause: Clerk & Lindsell on Torts (16th Ed) paras 17-15.

But an initially lawful arrest does not become unlawful if the arresting person relents or matters are not taken further: Clerk & Lindsell on Torts (16th Ed) para 17-42; *Dallison v Caffrey* [1964] 2 All ER 610 (CA) at 616 and 618.

Assault and battery

The law draws a distinction between an assault and a battery, both forms of trespass to the person. Battery is the intentional and direct application of force to another person. Assault is an act of the defendant which causes to the plaintiff reasonable apprehension of the infliction of a battery on her or him by the defendant: Winfield & Jolowicz on Tort (12th Ed) p 54. But a necessary ingredient of the tort of trespass to the person is hostility: *Wilson v Pringle* [1986] 2 All ER 440 (CA) at 444-6.

The least touching of another in anger is battery (Clerk & Lindsell on Torts (16th Ed) para 17-03), but not every deliberate touching of another constitutes battery and the "touching must be proved to be a hostile touching" (*Wilson v Pringle*) (para 17-04).

The law draws a broad exception to allow for the exigencies of everyday life, and among such forms of conduct, long held to be acceptable, is touching a person for the purpose of engaging his or her attention, though of course using no greater degree of physical contact than is reasonably necessary in the circumstances for that purpose: *Collins v Wilcock* [1984] 3 All ER 374 (DC) at 378, referred to in *Wilson v Pringle*. The test is essentially whether a particular type of contact exceeds that degree or type of physical contact "generally acceptable in everyday life": *Collins v Wilcock*. The contact must be offensive outside the accepted usages of daily life: Fleming on The Law of Torts (7th Ed) p 23.

Trespass to land and nuisance

The criminal offence of house-breaking is not applicable in civil law and the Plaintiff would have to establish a trespass to land or a nuisance, neither of which were pleaded.

While the tort of trespass to land (meaning an unjustifiable interference with the possession of land) can occur in many ways, it is clear from the authorities that it normally deals with physical entry by setting foot on the land and that pointless litigation which could yield only nominal damages is discouraged. (Clerk & Lindsell para 23-01 etc; Halsbury's Laws (4th Ed) Vol 45 para 1384; Winfield & Jolowicz p 359-60; Fleming p 36-8) Damage must be proved in nuisance: Clerk & Lindsell para 23-06.

Grounds of decision

General

I believe that the translation of Entry No 10 on 18.6.02 from the Investigation Diary [Defence Exhibit 1], where the Plaintiff and her sister were referred to as Finau and Tae Nikua, gives a picture of the circumstances which were the background to this claim:

> "PC Kama went to Pea and took Tapenisa Pola's statement and brought Tae Nikua and Finau Nikua [the Plaintiff and her sister] to take down their statements. To my understanding about this complaint there is a rift between Tapenisa Pola and the household of Haitelenisia and it was spoken by Tapenisa that her husband Tevita, a minister of Tonga Hou'eiki Church of Pea, had an affair with the mother of Tenisia, Melaia Hoko and Tevita was expelled from being a Minister at Pea. The statement by Tae and Finau Nikua shows that it was them that told the story and found out by Tapenisa. It was said by Tae and Finau that Tenisia went over one day in 1999 and there was a red mark on her neck like love bites and they made jokes about it ever since then. Tae and Finau also said that Telenisia herself told them that one night she was asleep at her house and her uncle Manulea Moala happened to come by and caressed her stomach. There then was a rift between Tapenisa and Tenisia's mother and Tapenisa talked with Tae and Finau and Tae and Finau explained this story to Tapenisa. Tapenisa then told this story to Telenisia on Sunday the 5 of May 2002 during the feast of a wedding held at Longolongo [between the Plaintiff's sister Losana and her Counsel Mr Teisina Fifita] and Telenisia was upset by it so she came and complained. The IO [Investigating Officer] again conversed with Haitelenisia about the story told by Tae and Finau about her uncle and she was very upset and came and complained. The IO talked again with Telenisia about the story that Tae and Finau told about her uncle and she denied it, that she did not tell such a story Tae and Finau but about the red mark on her neck she said yes it is true her neck was red but it was red because she was playing with her younger sister."

From the evidence it was not disputed that Miss Haitelenisia Hoko of Pea made a complaint to the Police on 9 May 2002 about another lady Tapenisa Pola who told her some allegedly defamatory comments conveyed to her by the Plaintiff Finau Taulanga (who became 16 on 25 July 2002) and her younger sister Tae (who was then aged around 15, but had stopped attending school).

The 1st Defendant PC Niua Kama was the Police officer who took over task of investigating the case from PC 422 Kailea around 6 June 2002.

The 1st Defendant saw the Plaintiff on 3 different occasions in relation to the investigation of this matter, on 18 and 25 June and 27 July 2002.

The first incident

The Plaintiff claimed that the 1st Defendant went to her house at Pea on Monday 10 June 2002 and arrested her and her younger sister Tae (who was 15 at the time) and took them to the Central Police Station, Nuku'alofa [CPS], but the Investigation Diary [Defence Exhibit 1], which I accepted as being an accurate record on this point, showed that the date was 18 June 2002. The Plaintiff said that the 1st Defendant was accompanied by another officer (Sgt Hausia) who took no part in her alleged the arrest. She said the arrest was made on or about 2000 hours that evening.

The Plaintiff claimed that her friends knew about that night time arrest and it was very shameful, but there was no evidence from any of her friends about that.

The Plaintiff claimed that she was interrogated by the 1st Defendant at the CPS and was returned home at about 2150 hours the same night. She said that at the arrest she was not told the reason for her arrest, but at the CPS the 1st Defendant told her that she was arrested for defamation of Haitelenisia Hoko. She said she was not asked whether she wanted the assistance of a lawyer or a family member; that she was imprisoned for approximately 2 hours; and that her arrest, detention, and interrogation amounted to false imprisonment, from which she suffered damages. The Plaintiff also said in evidence that she was ill-treated by the Police, but that that was because she was being spoken to angrily.

The 1st Defendant said that he was informed by the complainant, Haitelenisia Hoko, that the Plaintiff and her sister Tae were the people that had started the defamatory remarks, so he approached the Plaintiff and her sister to ask questions about the complaint. The 1st Defendant said it was normal procedure to take in witnesses to the Police Station: while Sgt Hausia said that witnesses can give their statements at the Police Station or at their homes, there are no hard and fast rules as to where statements by witnesses are taken, which I accepted.

The 1st Defendant, whose evidence I accepted on this point, said that, on the first occasion he went to the Plaintiff's house, he asked at the house for the Plaintiff and her sister and they said 'Here we are'. He said that he told the Plaintiff and her sister the reason why he was there - because of a complaint lodged by Haitelenisia - and that he needed to take statements from them about the complaint. Although the Plaintiff denied that the 1st Defendant told her the reason why she was required to take a statement until they got to the CPS, her sister Tae said in evidence that she knew that the reason why they were taken to the Police Station was due to the complaint made by Haitelenisia, so I was unable to accept the Plaintiff's evidence on this point.

The 1st Defendant said in evidence, which again I accepted, that the Plaintiff and her sister were not arrested at the first incident as they were not suspects, they were witnesses in his investigation and he needed to get statements against the complaint made. The Plaintiff and her sister had consented to his request.

The Plaintiff also said in evidence that she was told at the CPS that she would get a witness subpoena to give evidence in court, which was inconsistent with her being arrested as a suspect. In due course she was subpoenaed and gave evidence at the trial in the Magistrates' Court of Tapenisa Pola.

The Plaintiff said that at the time of the first incident on 18 June her mother was not allowed to accompany her to the Police Station, but I found that she was confused on this point, as her mother was only present on one occasion, the second incident, and had not known that the Plaintiff and her sister Tae had been to the CPS on the first occasion. The 1st Defendant said in evidence, which I accepted, that the Plaintiff

had told him that they wanted to wait for their mother, but he told them to come along because there were 2 of them and that they would return them once the work was complete. It was then that the girls agreed and went with the 1st Defendant and Sgt Hausia. In reality, they did not tell their mother about the first incident until just before the hearing of this case.

In relation to the first incident I thus accepted that the Plaintiff and her sister at that stage were not formally suspects in the complaint by Haitelenisia Hoko, as the complaint was made against Tapenisa Pola, so the 1st Defendant had no intention to arrest them at that time, as he viewed them as witnesses and not suspects, as he said in evidence. Against that background in terms of the evidence of what happened there was no arrest, and the Plaintiff was not seized, touched or restrained and the 1st Defendant had clearly asked her and her sister if they could come with him for him to take statements in relation to the complaint made. I therefore found on the balance of probabilities that the Plaintiff was not arrested on the occasion of the first incident.

The Plaintiff's request for her mother to be present was not a sign of refusal to go, but, as submitted for the Defendants, when the 1st Defendant said that there were 2 of them and they would be returned, that was not compulsion but was a further request to which the Plaintiff and her sister agreed.

In addition to not finding that the first incident amounted to an arrest, I was unable to characterise the purpose of taking the Plaintiff and her sister into the CPS as interrogation, so I did not accept the submission for the Plaintiff that it was for the purpose of interrogation, not for a legal purpose, ie to take her before a Magistrate as an arresting officer.

As stated above, false imprisonment is complete deprivation of liberty for any time, however short, without lawful cause. As I found that the Plaintiff was not arrested at the first incident and thus she was not completely deprived of her liberty, I therefore found on the balance of probabilities that her claim of false imprisonment in relation to the first incident was not established. In addition, the 1st Defendant had lawful cause to take her to the CPS, ie to interview her as a witness in relation to Haitelenisia's complaint.

The second incident

The circumstances of the second incident were narrated in Entry 11 of 25.6.02 in the Investigation Diary:

> "PC Kama brought in [or arrested] Tae and Finau Nikua and the complainant so that they can talk about this complaint because it has reached a stage where this case is very complicated due to the unreliability of Tae's and Finau's statements and it is contrary to Haitelenisia's statement. Tae and Finau were further questioned about their story of Manulea Moala stroking Haitelenisia's stomach. It was then understood that their first statement was not true when they said that Telenisia told them that Manulea stroked her stomach. They both explained that they were just making up this story about Manulea and Telenisia due to them being upset with Melaia mother of Telenisia due to Tapenisa Pola telling them that Melaia gossiped about Tae and Finau's mother saying she is a whore."

In relation to the second visit to the Plaintiff's house, the 1st Defendant said that due to some differences in the statements made by the complainant and the Plaintiff he decided to get all parties involved in the matter to give further statements. This resulted in the 1st Defendant going again with Sgt Hausia to the Plaintiff's house and the complainant's house to pick them up. The 1st Defendant said in evidence that when he arrived at the house the Plaintiff's mother was there and he approached her and informed her of the reason why he was there and that he needed to take the girls in for statements in relation to the complaint by Haitelenisia. That was confirmed in evidence by the Plaintiff's mother Mrs 'Ana Taulanga, who said that when the 1st Defendant informed her of the reason of why they wanted her girls she agreed. She said in evidence that she had asked the Police if she could come too but was informed that the car was full, but she agreed that she did not take any other steps to follow the girls, even though she had a car at her house which she could have asked neighbours to drive for her when she needed to be taken somewhere. I accepted that the inference was that this was not an occasion which she felt was important enough to take that option.

The Plaintiff claimed in her Statement of Claim that on or about 1300 hours on 20 June 2002 (again that date was wrong) the 1st Defendant came to her house to arrest her and her sister. She said that she was lying on a couch in the house and the 1st Defendant without saying any word reached in from outside and pulled her hair very suddenly and in a hard way, which I did not accept. The Plaintiff said that the 1st Defendant, in reaching from outside her house with the intention of pulling her hair, and in fact pulling it (which she said was an assault on her), was an act of house breaking.

The Plaintiff, her sister Tae and the 1st Defendant all accepted in evidence that on the second occasion, the 1st Defendant on arrival at the house went to the living room window and saw Tae and asked where was the Plaintiff and was told that she was sleeping on the sofa near the window. The 1st Defendant said in evidence that because that was his second visit, he asked Tae twice to wake up the Plaintiff but she did not, so according to him he playfully tugged at the Plaintiff's hair which woke her up and she said to him 'Why do you always come here?' He said he did it as a joke in a playful manner. The Plaintiff said in evidence that the pull hurt her, but there was no independent evidence to show that her reaction to the pull at the time it was carried out was that of agony or pain and I could not accept the Plaintiff's evidence on that matter.

The Plaintiff said she was surprised and stood up and the 1st Defendant told her to go with him to the CPS. She did not want to go and said she told the 1st Defendant that she would not go as her mother was not at home, but the 1st Defendant told her and her sister just to get into the car and go with him to the CPS. The Plaintiff said they then went to the CPS without her knowing the reason for the alleged arrest, but again I was unable to accept that, especially as it occurred just a week after the first incident.

I accepted that the 1st Defendant told the Plaintiff why they were there again, when her mother walked from the neighbour and the 1st Defendant also told her about wanting to take the girls to the Police Station to take down statements about the complaint and she agreed.

Mrs Taulanga said in evidence that she was never informed of any complaint against the Police for any wrong work they had done from her daughters, and that it

was not until the day before she gave evidence that she found out. I accepted the submission for the Defendants that if that issue of pulling of her hair had been so important to the Plaintiff she would have told her mother the same day it happened, not 2½ years later, at the start of the trial.

The Plaintiff said in evidence that she did not know that the 1st Defendant had spoken to her mother on the second occasion, but that contradicted the evidence of her mother that she had told them why the 1st Defendant was there on the second occasion, and I preferred the evidence of her mother.

The Plaintiff gave conflicting evidence on whether she had had a conversation with the 1st Defendant in the interval since the first incident, but in cross-examination admitted that she had, which I accepted.

The Plaintiff said that in the CPS the 1st Defendant told her to go upstairs to record a statement relating to a defamation complaint by Haitelenisia Hoko and he asked her why she was lying in matters relating to Haitelenisia. She told him that what she recorded before was the truth, but he angrily said to her "You are lying". She said that the 1st Defendant also told her that she forced her sister to lie. The 1st Defendant then recorded the complainant's statement. After recording the complainant's statement the 1st Defendant recorded the Plaintiff's statement.

However the Plaintiff herself in evidence accepted that at the CPS there had been a reconciliation between the parties (as her sister, the 1st Defendant and Sgt Hausia also said in evidence), as she and her sister informed the Police that they had made up the story about the complainant. The Plaintiff also admitted that there had been tears and she and her sister had apologised to Haitelenisia. The 1st Defendant then drove them home, about 1600 hours the same day. Again the Plaintiff said she was told she would be given a witness subpoena.

The Plaintiff claimed that she was full of fear and insecure, as she was taken with her younger sister, that she was adolescent and that she lost her self esteem and dignity, as it was shameful when her peers found out that she was taken by the Police twice to the CPS for defamation, but there was no independent evidence of that and I did not accept it.

In relation to the second incident I accepted that the Plaintiff and her sister at that stage were still not formally suspects in the complaint by Haitelenisia Hoko, and that the 1st Defendant's intention was to get all parties involved in the matter to give further statements, as he obviously needed to clarify this complicated matter. Then after recording the complainant's statement he recorded the Plaintiff's statement. After that had been done, the Plaintiff accepted that the 1st Defendant drove them home, and there was no evidence that they had been charged on that occasion.

It was submitted for the Defendants that because in these 2 instances there were not arrests, it therefore followed that the Plaintiff was not imprisoned and that the Plaintiff's presence at the Central Police Station was voluntary due to the fact that she and her sister consented to it at the first instance and the Plaintiff's mother consented in the second instance. I accepted that submission.

Indeed the 1st Defendant said he thought the matter would end there, but that had not been the case, as the complainant said in evidence that the problem still continued and she contacted the 1st Defendant and complained again that the Plaintiff was still spreading around defamatory comments about her.

Again, against that background, at the second incident there was no arrest in terms of the evidence of what happened, as the Plaintiff was again not seized, touched

or restrained. On the second occasion the evidence showed that the 1st Defendant had informed the Plaintiff's mother of the reason why he wanted her girls to go with the Police and she had agreed. I therefore found on the balance of probabilities that the Plaintiff was again not arrested on the occasion of the second incident.

Once more, in addition to not finding that the second incident amounted to an arrest, I was unable to characterise the purpose of taking the Plaintiff and her sister into the CPS as interrogation, nor to make her admit that she had made up the defamatory statement, even although as events turned out at the CPS, having made the admission she was told to apologise to Haitelenisia, which she did. So again I did not accept the submission for the Plaintiff that it was for the purpose of interrogation or forcing an admission from her, not for a legal purpose, ie to take her before a Magistrate as an arresting officer.

It was submitted for the Plaintiff that the Defendants' Investigation Diary [Defence Exhibit 1] at No 11 on 25 June used the Tongan word "puke", which properly means "arrest", rather than "brought in" as in the English translation of that entry tendered by the Defendants; and that that contrasted to No 10 on 18 June, which used the Tongan word '"omai", which correctly means "brought in". I accepted all that, and that Entry No 11 recorded the Plaintiff as having been arrested, however that was only 1 element in all the other evidence of what happened, and against all that other evidence I did not find No 11 conclusive in establishing that the Plaintiff was arrested on that occasion, as the overwhelming evidence was that at that stage she was still being regarded as a witness and not a suspect.

As I found that the Plaintiff was not arrested at the second incident, thus again she was not completely deprived of her liberty, and again I therefore found on the balance of probabilities that her claim of false imprisonment in relation to the second incident was not established. In addition, once more the 1st Defendant had lawful cause to take her to the CPS, ie to interview her again as a witness in relation to Haitelenisia's complaint for some much-needed clarification.

In relation to the incident when the 1st Defendant put his hand through the louvres and pulled the Plaintiff's hair, she also claimed damages for assault and house-breaking. It is important that in a civil case these have to be judged according to the civil law of torts, not the criminal law.

In relation to the claim of assault, it is clear that what was being claimed by the Plaintiff was battery rather than assault, as the 1st Defendant actually touched her and there was no evidence that she was caused reasonable apprehension of the infliction of a battery on her. Battery was not pleaded. But in any event the Plaintiff failed to establish on the balance of probabilities the necessary element of hostility by the 1st Defendant, who I accepted pulled her hair playfully, and in addition it was not established that the particular type of contact was offensive outside the accepted usages of everyday life. It may have been a trivial interference with the Plaintiff's liberty, but that did not take it outside the course of the 1st Defendant's duty.

In relation to the alleged house-breaking, as mentioned the criminal offence of house-breaking is not applicable in civil law and the Plaintiff would have to establish a trespass to land or a nuisance, neither of which were pleaded. It was clear from the evidence that the 1st Defendant did not set foot inside the house and this was another trivial aspect of the incident. I did not find on the balance of probabilities that it amounted to trespass to land or nuisance, and further no damage to the Plaintiff was established.

The third incident

The circumstances of the third incident were narrated in Entries 12 & 13 of 27.7.02 in the Investigation Diary:

> "PC Tu'ivailala, PC Kama arrested Finau Nikua in order to complete the work.
>
> PC Kama released Finau Nikua on the completion of the R/lnterview, charge, confess and fingerprinting and summons will be later served because the PI booklet is busy and plus Finau has a tooth ache and she can't stand the pain she will go to the hospital and her summons can be given later."

In the Statement of Claim the Plaintiff said that on or about 21 August 2003 (again an incorrect date) at 0900 Hrs the 1st Defendant arrested her at Vaha'akolo Road, Kolofo'ou, Nuku'alofa on her way back from the store. She said that she did not want to go to the CPS; and that she asked the 1st Defendant that she wanted to stop at her elder sister's house (where she was residing at the time) so that her elder sister Losana Fifita would know where she was, but the 1st Defendant disagreed and said they would go straight to the CPS. The Plaintiff said that from fear of being taken to the CPS she told the 1st Defendant that her younger sister (who she said was also sought to be arrested for the same offence) was at Losana's house: the 1st Defendant had then agreed and stopped there. The Plaintiff admitted in evidence that she lied in saying that, but said she was being "enslaved" by the 1st Defendant's arrests (which in the circumstances I did not accept).

The Plaintiff said that she ran into the house and told her sister Losana that she did not want to go to the CPS, as the 1st Defendant seemed to enjoy arresting her and he would do that until she said she committed the crime that she did not. She said that Losana came to the lounge and saw the 1st Defendant reaching to the curtain and he moved it aside, peeping into the house. Losana asked the 1st Defendant what he was doing peeping into the house, and also asked him to wait for Mr Teisina Fifita, who would be home soon to help the Plaintiff.

The Plaintiff claimed that the 1st Defendant said he was arresting her and his job was to take away anyone arrested, without any referral to anyone or listening to anyone. She claimed that the 1st Defendant said he was not waiting for that "eat shit" Teisina. She said that on that occasion the 1st Defendant was accompanied by another Police officer who played no part in the arrest and seemed to dislike the 1st Defendant's action.

She said that Losana finally accompanied her with the 1st Defendant and the other officer to the CPS, where the 1st Defendant recorded her same statement again. She said that she was returned to Losana's house at about 1200 hrs.

The Plaintiff claimed she felt that if the 1st Defendant pressed her one more time (by means of arrest) she could not stand the pressure and she would tell the 1st Defendant what he wanted her to tell him, just to avoid being arrested again. She said he did not want her to be assisted by a lawyer.

The Plaintiff claimed that this arrest also was unlawful and amounted to false imprisonment. She said that again the 1st Defendant's action was arbitrary, oppressive, and unconstitutional; and she suffered damages and inconvenience, fear,

and homesickness. She claimed that she was entitled to aggravated and exemplary damages.

I regret that I was able to accept only part of the Plaintiff's narration of the third incident and found that it occurred about a month later, on 27 July. I found that the 1st Defendant met the Plaintiff on Vaha'akolo Road in Nuku'alofa, which was the only time he carried out an arrest of the Plaintiff, as another complaint had been laid by the complainant with the 1st Defendant. This time the 1st Defendant was with another Police Officer, PC Tu'ivailala. The 1st Defendant and PC Tu'ivailala said in evidence that the 1st Defendant arrested the Plaintiff on the offence of defamation against the complainant Haitelenisia Hoko. It was the intention of the 1st Defendant to take the Plaintiff straight to the Police Station, but the Plaintiff asked the 1st Defendant to stop at her brother-in-law Teisina Fifita's house to get her sister Tae, which the 1st Defendant did.

When the Plaintiff was slow in returning the 1st Defendant went to Mr Fifita's house to get her. There was a conflict in evidence as to whether the 1st Defendant touched the curtain of the house or not, according to the Plaintiff and Losana Fifita he did, but according to the 1st Defendant he was just outside on the verandah and looked into the house and saw the Plaintiff and Losana. The Plaintiff and her witnesses said that the 1st Defendant went into the garage which was part of the house, put in his hand and moved the curtain then finally swore at the place. According to the 1st Defendant there was some disagreement between himself and Losana as to his taking the Plaintiff to the Police Station and he explained to Losana that there was a complaint against the Plaintiff. However as I found that the Plaintiff was lawfully arrested that issue was not material in the case.

The 1st Defendant strongly denied that he had sworn at or about Mr Teisina Fifita, Losana's husband, which both the Plaintiff and Losana claimed he had done, but again this is a case by the Plaintiff Finau Taulanga and not by Mr Teisina Fifita, so that issue is not relevant in this case.

The 1st Defendant then allowed Losana to accompany the Plaintiff, which it was submitted for the Defendants was an act by him which portrayed humane consideration of the Plaintiff. I accepted that the 1st Defendant explained to Losana the previous 2 incidents in which the Plaintiff was taken in to make statements and this time she was to be charged; and that it was the 1st Defendant who suggested that Losana should accompany her sister to the CPS.

As stated in evidence by the Plaintiff, Losana and the 1st Defendant, on their way to the CPS they met Mr Teisina Fifita. It was not disputed that they stopped when they met him and the 1st Defendant got out and explained the situation to Mr Fifita, in that they were going with the Plaintiff to the CPS due to complaints against her by Haitelenisia, and Mr Fifita agreed. It was also not disputed that at that point Losana also left the Police vehicle and went with her husband.

It was submitted for the Defendants that it was clear from that evidence that at that point the Plaintiff's sister Losana, and her husband and lawyer Mr Teisina Fifita, did not care much about her welfare or protection against the Police, as they both allowed the Police to take the Plaintiff without their company. It was therefore submitted for the Defendants that Mr and Mrs Fifita either trusted the Police in full, or they did not see the need to provide any support to the Plaintiff, because she did not show any need for either moral support or assistance. Losana said in evidence that the Plaintiff during that time was living with them and it was submitted for the

Defendants that they both failed as guardians of the Plaintiff to offer any kind of assistance to her – which was not offered or given because there was no need for it. While I could not accept these submissions in their entirety, I did conclude from the evidence that at that time neither Mr nor Mrs Fifita had any grounds for thinking that there was any question of wrongful arrest or false imprisonment, or they would have gone with the Plaintiff to the Police Station, even if Mr Fifita had an appointment with other clients at his office.

The 1st Defendant then took the Plaintiff to the CPS, recorded a record of interview and so-called confession and charged her with the offence of defamation; and her fingerprints were taken. These documents were not produced in Court except for the Investigation Diary [Defence Exhibit 1], which recorded that such work had been done. The 1st Defendant said, and I accepted, that after working on the documents relating to the Plaintiff he than passed them on to the Prosecution Branch. Insp Soane Vaka'uta, who was the Police Prosecutor at the time, said in evidence that after investigation of a case the CID Branch passes the file to the Head of CID and then to the Prosecution Branch. All CID files passed on to Prosecution were registered in their Movement File and a check was made as to whether the file had enough evidence to be taken to Court or not. Insp Vaka'uta said that the file charging the Plaintiff was not registered in the File Movement Register, which could mean that there was insufficient evidence. However he recalled prosecuting a case against Tapenisa Pola.

The Plaintiff claimed that she was frightened, but, if she was, that is an understandable reaction to a lawful arrest and does not make the arrest unlawful.

The Plaintiff claimed that on the third occasion her arrest had no basis nor justification. As mentioned earlier, the Plaintiff ultimately gave evidence in the Magistrates' Court in the criminal case against Tapenisa, but the Police did not proceed further with the charge against the Plaintiff. However that does not make the original arrest unlawful.

On this third occasion I found that the 1st Defendant did arrest the Plaintiff, but in terms of the law as set out in Fainga'a it was a lawful arrest, so there was no false imprisonment of the Plaintiff, even though the complaint was not subsequently proceeded with. Because the arrest was made on lawful grounds, the 1st Defendant committed no civil wrong in the course of making the arrest in pulling aside the curtain of the house when the Plaintiff was delaying in going with him to the CPS.

It was also clear from the evidence that the Plaintiff and the 1st Defendant met after the claim was served on the 1st Defendant. The 1st Defendant said in evidence that the Plaintiff told him that he was not to worry about the case because she did not want it to go ahead, but it was Mr Teisina Fifita who was insisting. When this was put to the Plaintiff she did not deny that, but said that she told the 1st Defendant that she would pursue the case because Mr Fifita had been burdened with preparing the claim and was bearing all the costs for the claim and not her.

In addition it was submitted for the Defendants that it was surprising that the Plaintiff's sister Tae was not joined as a Plaintiff, because in the first 2 incidents she was also taken in by the Police: but she said in evidence that she was not bringing any claims against the 1st Defendant, so the presumption was that she was happy and was not treated in any way contrary to law. It was submitted for the Defendants that her not being part of this claim against the 1st Defendant was a strong indication that

neither the Plaintiff nor her sister suffered any pain, inconvenience, or damage to reputation as alleged in the statement of claim.

While these 2 aspects did not contribute to the reasons for the Court's decision in this case, they did raise questions about the motives for bringing these claims.

Conclusion

As none of the Plaintiff's claims have succeeded they are therefore dismissed, with costs as agreed or taxed to the Defendants.

I regret to record that in general I found that the Plaintiff's claims in this action were lacking in merit and they were not established. I must point out that it is important to apply the law to the facts of the case, not the other way round by trying to fit the facts to the law. I regret that I consider that there must have been inadequate consideration of the law in relation to the facts of the case. I must emphasise yet again that the responsibility lies with Counsel, not the Court, to find out the law applicable to the facts claimed. None of the law set out above is complex, nor was it difficult to find, as it comes from standard text books and the universally accessible All England Reports.

I noted that the submissions for the Plaintiff seemed to place emphasis on why the Court should award aggravated damages and exemplary damages, whereas it would have been more appropriate if they had concentrated on whether the basic claim had succeeded. In addition the amounts claimed and the submissions made in their support bear no relationship to reality and simply serve to confuse: cf *Kaufusi v Lasa* [1990] Tonga LR 139 (CA).

I also have to add that even if the Plaintiff's claims had been established, given that she had been one of the authors of the defamation in question, any damages would have been absolutely minimal. It is unfortunate that 4 days of the hard-pressed time of the Supreme Court was taken up with these claims.

I very much regret the delay in issuing this decision due to various pressures on the time of the Court and other factors beyond its control.

Kingdom of Tonga anor v Allianz Australia Insurance Ltd

Supreme Court, Nuku'alofa
Ford J
CV 723/2003

25 May, 8 July, 19 July, 27 October, 30 October, 1 November, 23 November, 29 November, 21 December 2005 and 1 February 2006; 17 February 2006

Costs – reasonably necessary for attainment of justice – hourly rate $400 allowed in full

The defendant was successful in a claim under a marine insurance policy where the issue before the court had been whether the plaintiffs' vessel was insured at the time it was damaged in a cyclone. The three-day hearing was confined to the issue of liability only. Issues then arose over the defendant's entitlement to costs and disbursements. The plaintiffs challenged the defendant's New Zealand counsel's charge out rate of TOP400 per hour which was higher than the amount allowed on taxation to Tongan senior counsel and submitted that approval should have been given to that rate prior to the commencement of the trial. There was also a challenge to the amount claimed for witnesses' travel expenses and to a claim for fees incurred by the defendant's Australian solicitors.

Held:

1. The overriding consideration under Order 29 Rule 4 (1)(ii) of the Supreme Court Rules 1991 (O.47 Rule 2(1) of the Supreme Court Rules 2007) was that the costs, charges and expenses to be allowed to a party in civil proceedings were those that were reasonably necessary or proper for the attainment of justice or for defending the rights of the defendant. There was no element of surprise or prejudice associated with the hourly rate claim of TOP400 and it was allowed.
2. The claim for overseas witnesses' travel expenses and other disbursements was allowed in full.
3. Overseas solicitor's costs are recoverable on taxation in Tonga if the solicitors were effectively acting as agents for the lawyer on the record who, in turn, was admitted and certified to practise law in Tonga.

Cases considered:

Gough Finance Ltd v Westpac Bank of Tonga [2005] TOSC 29
Taimi o Tonga Ruling on Costs [2004] TOSC 22

Yanuca Island Ltd v Markham (Court of Appeal, Fiji, Civil Appeal No AB U0092, 11 November 2005)

Statutes considered:
Law Practitioners Act 1989
Legal Practitioners Act 1997 (Fiji)

Rules considered:
Supreme Court Rules 1991

Counsel for plaintiff	:	Mr Stanton and Mr Afeaki
Counsel for defendant	:	Dr Harrison QC

Ruling on costs

In a judgment dated 25 February 2005, following a three-day hearing, I held that the plaintiffs had failed in their substantive claim and I awarded costs to the defendant to be agreed or taxed. An appeal was then foreshadowed but that was withdrawn on 6 May 2005. There was no agreement reached as to costs.

The defendant's bill of costs was filed for taxation on 25 May 2005 accompanied by a helpful memorandum from counsel. Leave was sought and granted for the bill of costs to be filed out of time. A number of issues arose in connection with the taxation exercise. I do not intend to refer to them all in this ruling but I acknowledge that the matter has taken longer to dispose of than the court would otherwise have wished. The delay is regretted.

The relevant facts in the substantive action were that the plaintiffs' vessel, the M V "Olovaha", ran aground in Tonga and was seriously damaged during a cyclone on the night of 15 January 2003. The issue before the court was whether, at the time it sustained the damage, the vessel was insured with the Sydney-based defendant underwriters. The plaintiff claimed damages in the sum of T$1,745,327.00 but the hearing was, by agreement, confined to liability issues.

The bill of costs submitted by counsel for the defendant was for a total amount of T$72,922.77 made up as follows:

Counsel's fees -- 113 hours 45 minutes @ T$400 per hour: $45,500.00
Australian solicitor's fees (Withnell Hetherington) -- 39.6 hours @ T$300 per hour: $11,880.00
Disbursements:

Defendant's counsel	:	$2476.66
Withnell Hetherington	:	$2698.21
Witnesses' travel disbursements	:	$10,367.80
Total:		T$72,922.67

The fee claimed on taxation by Dr Harrison of T$40,000.00 can be compared to the actual fee he charged out to the defendant which is shown in two invoices before the court as NZ$74,000.00 together with disbursements. The bill of costs submitted for taxation is supported by computer printouts and detailed costs breakdowns all of which, for taxation purposes, I accept.

The first challenge made by the plaintiffs is to Dr Harrison's charge out rate of T$400 per hour which, they note, is higher than the usual scale for senior counsel in Tonga. Plaintiffs' counsel acknowledges that Practice Direction No. 2 of 1992 specifically allows a Judge "on special cause shown" to increase the scale rates to such amount as he sees fit but it was submitted that application for such increase should have been made prior to the commencement of the trial. Reliance in this regard was made on the following statement from the judgment of Ward CJ in the *Lali Media* case - *Taimi o Tonga Ruling on Costs* [2004] TOSC 22, 24:

> "Counsel are reminded that, if they wish to claim their costs following a successful outcome at other than the usual rates in Tonga, application should be made to the court to certify it is an appropriate case. Such application should normally be made before the case is heard and failure to do so may result in the costs being awarded on the normal scale for Tonga."

In response, counsel for the defendant stressed that the Chief Justice had used the word "normally" and he submitted that there was no rule of law covering the timing of an application to certify and that, in any event, the overall consideration must be the justice of the particular case.

I accept the submissions advanced on this issue by counsel for the defendant subject, of course, to the overriding consideration spelt out in Order 29 rule 4(1)(ii) of the Supreme Court Rules 1991 that the costs, charges and expenses to be allowed to a party in civil proceedings are those that are reasonably necessary or proper for the attainment of justice or for defending the rights of the defendant. There was no element of surprise or prejudice associated with the submission of Dr Harrison's bill of costs. The plaintiffs were keenly aware from the very outset of the proceedings that Dr Harrison was acting and that he would be appearing at the trial on behalf of the defendant.

At the time of the *Lali Media* hearing in March 2003, Dr Harrison, who appeared for the plaintiff in that litigation, had a charge out rate in New Zealand of NZ$450 per hour. Upon taxation, the then Chief Justice held that it was reasonable to allow Dr Harrison's counsel fee for the hearing in Tonga in the amount of T$350 per hour.

In the present case, Dr Harrison advised the court that his current charge out rate in New Zealand varies, according to the circumstances, between NZ$450 and NZ$550 per hour. His claim for taxation purposes is based on an hourly rate of T$400 which, at the exchange rate operating at the date of his submissions, equated to NZ$283 per hour. It is not altogether clear, but if the NZ$74,000.00 figure which Dr Harrison actually charged out to the defendants is in respect of the same 113.75 hours claimed in the bill for taxation, then counsel's actual charge out rate in the instant case would have been NZ$650 per hour. The discount counsel has made in the bill tended for taxation, therefore, is considerable.

In the particular circumstances of this case, I accept the reasonableness of the T$400 per hour figure in relation to Dr Harrison's fees. Although my determination of the substantive action, in the end, involved relatively straightforward issues that outcome was by no means always obvious. Defence counsel in his submissions on costs, referred to the plaintiffs' "confusing and discursive approach to pleading in a number of different documents" and to the "unnecessarily complicated scope of the

plaintiffs' oral and documentary evidence which lengthened the trial and added substantially to the defendant's preparation time." Those observations do not overstate the position. As defence counsel summed it up:

> "The defendant was put to wholly unnecessary expense because the plaintiffs' chose to make a simple case immensely complicated and prolonged."

130 I accept that in all the circumstances the defendant acted reasonably and properly in instructing senior counsel from overseas to act on its behalf. For his part, Dr Harrison has made an appropriate and significant reduction for taxation purposes not only in his charge out rate but also in relation to the actual bill of costs he submitted to the defendant. I consider those concessions to be fair and appropriate and I have no difficulty in concluding that the claim in respect of Dr Harrison's fee should be allowed in full.

I turn now to disbursements. The plaintiffs' opposition to the defendant's claim to disbursements is expressed in tentative terms. Counsel's opposition appears to be confined to witnesses' travel expenses. In response, Dr Harrison submitted:

140 > "If a Tongan plaintiff chooses to sue an overseas entity in the courts of Tonga, about matters largely transacted overseas, it is inevitable that witnesses will have to travel Tonga to give evidence in order that the defendant can adequately prosecute its defence. If anything, payment by the unsuccessful party of the travelling expenses of witnesses, as a disbursement legitimately incurred by the successful party, is an *a fortiore* case."

I do not see any substance in the plaintiffs' objection to the claim for witnesses' travel expenses. They, and the claim for other disbursements, are allowed in full.

Finally, there are the fees incurred by the defendant's Australian solicitors,
150 Withnell Hetherington. This item has proved to be the most contentious claim. Plaintiffs' counsel told the Court that he had been instructed to oppose the claim in its entirety.

The plaintiffs' initial objection was twofold. First, they submitted that many of the Withnell Hetherington attendances appear to be "client/counsel costs as opposed to party/party attendances." Secondly, they submitted, without adducing any evidence on the subject, that "as large International underwriters" the defendant would "have in-house legal experts" and therefore "only backup advice from outsourced legal counsel" would be required.

In response, the defendant denied that "client/counsel costs" were being
160 claimed. Dr Harrison highlighted the fact that the actual costs charged out to the defendant by Withnell Hetherington were substantially higher than those claimed upon taxation. In relation to the plaintiffs' second objection, Dr Harrison told the court that so far as he was aware, the defendant did not have any in-house legal experts. He went on to say that even if it did, it would still have been entitled to consult an Australian firm of solicitors after being served with the writ.

Withnell Hetherington's invoices to the defendant are before the court. They detail with precision all the attendances and time units involved and include particulars of hourly rates and the respective authors. Excluding disbursements, the

invoices total A$13,860.00 which, using the conversion rate applicable at the date of counsel's submissions, equated to T$20,097.00. The amount claimed for the Australian solicitors fees upon taxation is T$11,880.00 which is a considerable discount.

I accept that it was appropriate for the Australian solicitors to be instructed and, in the absence of any challenge to the specific attendances detailed in the various invoices, I accept that the amount claimed is reasonable.

That is not the end of the matter, however. Whilst Dr Harrison holds a current practising certificate under the Law Practitioners Act 1989, the Australian solicitors are not licensed to practise law in the Kingdom. Section 12 of the Law Practitioners Act 1989 provides that only a "law practitioner" is entitled to sue for or recover costs and the term "law practitioner" is defined in sections 2 and 3 of the Act as a person who is registered on the Role of Law Practitioners in the Kingdom of Tonga and holds a valid practising certificate. Section 10 of the Act makes it an offence to practise as a law practitioner without holding a valid practising certificate.

Counsel's attention was drawn to the recent decision of this court in *Gough Finance Ltd v Westpac Bank of Tonga* [2005] TOSC 29, where it was held that overseas based solicitors who were not licensed to practise law in Tonga could not recover costs upon taxation in this country. A similar conclusion was reached more recently by the Fiji Court of Appeal in *Yanuca Island Ltd v Markham* (unreported) Civil Appeal No. AB U0092 (judgment dated 11 November 2005).

In *Yanuca* the relevant legislation -- section 52 of the (Fiji) Legal Practitioners Act No.19 of 1997, stated that "a person shall not, unless that person is the holder of a current practising certificate, practice or act as a legal practitioner of Fiji." The trial Judge had upheld a claim for costs by the plaintiff's Sydney-based solicitors upon the grounds that, although they had not held current Fiji practising certificates, they had, at the material time, been acting as agents for the Fiji lawyers on the record. The Court of Appeal upheld that approach.

Dr Harrison sought to place a different interpretation on section 12 of the Law Practitioners Act than the literal meaning applied in *Gough* but I have not been persuaded that the approach adopted by the court in that case was wrong. However, the court in *Gough* did go on to say:

> "The relevant question to be considered at any taxation hearing, therefore, is whether the law practitioner whose name is on the bill of costs i.e. the person who will receive the payment, is admitted and certified to practise in Tonga."

In the present case, I am prepared to accept that in relation to the proportion of the Sydney solicitor's costs claimed on taxation, the firm was effectively acting as agents for the lawyer on the record who, in turn, was admitted and certified to practise law in Tonga. In terms of the above quotation from *Gough*, the law practitioner whose name appears on the bill of costs submitted for taxation is Dr Harrison. In these circumstances, I am satisfied that the case can be distinguished on the facts from *Gough*. I, therefore, uphold the claim in respect of the Australian solicitor's fees.

In summary, the defendant has succeeded and is awarded costs and disbursements in terms of the amounts claimed upon taxation. The total of the award is certified in the sum of T$72,922.67.

R v Amanoni anor

Supreme Court, Nuku'alofa
Webster C J
CR 239-240/04

22 February 2006

Criminal procedure – jury heard prejudicial evidence – jury discharged – new trial ordered

In the course of a criminal trial before a jury, a witness had stated in answer to a question from the prosecution in re-examination that the second accused had committed offences before and he used cannabis. The court issued a brief Ruling.

Held:

1. There must be a fair trial, which meant that an accused was to be judged on the evidence brought before the court, not on his record or bad character, and not on someone's say-so evidence. If there was a reference to either of those matters it may be prejudicial to the accused. Prejudicial means evidence to which the jury may attach undue weight and regard it as probative of the crime with which the accused was charged.
2. The case was different from one where the evidence had been passed over. The whole case had effectively stopped and the matter obviously came to the attention of the jury. It could not just be passed over. There had been serious prejudice to both accused and the trial had been rendered unfair. The jury was discharged and a new trial ordered.

Cases considered:

R v Blackford [1989] 89 Cr App R 239 (CA)
R v Coughlan & Young 63 Cr App R 33 (CA)
R v Palin [1969] 3 All ER 689, 53 Cr App R 535 (CA)
R v Weaver & Weaver [1967] 1 All ER 277, 51 Cr App R 77,83 (CA)
Scott v R [1989] 2 All ER 305 (PC)

Edited Transcript of Ruling by Hon Chief Justice Discharging the Jury

This brief ruling arises from what the witness said in her last answer. The key points of what the witness said were that:

- the 2nd Accused has committed offences before;

- he uses this substance (and whether or not she pointed to the exhibits, by inference she was meaning cannabis/marijuana/Indian Hemp).

To start at the beginning, there must be a fair trial, which means that an accused is to be judged on the evidence brought before the Court, not on his record or bad character, and not on someone's say-so evidence. That is what the Jury is told at start of the trial.

If there is a reference to either of these aspects, it may be prejudicial to the accused. By prejudicial I mean evidence to which the Jury may attach undue weight and regard it as probative of the crime with which the accused is charged: *Scott v R* [1989] 2 All ER 305 (PC), at 311. If that occurs, the trial is likely to become unfair.

Unfortunately these matters have come out in this case. Archbold 2005 para 8-203 says what the Judge has to do in such circumstances. He has to use his discretion to consider discharging the Jury. See also Halsbury's Laws (4th Ed Reissue) Vol 11(2) Para 1022. The discretion has to be exercised on the particular facts of the case: *R v Weaver & Weaver* [1967] 1 All ER 277; 51 Cr App R 77 (CA), at 83, *R v Palin* [1969] 3 All ER 689; 53 Cr App R 535 (CA).

In *Weaver* it was made clear that that depends on nature of what has been admitted into evidence, the circumstances in which it has been admitted and what, in the light of the circumstances of the case as a whole, is the correct course. Nowadays it is very far from being the rule that in every case where something of this nature gets into evidence through inadvertence the Jury must be discharged.

Turning to this case, in which I have now heard submissions from Counsel on this matter:

1. The nature of what has been admitted into evidence.

There were not 1, but 2 serious matters, ie previous offences and the use of cannabis. It is clear from cases such as *R v Blackford* [1989] 89 Cr App R 239 (CA) (also a case involving cannabis) that admission of evidence such as this is regarded seriously. In that case the judge did not discharge the jury, but on appeal was criticised for not doing so.

2. The circumstances in which the evidence was admitted.

This evidence did not slip out in answer to a question from the defence, it arose from a question from the prosecution in re-examination. The question was not about the witness' fear, the question was a direct question "What do you mean Semi Vete Jr does not have a good record in Tonga?"

The case referred to by Crown Counsel from Archbold 8-204, *R v Coughlan & Young* 63 Cr App R 33 (CA), was one where the evidence was passed over without mention until the matter was raised in the absence of the jury. It was quite different in this case, where the whole case effectively stopped and the matter obviously came to the attention of the Jury. It cannot just be passed over.

3. The whole circumstances of the case.

So far the trial has lasted 3 weeks and it will be a great pity if the Jury has to be discharged. But the genie is out of the bottle, as it were, and cannot be put back. I am not satisfied that even a strong direction to the Jury could restore the position.

Overall I therefore regret that my view is that there has been serious prejudice to both accused and so this trial has been rendered unfair.

It is therefore my duty to discharge the Jury and order a re-trial.

AJ & E Ltd v FC Nichols (Wholesales) Ltd

Court of Appeal, Nuku'alofa
Webster CJ
AC 8/2005

23 February 2006

Practice and procedure – leave to appeal out of time – refused
Practice and procedure – stay of execution application – refused

This was an application for leave to appeal out of time against the decision of the Supreme Court dated 10 June 2005. An appeal must be lodged with the Registrar within 42 days after the date of the judgment (by 22 July 2005). This application for leave to appeal out to time was not lodged until 29 November 2005, over five months after the date of judgment. It was accompanied by an affidavit by one of the second defendant's directors and a draft Notice of Appeal. Although such an application could be heard ex parte a note of opposition to the application was filed on 30 January 2006 and the application was heard inter parties in chambers on 10 February 2006. Further, the second defendant applied for a stay of execution.

Held:

1. The basic principle in deciding an application for leave to appeal out of time was that it was entirely in the discretion of the Court. The Rules of Court have to be observed and must not be disregarded or ignored.
2. There was not a point of principle affecting others involved, and there was no suggestion that the appeal could be allowed to proceed while preserving the plaintiff's position. Leave to appeal out of time was refused.
3. There was no evidence to show that without a stay of execution the second defendant would be ruined. The second defendant's application for a stay of execution was refused.

Cases considered:

Atkins v Great Western Railway (1886) 2 TLR 400
Bank of Tonga v 'Alatini & Muti [1990] Tonga LR 153 (CA)
Barker v Lavery [1885] 14 QBD 769
Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887 (CA)
Revici v Prentice Hall Inc [1969] 1 All ER 772 (CA)
Samuels v Linzi Dresses Ltd [1980] 1 All ER 803 (CA)
The Annot Lyle (1886) 11PD 114 (CA)
'Uta'atu v Free Wesleyan Church of Tonga (No 26/90, 12 August 1994)

Rules considered:
Court of Appeal Rules 1990

Ruling on Application for Leave to Appeal out of Time

This is an application for leave to appeal out of time against the decision of Thomas J in the Supreme Court dated 10 June 2005. Under Order 5, Rule 2(1) of the Court of Appeal Rules 1990 an appeal must be lodged with the Registrar within 42 days after the date of the judgment, ie in this case by 22 July 2005.

This application for leave to appeal out to time was not lodged until 29 November 2005, ie over 5 months after the date of judgment. It was accompanied by an affidavit by one of the 2nd Defendant's Directors, Mr John Sullivan, and a draft Notice of Appeal. Although such an application can be heard ex parte under Order 7, Rule 1, a note of opposition to the application was filed on 30 January 2006 and I heard the application inter parties in chambers on 10 February 2006.

The basic principle in deciding an application for leave to appeal out of time is that it is entirely in the discretion of the Court (*Bank of Tonga v 'Alatini & Muti* [1990] Tonga LR 153 (CA)). Of course the discretion has to be exercised judicially.

My starting position in considering this application is that it is important that there should be finality in litigation so that parties know where they stand and matters taken as decided are not later re-opened at the whim, as it were, of the losing party. I have found that there is a tendency in Tonga to regard time limits as unimportant, but ultimately laxity on this works to the disadvantage of litigants as a whole.

The principle is therefore that the Rules of Court have to be observed and must not be disregarded or ignored: Halsbury's Laws (4th Ed) Vol 37 para 25; *Revici v Prentice Hall Inc* [1969] 1 All ER 772 (CA); *Samuels v Linzi Dresses Ltd* [1980] 1 All ER 803 (CA), at 812. Any failure to comply calls for a full and proper explanation (the White Book (1997) Para 59/14/8); and it should not be taken for granted that the Court will exercise its powers to enlarge time: *Revici*.

In this case the application came 4 months after the appeal period had expired, and it very much looked as if the time limit for appealing was simply ignored until the issue of the writ of distress on 16 November 2005 after repeated unsuccessful attempts by the Plaintiff's major shareholder Mr Nichols to contact the 2nd Defendant's Managing Director Ms Sullivan. It appears from the accompanying application to stay execution that that may have been done on the basis that there would be no injustice as long as the appeal was filed in time for it to be heard at the Court of Appeal session later this year, but that cannot justify such a lengthy delay, and it matters not that there will be no injustice to the other side (*Revici*).

No real explanation was offered for the delay other than Counsel's statement in chambers that it was his failure, but he had no follow-up diary system to avoid such mishaps. In any event, while it is unfortunate if a litigant suffers through the fault of its Counsel, the 2nd Defendant may have a remedy against him in respect of that failure, so, regrettably for the 2nd Defendant's Counsel, in the circumstances that cannot be a good reason for extending time.

I consider that the issue of whether or not the appeal is likely to succeed is a neutral matter. If the appeal has strong merits, one would have expected it to be lodged promptly and it is difficult to see why it was not lodged promptly and there

has been such a long delay – not just a few days' forgetfulness or pressure of business, but 4 months beyond the specified appeal period of 42 days.

The 2nd Defendant's Counsel withdrew his submission about the possibility of criminal prosecution [of the Plaintiff]; and although this may be an important case for the 2nd Defendant, it is not of the same nature as in the *Bank of Tonga* case, there is not a point of principle affecting others involved, and there is no suggestion that the appeal could be allowed to proceed while preserving the Plaintiff's position.

I therefore refuse leave to appeal out of time, with regret at the embarrassment this may cause the 2nd Defendant's Counsel.

Application for stay of execution pending appeal

The 2nd Defendant on the same date applied for a stay of execution of the judgment on the basis that there were reasonable grounds for the appeal; it will be able to pay the judgment amount and costs if the appeal is unsuccessful and the Plaintiff will not be deprived of the fruits of its litigation, as at that time there were only 8 months to the Court of Appeal sitting.

That application was also opposed by the Plaintiff on the principle ground that the ability of the 2nd Defendant to pay the judgment amount is questionable.

Order 9 of the Court of Appeal Rules provides.

> "Order 9: Effect of Appeal
>
> Unless otherwise ordered by the Court or the Supreme Court, an appeal shall not operate as a stay of execution or of proceedings in the court below."

Two principles have to be balanced against each other as to whether a stay of execution pending appeal should be granted: first, that a successful litigant should not be deprived of the fruits of his litigation (*The Annot Lyle* (1886) 11PD 114 (CA), at 116); and secondly, that an appellant should not be deprived of the fruits of a successful appeal. Whether to grant or refuse a stay is within the Court's discretion. (Halsbury's Laws (4th Ed) Vol 37 para 699).

The Plaintiff's Counsel also drew my attention to the decision of Ward CJ in *'Uta'atu v Free Wesleyan Church of Tonga* (No 26/90, 12 August 1994), although that appeared to be a case where an appeal had been filed timeously. Ward CJ refers to two possible tests for granting a stay, the stringent test from *Atkins v Great Western Railway* (1886) 2 TLR 400:

> "As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds"

and the more relaxed test from *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887 (CA), at 888:

> "... if a defendant can say that, without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."

However the 2nd Defendant's problem is that there is no evidence to show that without a stay of execution it will be ruined – on the contrary Mr Sullivan's affidavit says it is able to pay and has arranged financing from the bank. Nor is there evidence that if the judgment amount is paid, the Plaintiff will be unable to repay it so as to deprive the 2nd Defendant of the fruits of appeal if successful (see *Barker v Lavery* [1885] 14 QBD 769 referred to by Ward CJ). As was said in *Barker v Lavery*, those who apply for a stay of execution must come before the Court prepared with all necessary materials.

I therefore also refuse the 2nd Defendant's application for a stay of execution.

Costs

Costs of both applications as agreed or taxed to the Plaintiff.

Fresha Export Ltd v Maseia Holdings Co Ltd

Supreme Court, Nuku'alofa
Ford J
CV 372/2002

24 February 2006; 6 March 2006

Practice and procedure – strike out application – based on delay – court looked at underlying justice – dismissed application

The plaintiff, a New Zealand company, issued proceedings against the defendant claiming to recover the costs of goods and merchandise supplied. The action had been struck out because neither party had appeared at a court convened chambers hearing. The plaintiff applied to have the action reinstated and the defendant opposed the application on the principal grounds that the plaintiff had failed to prosecute its claim with due diligence and the resulting delay was likely to prejudice the prospect of a fair trial. The two significant periods of delay identified were one year eight months after the filing of the statement of defence and one year nine months after the plaintiff filed its initial application for an order reinstating the proceedings.

Held:

1. The position in the Kingdom in relation to strike out applications based on delay was more akin to that in New Zealand with its emphasis on the underlying justice of the case rather than with the English approach which involved considerations of the general administration of the civil case list.
2. Whether a delay can be described as inordinate or inexcusable was a matter of fact to be determined in the circumstances of each individual case
3. Inaction by a party's legal counsel did not afford an acceptable excuse for a long period of inactivity.
4. The two lengthy periods of delay identified were inordinate and inexcusable.
5. The defendant had failed to establish that the delay gave rise to a substantial risk that it would not be possible to have a fair trial nor had it established any serious prejudice.
6. The strikeout application was dismissed but no order was made as to costs.

Cases considered:

Arbuthnot Latham Bank Ltd v Trafalgar Holdings [1998] 1 WLR 1426
Birkett v James [1978] AC 297
Commerce Commission v Giltrap City Ltd (1998) 11 PRNZ 573
Hussein v Pacific Forum Line Ltd [2003] FJCA 28
Lovie v Medical Assurance Society New Zealand Ltd [1992] 2 NZLR 244
New India Assurance Company Ltd v Singh [1999] FJCA 69
Savril Contractors Ltd v Bank of New Zealand [2004] NZCA 4
Securum Finance Ltd v Ashton and another [2001] CH 291
Tonga v Minister of Lands (Land Court, L 925/93, 20 November 1998, Finnigan J)

Statute considered:

Supreme Court Act (Cap 10)

Rules considered:

Supreme Court Rules 1991

Counsel for plaintiff : Mr Afeaki
Counsel for second defendant : Mr Edwards

Ruling

The application before the court

The plaintiff is a New Zealand company licensed to conduct business in Tonga. The defendant is a Tongan company carrying on a retail business in Nuku'alofa selling, amongst other things, groceries.

On 28 May 2002 the plaintiff issued proceedings against the defendant claiming a total of USD $56,249.99 for goods and merchandise supplied between July 2000 and January 2001. That action was struck out by the court on 19 March 2003 because neither party had appeared at a chambers direction hearing listed for that day. The plaintiff has now made application to have the action reinstated. The defendant opposes the application on the principal grounds that the plaintiff has failed to prosecute its claim with due diligence and the resulting delay is likely to prejudice the prospect of a fair trial.

Affidavits and submissions on the facts have been filed by both parties and I have heard counsel in chambers.

The background

The plaintiff's statement of claim was filed by a Tongan lawyer, Lopeti Foliaki. The claim was said to have been made up of four different consignments of produce that had not been paid for plus an additional sum of USD$3000 on account of interest and bank charges. The consignments were described as follows:

> Draft No. 2109 - USD $6,036.95
> Draft No. 2150 - USD $9,879.67
> Draft No. 2184 - USD $18,726.76
> Draft No. 2204 - USD $18,600.61

The defendants filed a statement of defence in reply dated 24 June 2002. The defence was signed by Vilisoni Ahota'eiloa as "legal representative for defendant" but he described himself as "Secretary of Board/Maseia Holding Co Ltd."

In its statement of defence, the defendant alleged that it had paid draft No. 2109 but it admitted that the amounts claimed in respect of drafts 2150 and 2184 were unpaid and still outstanding. In relation to draft No. 2204 the defendant pleaded:

> "Plaintiff supplied defendant with a malfunctioned frozen container of poultry shipment which was later founded to be partly damaged at the wharf."

The defendant denied liability for the additional $3000 claimed on account of interest and bank charges.

Chronology

Following on from the filing of the statement of defence, the court issued a notice convening a directions hearing for 30 July 2002 before Ward C.J. That directions hearing was then adjourned until 20 August 2002. On 20 August 2002 the then Chief Justice issued an order noting that counsel for the plaintiff had failed to appear and he adjourned the case until 29 August 2002 to fix a date for trial. On 29 August, counsel for the plaintiff again failed to appear and the Chief Justice fixed a trial date for 28 and 29 April 2003 and ordered a pre-trial conference for 25 March 2003.

On 24 February 2003 Ward C.J. transferred the file to myself and on the same day I issued an order bringing forward the pre-trial conference from 25 March to 19 March. On 19 March 2003 I issued a further order which is the order presently in contention. After noting that there had been no appearance by either party at the chambers hearing called for that day, I ordered the action to be struck out without any order as to costs.

Nothing further then happened on the file until some 11 months later. On 12 February 2004 the Registrar received a letter from another law practitioner, Siosifa Tu'utafaiva, advising that he had been instructed to act for the plaintiff because Mr Lopeti Foliaki had left the country. Included with the letter for filing was an application to cancel the court order dated 19 March 2003 and reinstate the proceedings. An affidavit in support was sworn by 'Emosi Maitaitangi who described himself as the plaintiff's authorised representative in Tonga. Although received by the court on 12 February 2004, the letter, application and affidavit in support were all dated 8 December 2003.

Mr Maitaitonga deposed that the plaintiff had been completely unaware of the strike-out order dated 19 March 2003 until the last week of September 2003. He said that he had

received no contact from Mr Foliaki about the chambers fixture for the 19th of March and he only found out later that Mr Foliaki had left the country. I interpolate that Mr Maitaitonga was confused in his affidavit and more than once he referred to the plaintiff as "the defendant".

The Registrar noted that one of the exhibits referred to in Mr Maitaitonga's affidavit was not attached and the court file records that on 19 February 2004 a court clerk spoke to Mr Tu'utafaiva and passed on the Registrar's advice. On 18 March 2004 a certificate of service was filed by plaintiff's counsel confirming that the application to reinstate the action had been served on the defendant on 17 February 2004.

The next development on the file came some 21 months later when on 22 December 2005 the plaintiff's present legal counsel, Mr Afeaki, filed a comprehensive application for an order setting aside the strike-out order dated 19 March 2003 and reinstating the proceedings. He also sought leave to file an amended statement of claim.

A lengthy affidavit from the Auckland Manager of the plaintiff company, Mr Peter Mundy, was subsequently filed in support of the application. The affidavit is dated 5 January 2006. In a covering letter to the Registrar, Mr Afeaki explained that the hold-up in filing the affidavit had been caused by difficulties he had experienced in obtaining the services of a Notary Public to take Mr Munday's affidavit over the Christmas holiday period. A certificate of service has been filed recording that the application and affidavit were served on the defendant on 9 January 2006. Certainly no criticism can be directed at Mr Afeaki who, in the circumstances, followed up his client's instructions with commendable dispatch during what is generally regarded as a difficult time of the year for conducting business matters in New Zealand.

That, then, is the factual background to the matter. On 23 February 2006 Mr Edwards filed a formal notice of opposition to the plaintiff's application along with a memorandum and a supporting affidavit from one, Tevita Manatu Tuione. The matter was then heard before me in chambers on 24 February 2006.

The law

Rather disappointingly, neither counsel was able to refer to any legal authorities in support of their respective submissions. In *Tonga v Minister of Lands* (Land Court, L 925/93, 20 November 1998) Finnigan J. struck out the action because of delays on the part of the plaintiff in prosecuting the case to trial but the judgment was confined to the facts. There are, however, numerous overseas authorities on the topic and counsel in the present case ought to have been able to familiarise themselves at least with some of the more basic principles rather than leaving it all to the court.

Order 8 rule 6 of the Supreme Court Rules (the rule dealing with strikeouts) contains no express provisions dealing with dismissal of an action for delays but it is well established that the court has such powers under its inherent jurisdiction. The leading English authority on the court's inherent jurisdiction to dismiss an action for want of prosecution is the decision of the House of Lords in *Birkett v James* [1978] AC 297, and in particular the statement by Lord Diplock at p.318:

> "The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

Lord Diplock went on to consider the effect of the limitation period upon the power of the court to dismiss an action for want of prosecution and concluded that the fact that the limitation period had not expired at the time the strike out application is heard would generally be a conclusive reason for not dismissing an action for want of prosecution because the plaintiff could simply avail himself of his legal right to issue a fresh writ. In Lord Diplock's words (p.322):

> "I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution when no question of contumelious default on the part of

> the plaintiff is involved; and in cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending."

In New Zealand, the leading authority on striking out is *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244, 248 where Eichelbaum C.J. reviewed the authorities and concluded:

> "The applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interest of justice."

In *Savril Contractors Ltd v Bank of New Zealand* [2004] NZCA 4, the New Zealand Court of Appeal again carried out a thorough survey of the authorities on striking out. Glazebrook J., delivering the judgment of the court, noted that since the recent changes to the English rules of procedure, the trend in English cases dealing with delay has been to consider more closely the effect of the delay on other litigants waiting to have their case heard before the court, i.e. case management, and the administration of justice generally rather than any resulting prejudice to the particular defendant in the case before the court. Reference was made in this regard to *Arbuthnot Latham Bank Ltd v Trafalgar Holdings* [1998] 1 WLR 1426 and its sequel *Securum Finance Ltd v Ashton and another* [2001] CH 291.

In *Savril* the Court of Appeal appeared to distance itself somewhat from the English trend and, in a comparison of the New Zealand and English positions, stressed the view expressed in one of its earlier decisions, *Commerce Commission v Giltrap City Ltd* (1998) 11 PRNZ 573, 579, that case management principles should not be allowed to undermine the delivery of justice to the parties. As Glazebrook J. expressed it at para [99]:

> "It is clear that the principles in *Birkett v James* apply in New Zealand. The subsequent English authority will as a consequence be persuasive. We do note, however, that in New Zealand the overriding consideration in strike out applications for delay has always been whether justice can be done despite that delay. In this regard, the concern has been to achieve justice between the parties and the administration of justice in a general sense has not figured in the decisions to the same extent as it does in the more recent English decisions of, for example, *Arthbuthnot* and *Securum*."

The position in the Kingdom in relation to strike-out applications based on delay is more akin to that in New Zealand with its emphasis on the underlying justice of the case rather than with the English approach which now involves considerations of the general administration of the civil case list.

The limitation period in the present case

In the present case we are not concerned with the first condition Lord Diplock spoke about in *Birkett v James* of contumelious conduct but with the two limbs of the second condition, i.e. whether there has been inordinate and inexcusable delay and whether such delay will seriously prejudice the defendant or the prospect of a fair trial. First, however, I need to consider whether the action is still within the five-year limitation period because if that is the position then if the action was to be struck out at this stage there would be nothing to prevent the plaintiff from simply issuing fresh proceedings.

In *Birkett v James* Lord Diplock recognised that in exceptional cases the court might strike out proceedings despite the fact that the limitation period had not expired but that was the exception rather than the rule. I find that there are no exceptional circumstances in the present case and, accordingly, if it is the position that the limitation period has not yet expired then the court will not strike out the action.

The only reference to the limitation period in argument before me came in the context of submissions on the plaintiff's application to file an amended statement of claim. Mr Edwards submitted that the amendment should not be permitted because it raised a new cause of action outside the limitation period. Mr Afeaki responded that the proposed new pleading did not contain any new cause of action but he made no specific submissions as to whether or not the limitation period had expired.

Section 16 of the Supreme Court Act (Cap 10) makes it unlawful to sue any person for debt or damages after the expiration of five years from the date on which such liability was incurred. On the face of it, therefore, as the debts sued upon were incurred in the second half of the year 2000 and in January 2001, the five-year limitation period would appear to have now expired. Section 16 goes on, however, to provide:

> "But if any part of such liability or claim has been paid within such time (i.e. the five-year limitation period), the five years shall commence to run from the time of such payment."

In paragraph 25 of his affidavit dated 5 January 2006, Mr Mundy states:

> "I confirm that since filing of the claim, only some payments amounting to around half of the amounts due for goods supplied under the contract have been received from the defendants. The principal amount of USD $29,269.99 remains due and outstanding and contractual interest is due on the same. This is reflected in the amended statement of claim filed with the present application."

There is no indication, either in the affidavit or the draft amended statement of claim, as to when the payments were made apart from Mr Mundy's statement that it was, "since filing of the claim." As the claim was commenced on 28 May 2002, it follows that, if what Mr Munday says is correct, the limitation period would not expire until sometime after 28 May 2007.

As the present claim is still within the limitation period, therefore, and as there are no special circumstances that would take the case outside the general rule in *Birkett v James*, I decline to strike out the proceedings.

Mr Mundy was not cross-examined on the contents of his affidavit, however, nor did counsel address me on the effect of the limitation period on delays. For these reasons, and out of an abundance of caution, I turn now to consider generally the issues of delay and prejudice. The first issue I need to deal with is the point made forcefully by the plaintiff in argument, namely, that until the end of September 2003 it was completely unaware of the chamber's direction hearing held on 19 March 2003 and the order made that same day striking out the proceeding.

The strike-out order

Both Mr Maitaitonga and Mr Mundy deposed that they had not received any notice of the chambers hearing scheduled for 19 March 2003 nor were they aware, until the end of September 2003, that because neither party had turned up for the chambers hearing, the court had made an order striking out the proceeding.

Mr Mundy goes further and says that plaintiff's counsel, Mr Foliaki, had given the plaintiff no notice of the earlier chambers hearings that had been scheduled for 20 and 29 August 2002 and 24 February 2003. Mr Munday deposed:

> "11. Later in 2003, because we had not heard anything about our claim, we instructed our Tongan representative to contact the defendants directly and find out what was happening. It was then that we discovered that Mr Foliaki had disappeared and had not told anyone where he had gone. Importantly he had not even told us that he was going away and we had no reason to suspect anything was wrong. We thought that the claim was delayed but that Mr Foliaki was looking after it for us."

I have no difficulty in accepting everything that Mr Munday says in this regard. Sadly, the plaintiff was not the only litigant Mr Foliaki let down in this way. In 2002 Mr Foliaki appeared to have had a busy law practice and he frequently appeared before this Court. My bench book shows that he last appeared before me for a chambers hearing on 2 August 2002 and then he failed to appear for another chambers hearing on 21 August 2002. It is common knowledge that at some stage between those two dates he turned his back on his practice and his clients and without any warning or notice left the country and travelled to the United States. His conduct in this regard was quite inexplicable and, given his capacity as an officer of the court, could only be described as disgraceful. After an investigation, the then Chief Justice struck Mr Foliaki's name off the role of registered law practitioners in the Kingdom. Against that background, as I have indicated, I have no difficulty in accepting all Mr Munday's criticisms about Mr Foliaki.

There is another important aspect of the case which follows on from Mr Foliaki's sudden departure. The plaintiff denied any knowledge of the chambers hearing convened for 19 March 2003. On checking the court file and the relevant service book it now appears that neither notice of the hearing for 19 March or the order itself were, in fact, served on the plaintiff. The Registrar confirms the position in this regard. Apparently the court usher attempted to serve the notice and order on Mr Foliaki at his home but the attempt was unsuccessful, no doubt because at that stage Mr Foliaki had already left for the USA.

As the plaintiff had not been served with notice of the chambers hearing, it would be quite unjust to allow the order of 19 March 2003 to stand. A similar situation confronted the Court of Appeal of Fiji in *Hussein v Pacific Forum Line Ltd* [2003] FJCA 28. In that case the respondent issued a summons to have the proceeding struck out for delays and it was struck out but, on appeal, the appellant argued that he had never been served with the summons giving notice of the hearing. The Court of Appeal accepted that submission and went on to hold that the order striking out the proceeding was, therefore, a nullity and it was set aside. I have reached the same conclusion in the present case. My order of 19 March 2003 is, likewise, set aside and the proceeding is reinstated.

Given that the original action remains extant, I propose to treat the defendant's notice of opposition to the reinstatement of the claim as a strikeout application to be considered on its own merits. The issue then becomes whether the defendant has succeeded in establishing the two limbs of the second condition spoken about by Lord Diplock in *Birkett v James*. In other words, that there has been inordinate and inexcusable delay on the part of the plaintiff or its lawyers which, in turn, has caused the defendant serious prejudice or given rise to a substantial risk that it may not be possible to have a fair trial

The delay

In *New India Assurance Company Ltd v Singh* [1999] FJCA 69, the Fiji Court of Appeal in dealing with an application to strike out the proceeding for want of prosecution, observed:

> "We do not consider it either helpful or necessary to analyse what is meant by the words "inordinate" and "inexcusable". They have their ordinary meaning. Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case."

I respectfully agree with that observation.

In the present case the proceedings were issued approximately 16 months after the commencement of the limitation period and, given the fact that the plaintiff is an overseas based company, I do not regard that delay as unreasonable. After the statement of defence was filed however, on 24 June 2002, no further steps were taken in the action by the plaintiff until 13 February 2004 when it's new counsel Mr Tu'utafaiva filed an application for an order reinstating the proceedings. There then followed a second significant period of inaction on the plaintiff's part when no steps whatever were taken between 18 March 2004 (when a certificate of service was filed) and 22 December 2005 when the present application was filed in the court by Mr Afeaki.

The court is entitled to have regard to all periods of delay up to the hearing of the application. The two significant periods of delay I have focused on of one year eight months and one year nine months respectively total a cumulative delay of three years five months.

In respect to the first period of delay, the plaintiff seeks to lay the blame with Mr Lopeti Foliaki but Mr Foliaki left the country in August 2002. The plaintiff admits that it was not until late September 2003 that it checked to ascertain the status of the proceedings and then, as it is expressed in the application, "as result of this search, the plaintiffs finally discovered that Mr Foliaki had disappeared, had failed to pursue their matter and the action had been struck out on 19 March 2003."

The plaintiff advances two explanations for the second period of delay. First, counsel speculated that Mr Tu'utafaiva may have had a conflict of interest which could explain his delay in progressing the plaintiff's case. He stressed, however, that he was "only making inferences" in this regard because he had not discussed the matter with Mr Tu'utafaiva. Secondly, plaintiff's counsel sought to rely upon the plaintiff's involvement in other litigation which it considered required priority attention. As Mr Munday expressed it in his affidavit:

> "22. As things turned out, the plaintiff had to pursue the Manu JM store debt (the other litigation) because it was so large and we urgently needed action on that debt. This meant that we were not able to focus on the Maseia debt (the present litigation) until we had completed getting judgment and enforcing that judgment against those defendants. We have only now gotten around to the present Maseia claim."

Mr Edwards described this explanation as "weak and unacceptable". I agree. It certainly cannot excuse such a long period of inactivity.

Similarly, the plaintiff's criticisms of his two former counsel do not afford an acceptable excuse. The question whether a plaintiff has an alternative remedy against his solicitor who was responsible for the delay is not a relevant consideration in deciding whether or not to dismiss an action for want of prosecution: see *Birkett v James* per Lord Diplock at p.324 and per Lord Edmund-Davies at pp. 335-6.

I conclude, given the two lengthy periods of delay referred to, that the plaintiff has been guilty of inordinate and inexcusable delay.

Prejudice

The issue that then arises, in terms of the second limb of the condition Lord Diplock referred to is whether the delays were such that it may not be possible to have a fair trial or whether they have caused the defendant serious prejudice. The onus of proof in respect of both these elements of the test lies upon the defendant.

In its notice of opposition, the defendant alleges that the, "long delay is likely to prejudice a fair trial" but the supporting affidavit sworn by Tevita Manatu Tuione, deals more with the issue of alleged prejudice suffered by the defendant. Mr Tuione states that he is 75 years of age and he described himself as the former manager of the defendant company. The alleged prejudice he refers to is expressed in these terms:

> "6. The defendant paid to the plaintiff what it owed and disputed the rest due to one container of chicken going bad at the wharf, if my memory is correct. This happened in the year 1999 or 2000 and I am unable to verify this now because the company file kept by Vilisoni 'Ahota 'e 'iloa (described as the secretary of the company) has been destroyed or gone missing.
>
> 7. Mr Vilisoni 'Ahota'e'iloa has left Tonga and now lives in the United States of America.
>
> 8. The present manager is new as well as the staff and have no knowledge of this old transaction which occurred in 1999 or 2000.
>
> 9. The defendant will be greatly prejudiced in its defence because of the long delay after the case was struck out on 19 March 2003."

Mr Tuione's affidavit, in my view, fails to prove material prejudice. It does not state, for example, what was on the file nor, if it was significant evidence, why it cannot be put before the court in some other way.

While the facts of each case are, of course, unique there are some similarities between the allegations of a malfunctioning container made by the defendant in the present case and the facts in *Hussein*'s case. In *Hussein*, the plaintiff shipped furniture in a container from Suva to Sydney. On arrival, the furniture was found to be damaged. The action was brought against the shipper.

The Court of Appeal was critical of the affidavit filed in support of the defendant's subsequent application to have the proceeding struck out for delays. The court said that, in terms of establishing that the defendant had suffered prejudice, the affidavit was notable for what it omitted. The court observed that it was reasonable to assume that the defendant would have investigated the alleged problem prior to filing its statement of defence but there was no reference in the affidavit to who carried out the investigation or what reports were prepared.

Similar observations can be made about Mr Tuiono's affidavit in the present case. In addition, there is no indication given as to when the file went missing or how it might have gone missing or been destroyed. There is nothing in the affidavit to indicate why Mr 'Ahota'e'iloa would not be able to travel from the United States for the trial if his evidence was needed. Mr Tuiono speaks about the present manager and staff of the defendant

company having no knowledge of the transaction but he does not explain why the present manager has not filed an affidavit of his own deposing to these matters.

I am also bound to observe that I have some doubts about the reliability of Mr Tuiono recollection of the matters he deposes to. Early in his affidavit he said that he was present in court on 19 March 2003 when the action was struck out. He then went on to say:

> "4. On the case being called on 19 March 2003 I went to court and sat there without introducing myself because Vilisoni 'Ahota'e'iloa was not at work on that date.
>
> 5. I knew the case was struck out on the 19th of March 2003 and I returned to work and some days later when Vilisoni "Ahota'e'iloa returned I advised him of the result."

The problem I have with this narrative of events is that the case was not called in court on 19 March 2003. The matter was set down to be dealt with in chambers that day but as there was no appearance for either party, the proceeding was struck out. No announcement was made in court at any stage that day to indicate that the case had been struck out. The order was simply recorded in writing on the Court file and typed up and issued the following day.

Conclusions

The defendant has established inordinate and inexcusable delay on the part of the plaintiff but it has failed to establish that such delay gives rise to a substantial risk that it will not be possible to have a fair trial nor has it established that the delay in question has caused the defendant serious prejudice. The strike-out application is, therefore, dismissed. These findings are additional to the court's principal conclusion that, as the five-year limitation period has not yet expired, the proceeding cannot be struck out because of delays.

I am satisfied that the draft amended statement of claim does not seek to introduce any new cause of action although it does refer to contractual provisions relating to the significantly increased claim for bank charges and interest and they, of course, will need to be proved in the usual way. Leave is, therefore, granted allowing the plaintiff to file within 14 days of the issuance of this Ruling an amended statement of claim in terms of the draft before the court provided that it is first amended further so as to comply with Practice Direction No. 1 of 1995.

Costs

On the question of costs, the proceeding has been reinstated and the plaintiff has successfully defended what the court has treated as a strike-out application. Normally in that situation the plaintiff would be entitled to an award of costs.

I am mindful, however, that the case has a number of distinctive features not least of all being the court's findings regarding the status of the strike-out order of 19 March 2003. The reality is that it was not the defendant who initiated an unsuccessful strike-out action. In raising the delay and the prejudice issues, the defendant was responding to a belated application by the plaintiff seeking an indulgence from the court.

In all the circumstances, I consider that justice will best be achieved if each party is left to bear its own costs and I so order.

R v Li

Supreme Court, Nuku'alofa
Webster CJ
CR 214/04

6-10 and 13 March 2006; 17 March 2006

Criminal law – carnal knowledge of girl under 12 – no proof of penetration – not guilty
Criminal law – attempted carnal knowledge of girl under 12 and indecent assault – convicted
Evidence – complaint not made "shortly after the crime was committed" – admissible

The defendant was charged with four counts of carnal knowledge of a girl under 12 (aged 11), contrary to section 121 of the Criminal Offences Act, and four offences of indecent assault on the same child contrary to section 125(1) of that Act. It was alleged that the offences occurred over a four-day period in early September 2004 at the defendant's house in Manuka. The defendant, who was 52-year of age at the time of the alleged offending, gave evidence denying the charges and he claimed that the confession he gave to the police was made so that he could be released from custody. The complainant was under no compulsion to keep meeting the defendant at his home and she did not make any complaint until 11 days after the first incident. Defence counsel had submitted that the effect of section 11 of the Evidence Act was that that as the complainant had not made any statements relating to the commission of the offences "shortly after the crime was committed", nor voluntarily, her complaint could not be admitted.

Held:

1. The purpose of section 11 was to allow on an optional basis, evidence of a complaint by a victim shortly after the incident to show that her conduct was consistent with her evidence at the trial, not to exclude the whole complaint if that did not occur. The finding that the complainant did not make any statement until 11 days after the first incident, nor was it made voluntarily, but under pressure to provide a reason for four days absence from school, did not truly corroborate the complainant's evidence.
2. Under section 140 of the Criminal Offences Act the offence of carnal knowledge requires proof of penetration (which means penetration however slight). The medical evidence did not fully support penetration raising a reasonable doubt as to this element of the offence and it was held that the charges of carnal knowledge were not proved.
3. It was held that the evidence of the complainant and the defendant's statements to the police, taken with the medical evidence, did established beyond reasonable doubt that the accused attempted to have carnal knowledge of the complainant and he was therefore convicted under section 122 of the Criminal Offences Act of attempting to have carnal knowledge.
4. The relevant definition of an attempt to commit an offence in section 4 of the Criminal Offences Act was that it was an act done with intent to commit that offence, which would have constituted the offence if it had not been interrupted for whatever cause. The essential elements to establish a charge of attempted carnal knowledge of a girl are that: it was the defendant; who did an act with intent to have sexual intercourse (i.e. by his penis penetrating her vagina); with a girl who was under the age of 12 years; whether or not she consented to the act; or whether or not he reasonably believed that the girl was of or above that age; and the defendant's act would have constituted carnal knowledge if it had not been interrupted for whatever cause.
5. The accused was convicted on four counts of attempting to have carnal knowledge of a girl and four counts of indecent assault on a child.

Cases considered:

DPP v Hester [1972] 3 All ER 1056 (HL)
Holland v R 117 ALR 193 (HC)
Kaitamaki v R [1984] 2 All ER 435 (PC)
Papadimitropoulos v The Queen (1957) 98 CLR 249
Puloka v R (Court of Appeal, 30 March 1992)
R v C [1992] Crim LR 642 (CA)
R v Court [1988] 2 All ER 221 (HL)
R v George (1956) Crim LR 52
R v Hughes (1841) 2 Mood 190; 169 ER 75
R v McRue (1838) 8 Car & P 641 (173 ER 653)
R v Lines (1844) 1 Car & K 393; 174 ER 861
R v Rennie [1982] 1 All ER 385 (CA)
The People (Attorney General) v Dermody (1956) IR 307

Statutes considered:

Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)

Counsel for prosecution : Ms Simiki
Counsel for defendant : Mr Veikoso

Reserved judgment

Preliminary

The defendant Kaluseti Li pleaded not guilty to 4 offences of carnal knowledge of the same girl under 12, contrary to section 121 of the Criminal Offences Act, and 4 offences of indecent assault on a child under 12 (on the same girl) contrary to section 125(1) of that Act.

Evidence and submissions

With the agreement of Counsel, the trial was heard in camera under section 141 of the Criminal Offences Act. On the application of Crown Counsel and with the agreement of Defence Counsel I also made an order directing that the identity of the complainant and her evidence taken in the proceedings shall not be published in the Kingdom in a written publication available to the public, or be broadcast in the Kingdom.

I heard evidence for the prosecution from 10 witnesses, the complainant Y (now aged 13), who gave evidence on oath; Pita Kelepi Katoa (aged 9), of Manuka, who gave unsworn evidence; the complainant's mother Z; Ms Kalisi Langi, then Vice-Principal of Navutoka Government Primary School; Ms Falekihetoa Fatai, shopkeeper, Navutoka; Cpl Semi Ve'ehala, then stationed at Mu'a Police Station; Ms Losili Liu Masima, then 2nd Vice-Principal of Navutoka Government Primary School; Ms Sepiuta Mu'a, Navutoka; Dr Semisi F Latu, Senior Medical Officer i/c Obstetrics & Gynaecology, Vaiola Hospital; and Mrs Lesili Mu'a, Navutoka. The prosecution also produced a number of documentary exhibits. The defendant Mr Li gave evidence himself; and the defence led evidence from Mrs Vika Lolohea, Navutoka; Mrs X, Navutoka (a relative of the complainant); and the defendant's daughter Ms Lilio Li.

The unsworn evidence of the little boy Pita Katoa was received under section 116 of the Evidence Act, as in my opinion he was possessed of sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth. It was corroborated by other material evidence from the complainant herself (who gave evidence on oath) in support of it implicating the defendant; ie confirming from some other source that the witness was telling the truth in some part of his story which goes to show that the defendant committed the offences with which he is charged: *DPP v Hester* [1972] 3 All ER 1056,1073-4 (HL).

There was also a voir dire on the defence challenge of the admissibility of the record of interview, answers to charges and confession statements dated 23 September 2004. In that I heard evidence from Cpl Ve'ehala and the countersigning officer, former Detective Constable Latiume Fungavai. The accused himself did not give evidence in the voir dire. That ruling, in which I held these documents to be admissible, is appended to this decision.

On 10 March after all the oral evidence had been heard a site view at Navutoka and Manuka was conducted, including the site of the complainant's home, the shop, the

Government Primary School, Mrs Mu'a's home, the defendant's home (and its interior) and the site of the defendant's bush allotments.

On completion of the evidence in the main trial, on 13 March I heard closing submissions in support of their respective cases for the defence and prosecution. As no submissions were made at that stage on the possibility of convictions for attempted carnal knowledge, I heard further submissions on that on 17 March.

Indictment

The offences with which the defendant was charged were:

> CARNAL KNOWLEDGE OF GIRL contrary to section 121 of the Criminal Offences Act (Cap 18).
> Kaluseti Li on or about 3/6/7/8 September 2004, you carnally knew Y who was under the age of 12 years by inserting your penis in to her vagina.
>
> INDECENT ASSAULT ON CHILD contrary to sections 125(1) of the Criminal Offences Act (Cap 18).
> Kaluseti Li on or about 3/6/7/8 September 2004, you indecently assaulted Y who was under the age of 12 years by using your tongue to lick her vagina and doing other things.

The burden is on the prosecution in a criminal trial to prove beyond reasonable doubt every element of the offence alleged.

Essential elements of carnal knowledge of girl

Section 121 of the Criminal Offences Act provides:

> Carnal knowledge of girl.
> 121. Any person who carnally knows any girl under the age of 12 years shall be liable on conviction thereof to imprisonment for any period not exceeding life.

Carnal knowledge is a legal term for sexual intercourse, and for the purposes of this offence that is deemed complete on penetration: *Kaitamaki v R* [1984] 2 All ER 435 (PC). Under section 140 of the Criminal Offences Act, on the trial of any person on a charge of carnal knowledge it is not necessary to prove the actual emission of seed and the offence is deemed complete on proof of penetration only.

The requirement of penetration can be satisfied by any penetration however slight, without penetration of the actual vagina: *R v Lines* (1844) 1 Car & K 393 (174 ER 861); Holland v R 117 ALR 193 (HC) 197; *Papadimitropoulos v The Queen* (1957) 98 CLR 249, 255. It is not necessary to prove rupture of the hymen to prove rape: *R v Hughes* (1841) 2 Mood 190 (169 ER 75); *R v McRue* (1838) 8 Car & P 641; 173 ER 653; *The People (Attorney General) v Dermody* (1956) IR 307. (Halsbury's Laws (4th Ed Reissue) Vol 11(1) para 516; Archbold 2005 para 20-24; Archbold 2003 para 20-24)

The case of *Puloka v R* (Court of Appeal, 30 March 1992), to which Mr Veikoso referred, had no relevance to the law on unlawful carnal knowledge as it was an appeal against sentence after a plea of guilty.

The essential elements to be established in this case to find that there has been carnal knowledge of a girl are that:

> it was the defendant;
> who had sexual intercourse (ie by his penis penetrating her vagina);
> with a girl who was under the age of 12 years;
> whether or not she consented to the act;
> or whether or not he reasonably believed that the girl was of or above that age.

Under section 123 it is no defence to a charge under section 121 to prove that the girl consented to the act or that the person reasonably believed that the girl was of or above the age of 12 years.

Attempt to have carnal knowledge

Under section 122 an attempt to have carnal knowledge of a girl is a separate offence:

> Attempt to have carnal knowledge.
> 122. Any person who attempts to have carnal knowledge of a girl under the age of 12 years shall be liable on conviction thereof to imprisonment for any term not exceeding 10 years.

Attempt is defined in section 4:

> *Definition of attempt.*
>
> 4. (1) An attempt to commit an offence is an act done or omitted with intent to commit that offence forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted by the voluntary determination of the offender not to complete the offence or by some other cause.
>
> (2) A person who attempts to commit an offence by any means shall not be acquitted on the ground that by reason of the imperfection or other condition of the means or by reason of the circumstances affecting the person against whom or the thing in respect of which the crime was intended to be committed it was not possible to commit the crime according to his intent.
>
> *Illustrations*
>
> *A points a gun at B believing it to be loaded and meaning immediately to discharge it at him. A is guilty of an attempt to harm B although the gun is not, in fact, loaded.*
>
> *A puts his hand into B's pocket intending to steal. A is guilty of an attempt to steal although there is nothing in the pocket.*

The relevant definition of an attempt to commit an offence is thus that it is an act done with intent to commit that offence, which would have constituted the offence if it had not been interrupted for whatever cause. Before a defendant can be convicted of an attempt the Court must be sure that he intended to commit the offence, and that, with that intention, he did something which was more than mere preparation for committing that offence.

Under section 6 a person charged with the full offence may at the trial be convicted of the attempted offence:

> *Conviction for attempt on charge of offence*
>
> 6. Where the complete commission of the offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused person may be convicted of this attempt and punished accordingly:
>
> Provided that after a conviction for the attempt the person so convicted shall not be liable to be tried again for the offence which he was charged with committing.

That provision essentially echoes Clause 13(a) of the Constitution.

The essential elements to be established in this case to find that there has been attempted carnal knowledge of a girl are that:

> it was the defendant;
> who did an act with intent to have sexual intercourse (ie by his penis penetrating her vagina);
> with a girl who was under the age of 12 years;
> whether or not she consented to the act;
> or whether or not he reasonably believed that the girl was of or above that age;

> and the defendant's act would have constituted carnal knowledge if it had not been interrupted for whatever cause.

Essential elements of indecent assault on child

Section 125 of the Criminal Offences Act provides:

> *Indecent assault on child*
>
> 125. (1) Any person who shall commit an indecent assault on any child under the age of 12 years shall be liable on conviction thereof to imprisonment for any term not exceeding 5 years.
>
> *Consent no defence*
>
> (2) It shall be no defence to any prosecution for an indecent assault on a child under the age of 12 years to prove that he or she consented to the act of indecency.

An assault (in this sense meaning deliberate physical contact) is indecent if right-minded persons would consider the conduct so offensive to contemporary standards of modesty and privacy as to be indecent (*R v Court* [1988] 2 All ER 221 (HL)); ie it is objectively capable of being regarded as indecent (*R v George* (1956) Crim LR 52; *R v Court*).

R v Court was considered in *R v C* [1992] Crim LR 642 (CA), in which it was held that where an assault was indecent in itself, it was unnecessary to establish a specific indecent intent.

The essential elements to be established in this case to find that there has been an indecent assault on a child are that:

> it was the defendant;
> who intentionally assaulted the complainant;
> who was under the age of 12 years;
> and that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent;
> the defendant intended to commit an assault of that kind;
> whether or not she consented to the act of indecency.

The evidence

Although the complainant Y's mother Z said that she was born on 14 December 1992, her birth certificate records that she was born on 13 December 1992. Whatever the actual date of the complainant's birth, I was satisfied beyond reasonable doubt that at the time of the alleged offences in September 2004 she was under the age of 12 years old.

I have to start by saying that I found that many of the witnesses were not telling the complete truth, or were embroidering and adding to their evidence, so that all their evidence was not all credible and reliable. But through it all I discerned clear reliable evidence from which I was able to draw conclusions beyond reasonable doubt as to what had actually happened.

Aspects of the evidence which would lead me to being sure that the defendant committed the offences with which he is charged are as follows:

I found the core of the evidence of the complainant, although it had various shortcomings - as set out below – credible and reliable. It left me with the clear view that there had been sexual interaction between the defendant and her, even although she had subsequently added to her description. The complainant spoke of the defendant taking her on his bicycle to his house and there taking off her clothes and draping her legs over his shoulders; and she also said that afterwards her vagina hurt and was in pain. She also gave evidence about a white liquid coming out of the defendant's penis and, in a telling piece of evidence which she is unlikely to have picked up elsewhere, she said he used the bedsheet and wiped his penis. Although the defendant denied that there was a bed and said there was only a mattress, on the site view at the defendant's house it was plain that there was a bed of the height indicated by the complainant. It was also clear at the site view that the complainant's description of the approach to the defendant's house was accurate.

I was unable to accept the evidence of the defendant's daughter Lilio (who was very unhappy and ill at ease when giving evidence, so that I regretted I was unable to accept her as a credible and reliable witness) that she had been at the defendant's home each morning of the alleged incidents and had seen nothing of them.

The complainant did not give direct evidence about being afraid of what the defendant was allegedly doing to her, though she did say in cross-examination that she told the 2 teachers that she was afraid when the defendant took her to his house (but that was not put to either of the teachers in evidence). But she did tell the teachers that the defendant said they were going to do something bad, which was then followed by him "inserting his thing to my thing".

Nor did the complainant give evidence about having tried to avoid the defendant after the first alleged incident, and as she was not in a home situation where she was under some kind of compulsion to keep meeting the defendant, I inferred that if she had wanted to she could easily have gone to school another way after the first alleged incident. Taken with the evidence that the complainant did not tell anyone else voluntarily about what had allegedly happened between her and the defendant (and she was afraid of telling her teachers about it), and that when she did tell someone else under pressure it was 11 days after the first incident, I therefore inferred that in reality the complainant, despite her young age, did not actively object to what the defendant was doing. That certainly supports her evidence of what occurred, but beyond that it is not really relevant to these charges, as the offence of carnal knowledge of the girl under section 121 does not depend on whether or not the girl consented and absence of her consent is not a necessary ingredient of it. Likewise under section 125(2) it is no defence to the offence of indecent assault on child to prove that the child consented to the act of indecency.

The complainant did say in evidence that she had told Lesili Mu'a at her house near the school that the defendant had put her on his bicycle, but she did not give evidence that she had told Lesili the other things that the defendant had done to her (as submitted by the defendant's Counsel in his closing submissions). In any event that was not specifically put to Lesili in her evidence by either Counsel.

In corroboration of the complainant's evidence, there were the records of interviews of the defendant by the Police, his answers to the charges and confession (Exhibits 3 – 6), which he admitted saying. While the defendant gave general statements of having committed crimes against the complainant, in particular he said the following:

> *First interview:*
>
> Q. 13. And what were those bad things?
> I took Y and I tried to have sex with her (carnal knowledge).
>
> Q. 14. Kaluseti is it true that you took Y and you tried to have sexual intercourse (carnal knowledge) with her?
> Yes.
>
> Q. 15. How many times did you take Y?
> Only three times.
>
> Q. 17. When you took Y, where did you take her?
> I took her home.
>
> *Second interview:*
>
> Q. 4. Did you at any time give Y any money?
> Yes.
>
> Q. 5. How much did you give her?
> As I recall, I gave her 50 seniti.
>
> Q. 6 Kaluseti do you recall the day you inserted your penis into Y's vagina and she told you that it hurt?
> Yes.
>
> Q. 7 Was this during the day or night?
> Day.
>
> Q. 8 Did anyone know of it?
> No.

I regret that I did not believe the defendant's denial of these in evidence, nor his evidence that he only gave these answers so that he could be released from custody to look after his 18- or 19-year old daughter (born in 1985) and illegitimate son of around 3. The defendant later said his son was around 1, but that did not tally with his evidence about the son going to kindergarten and I could not accept it. I accepted the evidence of Cpl Ve'ehala that the girl and the baby had been well and not sick on the day the defendant was arrested; and it

transpired from the daughter Lilio's evidence that after a day or so they had moved away from the defendant's house at Manuka to the home of her uncle in Afa. While the defendant no doubt wanted to be released, he is a mature man and there was no suggestion that he had been ill-treated while in custody, so I believe that he must have known that his answers would be treated seriously and that he would have been very unwise to have confessed to such serious crimes if he had not committed them.

It is appropriate to repeat the passage which I quoted in my ruling on the admissibility of the statements in this case. In *R v Rennie* [1982] 1 All ER 385 (CA) the Chief Justice of England said (at p 388 h):

> "Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person [in authority]. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they may be able to bring both their interrogation and their detention to an earlier end by confession."

I also have to record that the defendant was not called to give any such evidence during the voir dire, so that such evidence was not before me when I decided to admit these documents, although as it turned out it would not have made any difference to my decision as I did not believe it.

In addition the defendant in evidence actually admitted meeting the complainant Y on 2 occasions and giving her money, which the shopkeeper Falekihetoa Fatai gave evidence of having seen occurring on 1 occasion (although I was unable to accept her evidence that on that occasion she saw the defendant lifting Y onto his bicycle).

Then there was the evidence of the little boy Pita Katoa that one morning when he went on to the defendant's house to call his elder brother, he saw Y waiting outside the fence of the defendant's house. The site visit on 10 March showed that the defendant's house was about 1 mile from the complainant's house and in the opposite direction from the school to the complainant's house.

There was also the crucial evidence of Sepiuta Mu'a, who knew the complainant well because she came to their house (which was near the school), that on a Wednesday morning she had been waiting for a bus on Taufa'ahau Road beside the beach around 10.00 am when the complainant came along from the direction of Manuka (where the defendant's house is) and then went on a bus with her into Nuku'alofa and back.

Finally, the complainant had been absent from the school on the 4 days on which the offences are alleged to have occurred, which the School Register (Exhibit 2) showed was out of character for her.

However there were also contradictory aspects of the evidence:

There was the complainant's embarrassment at demonstrating the part of the body where the incidents had taken place, so that she finished up pointing to the bottom as the site of the defendant's penis and said it was on the upper part of his body; and the surprising and unbelievable evidence about the defendant covering her with a black cloth to take her into his house in broad daylight. For whatever reason, in evidence the complainant appeared unable to recall how the defendant put his penis to her vagina.

The Medical Report (Exhibit 8) and evidence from Dr Semisi Latu of the medical examination on 22 September showed that there was no damage to the complainant's vagina or the vaginal opening, and the hymen, fourchette, perineum and anus were intact, the only injury being a small abrasion at the posterior commissure (ie outside the vagina and right below the vulva), which might have been caused by a blunt object or the complainant sitting on something hard, or even her scratching. Dr Latu's evidence was that if the penis of a grown male had been inserted into the complainant's vagina there would have been bleeding and the hymen would have been intact, but that at that young age a penis might be inserted to leave the hymen intact if it had been inserted slowly, gradually, carefully and continuously in stages (as the vagina would dilate without any damage to the

hymen). Unfortunately the medical examination was only conducted 2 weeks after the last alleged incident, so that if there had been any immediate medical evidence it was lost and not recorded.

The first time the complainant admitted that something had happened was on Tuesday 14 September, which was 6 days after the last alleged incidents on Wednesday 8 September and 11 days after the first alleged incident on 3 September. And that was not a truly voluntary statement by the complainant in terms of section 11 of the Evidence Act, but was obtained on the questioning by 2 of the teachers at the Government Primary School, Navutoka after the complainant's mother had complained about her being absent from school and about stories of the defendant giving her money and noodles. The complainant's admission was therefore not an immediate statement made soon after the incidents to the first person to whom she could make a such an intimate statement.

Then there was the evidence that around December 2005 or January 2006 the complainant Y, in the hearing of 2 witnesses, Vika Lolohea (who lives near to her house) and Mrs X (who is married to her mother's brother), said that the stories about the defendant taking her were not true as the kids had made her tell the story. In evidence the complainant admitted saying that it to these ladies, but said that her uncle had told her not to tell anyone else that it had happened, which I accepted as an explanation.

Conclusions on evidence

On consideration of the contradictory aspects that I have mentioned above, they are not sufficient to cause me reasonable doubt that something sexual happened between the complainant and the defendant.

The direct and circumstantial evidence which I took into account in reaching that view was as follows:

The defendant's admission to the Police and in evidence that he had twice met the complainant at the shop and given her money, which is the kind of approach frequently adopted by men who prey on young children, who are known to seek out children who are loners. The defendant's evidence about that was corroborated by Falekihetoa Fatai. There was also Kalisi Langi's evidence in cross-examination that she had observed that the complainant "normally does not hang around with other children", carrying the inference that she was indeed a loner.

The little boy Pita Katoa's unsworn evidence (corroborated by the evidence of the complainant herself) that one morning when he went on to the defendant's house to call his elder brother, he saw Y waiting outside the fence of the defendant's house. I was unable to accept the evidence to the contrary of Lilio Li, who was not a credible witness.

The site visit on 10 March showed that the defendant's house was about 1 mile from the complainant's house and in the opposite direction from the school to the complainant's house, so it was very much out of her way; and also that in cross-examination the complainant had given an accurate description of its approaches and surroundings.

There was also the crucial evidence of Sepiuta Mu'a, who knew the complainant well because she came to their house (which was near the school), that on a Wednesday morning in the week in question she had been waiting for a bus on Taufa'ahau Road beside the beach around 10.00 am when the complainant came along from the direction of Manuka (where the defendant's house is and in the opposite direction to the complainant's own home) and then went on a bus with her into Nuku'alofa and back.

The evidence from the School Register (Exhibit 2) that the complainant, out of character, was absent from school on Friday 3, Monday 6, Tuesday 7 and Wednesday 8 September 2004, the days when the offences were alleged to have taken place.

All that evidence supports the complainant's account of having been taken to the defendant's house on the days in question.

Then there was the evidence of the complainant herself about what happened inside the defendant's house. I accepted her accounts of how the defendant took off her clothes, kissed her, draped her legs over his shoulders, licked her vagina, and put his thing to her thing; and that sometimes a white liquid came out of the defendant's penis and, in a telling piece of evidence which she is unlikely to have picked up elsewhere, she said he used the bedsheet and wiped his penis. Although the defendant denied that there was a bed and said there was only a mattress, on the site view at the defendant's house it was plain that there was a bed of the height indicated by the complainant in evidence.

The acts of a 52-year old man removing the clothes of a young girl aged 11, kissing her and kissing her vagina, and the circumstances accompanying them are very clearly capable of being considered by right-minded persons as so offensive to contemporary standards of modesty and privacy as to be indecent.

I accepted that evidence of the complainant because some of the detail was corroborated by the defendant in his statements to the Police as set out above and in general it had a ring of truth about it, even although the complainant's evidence was not all reliable - she admitted in evidence to lying, and at times, such as her evidence about being covered by the defendant in a black sheet, her evidence was not credible. Although she admitted saying in recent months in the hearing of her neighbour Vika Lolohea and Mrs X (who is married to her mother's brother) that the stories about the defendant taking her were not true as the kids had made her tell the story, I accepted as credible her explanation that her uncle had told her not to tell anyone else that it had happened. I inferred that the complainant's difficulties in demonstrating in evidence the part of the body where the incidents had taken place (so that she finished up pointing to the bottom as the site of the defendant's penis and said it was on the upper part of his body), and appearing unable to recall how the defendant put his penis to her vagina, were due to her embarrassment at being asked to do so in public.

As mentioned above, there was no direct evidence about the complainant being afraid of what the defendant was allegedly doing to her, nor about her having tried to avoid the defendant after the first alleged incident, and I inferred that if she had wanted to she could easily have gone to school another way after the first alleged incident. Taken with the evidence that she did not tell anyone else voluntarily about what had allegedly happened between her and the defendant (even although he had told her not to tell her), and that when she did tell someone else under pressure it was 11 days after the first incident, I therefore inferred that in reality the complainant, despite her young age, did not actively object to what the defendant was doing. But that it is not really relevant to these charges, as the offence of carnal knowledge of a girl under section 121 does not depend on whether or not the girl consented and absence of her consent is not a necessary ingredient of it. Likewise under section 125(2) it is no defence to the offence of indecent assault on child to prove that the child consented to the act of indecency.

The defendant's Counsel made lengthy submissions on the effect in this case of section 11 of the Evidence Act, which provides:

> *Evidence of complaint in sexual offences.*
>
> 11. In all criminal proceedings for rape or other sexual offences in order to corroborate the testimony of the person injured by the commission of the crime which forms the subject of the charge, evidence that such person at or shortly after the crime was committed voluntarily made a statement relating to its commission may be given. Such statement shall not in anywise be considered as constituting additional or independent evidence of the crime but only as showing that the person's conduct is consistent with his evidence at the trial.
>
> *Illustration*
> A is tried for the rape of B. Evidence may be given that a complaint was made by B shortly after the time when the offence is alleged to have been committed, and also of the particulars of such complaint so far as they relate to the charge against B.

Defence Counsel's submissions were to the effect that the result of section 11 is that, as in this case the complainant had not made her statements shortly after the alleged crime was committed, nor voluntarily, the whole complaint could not be admitted. I cannot accept these submissions, as the purpose of the section is to allow on an optional basis evidence ["evidence ... may be given"] of a complaint by a victim shortly after the incident to show that her conduct was consistent with her evidence at the trial, not to exclude the whole complaint if that did not occur. However I do find that the first statement about the alleged offences by the complainant was made on 14 September, ie 11 days after the first incident, and it was neither made shortly after the time when the first offence was alleged to have been committed, nor was it made truly voluntarily, as it was given when the complainant was under pressure to provide a reason for 4 days absence from school. So that evidence does not truly corroborate the complainant's evidence.

However the evidence of the complainant was corroborated by the detail in the defendant's statements to the Police as set out above, and I did not accept his denials of the facts of these in evidence before this Court.

The essential elements to be established in this case to find that there has been an indecent assault on a child are that:

> it was the defendant;

who intentionally assaulted the complainant;
who was under the age of 12 years;
and that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent;
the defendant intended to commit an assault of that kind;
whether or not she consented to the act of indecency.

I thus accept and believe the complainant's evidence that the defendant kissed her and licked her vagina on 4 occasions, which, as she was clearly under 12 at the time, amount to indecent assaults to which she was not able to give consent. I therefore find it established beyond reasonable doubt that these constituted indecent assaults on a child.

Turning to the allegation of carnal knowledge, there was the Medical Report (Exhibit 8) and evidence from Dr Semisi Latu of the medical examination of the complainant on 22 September. There was no damage to the vagina or the vaginal opening, and the hymen, fourchette, perineum and anus were intact, the only injury being a small abrasion at the posterior commissure (ie outside the vagina and right below the vulva), which might have been caused by a blunt object or the complainant sitting on something hard, or even her scratching. Dr Latu's evidence was that if the penis of a grown male had been inserted into the complainant's vagina there would have been bleeding and the hymen would have been intact, but that at that young age a penis might be inserted to leave the hymen intact if it had been inserted slowly, gradually, carefully and continuously in stages (as the vagina would dilate without any damage to the hymen). Unfortunately the medical examination was thus only conducted 2 weeks after the last alleged incident, so that if there had been any immediate medical evidence it was lost and not recorded.

The position about the allegations of carnal knowledge is thus different. Under section 140 of the Evidence Act that requires proof of penetration (which means penetration however slight) and while both the complainant in her evidence and the defendant in his interviews said that he inserted his penis to her vagina, that is not fully supported by the medical evidence. So while I consider that something like that may have happened between the two, albeit incompletely, there is a reasonable doubt raised by the absence of medical evidence of penetration (on the same kind of basis as the not dissimilar case of *Holland v R* 117 ALR 193, referred to above). I thus find that the charges of carnal knowledge were not proved.

But I believe the evidence of the complainant and the defendant's statements to the Police, taken with the medical evidence, do establish beyond reasonable doubt that the defendant put his penis to the complainant's vagina and so attempted to have carnal knowledge of her. Q & A 13 & 14 of the record of the first interview (Exhibit 3) in fact use the words "tried to have sex". It is therefore open to the Court to convict him for attempts to have carnal knowledge under section 122.

The relevant definition of an attempt to commit an offence in section 4 of the Criminal Offences Act is that it is an act done with intent to commit that offence, which would have constituted the offence if it had not been interrupted for whatever cause. I find that it was established beyond reasonable doubt from the complainant's evidence of the defendant's actions and his own answers to the Police that he intended to have sexual intercourse with the complainant and that in putting his penis to her vagina he did something which was more than mere preparation.

The essential elements to be established in this case to find that there has been attempted carnal knowledge of a girl are that:

> it was the defendant;
> who did an act with intent to have sexual intercourse (ie by his penis penetrating her vagina);
> with a girl who was under the age of 12 years;
> whether or not she consented to the act;
> or whether or not he reasonably believed that the girl was of or above that age;
> and the defendant's act would have constituted carnal knowledge if it had not been interrupted for whatever cause.

These elements have all been established beyond reasonable doubt, so in each case I found the defendant guilty under section 122 of an attempt to have carnal knowledge of the complainant.

For all the reasons given above, I also find that the 4 counts of indecent assault on a child have been proved beyond reasonable doubt and I find the defendant guilty of these 4 counts.

Conclusion

I therefore found that the necessary elements have been established beyond reasonable doubt and I find the defendant guilty as follows:

Count 1: Attempt to have carnal knowledge of girl;
Count 2: Indecent assault on child;
Count 3: Attempt to have carnal knowledge of girl;
Count 4: Indecent assault on child;
Count 5: Attempt to have carnal knowledge of girl;
Count 6: Indecent assault on child;
Count 7: Attempt to have carnal knowledge of girl;
Count 8: Indecent assault on child.

R v Talanoa

Supreme Court, Nuku'alofa
Ford Acting CJ
CR 389/2003

27-31 March, 3 and 7 April 2006; 13 April 2006

Criminal law – evidence – uncorroborated evidence of complainant – court scrutinised Crown case – accused acquitted

The accused was one of three offenders charged with rape. One of the offenders absconded while on bail and another pleaded guilty. The accused gave evidence and called evidence on his own behalf. The essence of his defence was that he did have sexual intercourse with the complainant but it was completely consensual and she played far more than a passive role in the events leading up to the sexual act. On the night in question the accused and his co-accused were at a nightclub when the complainant approached him and asked for a dance. After a second dance he asked her to be his girlfriend and she invited him over to a table she was sharing with her daughter and a friend. Later they all cruised around in the accused's car and eventually they finished up drinking in a house where the alleged rape offences occurred. The accused claimed that at one point the complainant called out to him to come into a bedroom where she lay naked except for her bra. He claimed that they had consensual sex but after that the two co-accused, who he was afraid of, also had sex with the complainant and while that was happening he walked back to his own hut nearby. There was no corroboration of the complainant's evidence and the issue was the approach a judge sitting alone should take in the absence of such corroboration.

Held:

1. Although there was no requirement that the evidence of a complainant in a rape case must be corroborated, the common law requirement as to the need for a judicial warning in the absence of corroborative evidence still prevailed.
2. A judge sitting alone must adhere to the common law principle in question and must, in the absence of corroborative evidence, scrutinise the Crown case with particular care and proceed with considerable caution before entering a conviction against the accused.
3. After analysing the evidence relating to credibility, the court was satisfied that the complainant had fully consented to have sex with the accused on the night in question and he was acquitted accordingly.

Case considered:

Teisina v R [1999] Tonga LR 145

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for Crown : Ms Tupou
Counsel for accused : Mr Veikoso

Judgment

The charge

[1] The accused is charged with one count of rape and, in the alternative, one count of abetment to rape. A co-accused, Tu'amelie Mahe, was charged with rape and indecent assault and another co-accused, Tahaafe Moala, was charged with one count of rape and

two counts of indecent assault. All the charges relate to the same incident and the same complainant.

[2] Moala pleaded guilty to the rape count and the Crown withdrew the indecent assault charges. He is awaiting sentence. Mahe absconded while on bail and is now believed to be in Samoa.

The Crown case

[3] The incident in question occurred during the night of Wednesday 20 August 2003. The 37-year-old complainant, originally from Lapaha, at that time was residing with her mother's relatives at Mataika so as to be close to her workplace. She worked as a housekeeper at Popua. She describes herself as a divorced woman with three children. Her former husband lives in New Zealand.

[4] The complainant had been invited by the Lapaha Youth Group to attend a function at the Phoenix Nightclub, Kolofo'ou. She had been to the nightclub before. On this particular night she went with two males - a relative and a neighbour. They arrived at approximately 9 p.m. She said that when the dancing was about to finish, the accused came over and introduced himself to her as 'Sifa' (in this judgment I will refer to him either as 'the accused' or 'Pita'). She said that he asked her for a dance and joined her at her table. She said that they had two or three dances. He asked her what she was going to do after the dancing. She told him that she was going to continue on to the Billfish (another bar and restaurant) and dance there. Her 17-year-old daughter was also at the nightclub but she had travelled from Lapaha in a different vehicle.

[5] The complainant told the court that after the dancing finished she went to the car and said goodbye to her relatives and her daughter. She was then going to walk to the Billfish. She said she was thinking of going to the Billfish with the two boys she had come with but she did not notice them. She said she then noticed Pita standing beside a white car. He asked her if he could take her to the Billfish. The complainant said that she was afraid because she did not know the two boys sitting in the front seat of the white car. Pita told her not to be afraid because the driver was his brother. That remark reassured the complainant. She said, 'I was not afraid anymore because I thought nothing would happen to me because it was his brother.' As it turned out, the driver of the white car was the co-accused -- Tahaafe Moala.

[6] The complainant sat in the backseat with Pita. She noticed that the vehicle started travelling in another direction from the Billfish and she asked Pita where they were going. He told her that they were going to get something from a house at Pahu and then they would go back to the Billfish. The vehicle duly stopped at a house in Pahu and the complainant noticed Pita get out and fetch something which he put in the boot of the car. She did not see what it was but it turned out to be a tyre which the three were planning to exchange for a bottle of liquor. The vehicle then travelled onto a taxi base at Ngele'ia where the exchange was made before returning to Pahu.

[7] By this time, the complainant said, she was becoming increasingly afraid. She asked the accused where they were going. He reassured her that there was nothing to worry about. He told her, 'after this, we are going to the Billfish.' On the way from the taxi base back to Pahu the complainant noticed that Moala and Mahe were drinking from the liquor bottle that they had picked up at the taxi base.

[8] Two houses at Pahu figured prominently in the evidence. First, there was an empty house owned by Samu Fifita who, at the time, was living overseas. The other house, two doors away, apparently belongs to the accused. It is actually a combination of two huts that at some stage had been joined together. Some witnesses referred to it as Pita's hut. For ease of reference, I shall refer to the two houses in question as 'Fifita's house' and 'Pita's hut' respectively.

[10] What happened when the vehicle then arrived back at Fifita's house is important. I set out the relevant passage from the complainant's evidence in chief:

> 'The two passengers got out of this car and went into the house. This house was very dark. All I noticed was that this house was too dark. There were no lights in it. The two passengers they got out of the car and went into the house. They were drunk and the liquor bottle taken from the taxi base - they drank it while we were on our way to the

house. (Pita) joined them drinking this liquor bottle. I was too afraid to get out of the car and Pita got out of the car and went to the other two passengers who were inside the house and when he came back I asked him when are we going to the Billfish and then he told me to wait until the other two passengers have a drink and then we had to go.

Q. So what did you do?
A. While I was sitting in the car he came back and asked me or insisted me to come with him and wait in the house for the other two passengers to finish their drink.

Q. So what did you do?
A. At that time I did not think that the accused was thinking of doing something bad to me and I recognised him whispering to the other passenger, not the driver, who was sitting in front of the car. The accused was whispering to him. The other person who Pita whispered to was in the house and all I noticed was Pita whispered to this person and telling me to come.

Q. So what happened?
A. As I recall the passenger that Pita whispered to (Mahe) immediately gone and I kept noticing the flash of a light -- the streetlight. I could see him coming with a mattress.

Q. So this person brought the mattress into the house?
A. It was Pita. At that time Pita was standing by the door of the house and he insisted me to come in and so I got out and stood by the car. The car was parked near the house.

Q. So what happened?
A. I was too afraid and I asked Pita to take me to the Billfish if these two guys are having a drink and I asked him to take me to the Billfish.

Q. So what did Pita do?
A. When Pita was about to answer the question the other two boys were shouting from inside the house telling us to go and have sex now.

Q. And what happened?
A. At this time I was confused and then Pita grabbed hold of my hand and pulled me inside the house.

Q. So what did you do when Pita got hold of your hand and pulled you inside the house?
A. I struggled when Pita got hold of my hand and I shouted at him and when we came into the room the other two boys laughed and locked the door from the outside.

Q. So why did you struggle and shout?
A. Because I never consented to what Pita was thinking about. I didn't agree with that.

Q. According to your knowledge at the time, what was Pita thinking of doing?
A. According to my knowledge at the time Pita was thinking of doing something bad to me from the time that I told him I wanted to go to the Billfish.

Q. Explain what you mean?
A. When we got into the room he started kissing me and he started kissing my breasts.

Q. So what did he do at that time?
A. At that time we were struggling and I just couldn't stop him he was too strong and I had no place to go at that time. I could not run anywhere. In this room there was no light. The louvres to the front in this room - was light shed from the streetlight. At that time I was struggling and I had no place to run to because the room only had one door and the two other guys were sitting in the living room shouting at us to go on and have sex fast so that they can come.

Court: Was that door locked from the outside?
A. Yes.

Q. Explain what Pita did to you at that time?
A. At that time Pita took off his clothes and he forced my clothes off. I shouted for help on the mattress on which I was lying.

Q. So why didn't you stand up on the mattress?
A. At that time I was so confused I didn't know what to do. I had no hope at all because I was thinking if I run through the door the other two guys would get me.

Q. So what happened?
A. While I was so confused Pita forced my clothes off.

Q. So what were you wearing at that time?
A. I wore a shirt and a T-shirt and short pants.

Q. How did he take off your clothes?
A. The first thing he did, he took off my T-shirt.

Q. How did he take it off?
A. He pulled my T-shirt. When he took off my T-shirt I didn't know where it went. I was lying on my back then. He took off my short pants as well. I was struggling and trying to get away but I couldn't. When he finished taking my clothes off the accused landed on top of me.'

[11] The complainant then described how Pita lay on top of her and, using his hands, he inserted his penis into her vagina and commenced having sex. She said that she continued shouting for help but the other two boys in the living-room shouted at them 'to go fast'.

[12] While they were still having sex, the door to the room opened and the complainant said that Moala (who she referred to simply as 'the driver') was standing there already naked. He told the accused to get up because it was his turn. The complainant said that the accused then got off her and walked out of the room. She called after him to help but he did not respond or return. She said that as he left the room he locked the door from the outside. She then described how Moala assaulted her and had sex with her. At one point she noticed the accused peeping through the door but then he left.

[13] The complainant told the court that while Moala was having sex with her, Mahe inserted his penis into her mouth and later they changed positions with Mahe having sex and Moala inserting his penis into her mouth. While all this was happening, the complainant said that she continued to struggle. At one point Moala coupled his hands over her mouth and nearly suffocated her. He also bit her on the breast and threatened to stab her with a knife but because of the darkness she was unable to tell if he had a knife in his possession.

[14] By this time, the complainant said, she had lost all sense of time but her ordeal continued until the accused suddenly reappeared on the scene again. She said, 'he had a look at us and then he told the other two guys, that's enough, we have to go.' The others then stopped what they were doing and the complainant began looking for her clothing. She said that she was dishevelled and hurt and when she found her items of clothing she thought of going to the police station. Pita suggested that she should come to his hut because there was a girl and boy there. She did that. She saw a boy and girl at Pita's hut who she took to be girlfriend/boyfriend. She said that at that stage she was still crying from her ordeal.

[15] The complainant described briefly what then happened at Pita's hut. She recalled giving her purse to Pita. She also recalled Mahe coming in and grabbing her head. She shouted out at them that she was going to the police. She eventually left the house and started walking to the police station. By that time it had started to rain. She met a man who asked her where she was going and she told him to the police station to make a complaint about some boys who had abused her. She asked if she could borrow his umbrella. He replied that it was not his umbrella but he agreed to walk with her and during the journey she described the boys to him.

[16] The complainant arrived at the Nuku'alofa Police Station at approximately 5 a.m.. She first spoke to a Corporal Lavaki who arranged for her to be interviewed by a female

officer, Constable Cocker. She then returned to the scene with the police and they apprehended Mahe and the accused. The complainant immediately recognised the accused again when she saw him. He was standing near his hut holding her purse. Moala was apprehended some time later. Later in the day the complainant was examined at Vaiola Hospital. In his report, the doctor concluded:

> 'Successful sexual intercourse did occur and the skin marks noted on right chest and breast are consistent with love bites.'

[17] The Crown called evidence from the man with the umbrella. He confirmed that on the night in question the complainant had asked him to take her to the police station with his umbrella and while they walked she had explained that some 'boys or men' had abused her. He recalled that she was wearing white short pants and a blue or light green T-shirt. In cross-examination, the witness was asked whether the complainant had given him the names of the men involved. The witness replied that she had only given him one name. She told him that it was 'her boyfriend, Pita.'

[18] Another witness for the Crown was 30-year-old 'Iunesi who knew the accused. She had also been to the Phoenix nightclub and had noticed the accused dancing with the complainant. After the dancing had finished she began walking home with her boyfriend, Elevisi. The court was not told precisely where she lived but they had gone into Pita's hut to shelter from the rain. She recalled Mahe coming in and asking for a mattress and blanket 'because he had a girlfriend.'

[19] 'Iunesi estimated that between half an hour and one hour later Pita came into his hut and told her and Elevisi that the two other boys were forcing a woman in the boys' house (Fifita's house) and he asked her to come. She asked who the woman was and Pita replied it was the woman who was in the other house and the two boys were forcing her. She told him that she was not going to go because she was afraid of Mahe. The witness said that when she looked at Pita she could tell that he was drunk and he looked like he was wanting to go to sleep. 'Iunesi said that Pita asked her more than once to go and get the woman but she said that she would not go. She kept insisting, however, that Pita should go and fetch her and so eventually he got up and went to the other house and brought the woman back with him.

[20] 'Iunesi said that the woman's hair was in a mess, her watch was broken and it looked as though she was crying. As they entered the hut she was holding her purse and holding Pita's hand, 'like boyfriend and girlfriend'. She said that they went and sat on the bed and the woman gave her purse to Pita, lay her head on Pita's chest and closed her eyes.

[21] A short time later, Mahe entered the hut. 'Iunesi said that he took the purse from Pita, took a tube of lipstick from the purse and put the lipstick on his lips. He then started kissing the forehead of the woman. The woman asked Pita to take Mahe away. Pita wanted her to stay the night but she then stood up and walked out the door. When she reached the road she shouted out that she was going to lodge a complaint.

Voir dire hearing

[22] The accused made a statement to the police but its admissibility was challenged by Mr Veikoso. After a lengthy voir dire hearing, I agreed to admit only those parts of the statement which the accused accepted were in his words. The so-called record of interview was unsatisfactory. It consisted of a series of leading questions which the interviewing officer put to the accused taken from the statement the complainant had given to the police, which the officer had in front of him. The leading questions simply called for a 'yes' or 'no' answer. As I indicated in my ruling, that type of leading question format is not what is envisaged by section 21 of the Evidence Act (Cap.15). A voluntary confession in terms of section 21 should, as a general rule, consist of answers or admissions in the accused's own words. The leading question format is easily manipulated, as happened in the present case when pressure was applied by the officer to have the accused give the 'yes' or 'no' answer that best fitted in with the complainant's statement.

[23] The additional problem for the prosecution in the present case was that the credibility of the police officer who conducted the interview was exposed rather dramatically by important contradictory evidence given by the police countersigning officer. The interviewing officer had said in evidence that at the interview the countersigning officer was seated at the same table in the chair to his immediate right. When he gave evidence, however, the countersigning officer confirmed that during the interview, he was seated at

another desk two tables away interviewing a suspect of his own. That evidence was consistent with the accused's own description of the interview.

The defence

[24] The accused elected to give evidence and to call evidence on his behalf. He freely admitted having sexual intercourse with the complainant on the night in question but he claimed that it was completely consensual and that she played far more than a passive role in the events leading up to the sexual act.

[25] The accused works as an electrician and assistant panel beater at BMG Auto Services. He told the court that at the time of the incident he was 21 years of age. He recalled going to the dance at the Phoenix nightclub with the two co-accused. Beforehand, they had been drinking at Fifita's house at Pahu. The two other boys remained in the car while the accused went inside the nightclub. He said that he started dancing by himself when the complainant, who he had not noticed approaching, suddenly grabbed his hand and asked him to dance with her. He said that they played another song and he continued on dancing with the complainant. He asked her if she would be his girlfriend and she told him not to mistreat her. She invited him to come over to her table and have a talk and he did so. He said she pointed out two girls -- her daughter and a friend and she said that that was why she was at a dance. Then two boys came and danced with the two girls and so he continued sitting at the table with the complainant. Pita said that he then asked the complainant for a chance to sleep with her to see if they were attracted to each other. She told him that she was concerned about her daughter and her friend and she suggested that they wait until they go. Pita told her that he was with his friends and they would continue on cruising in their car.

[26] Pita said that when he later went outside the nightclub and was about to reach his car he heard the complainant calling out to him. He asked if she could join them. She then gave Pita her purse to hold while she went to say goodbye to her daughter. After a short while she returned and she asked if the other boys were going as well and he said, 'yes'. Pita said that the complainant sat in the back seat alongside of him and they drove straight to his hut at Pahu where they picked up a tyre and took it to the taxi base at Ngele'ia to exchange for some liquor. They then cruised around in the car and picked up some water from Mahe's cousin at Kolofo'ou (presumably to mix with the liquor). Pita said that outside Mahe's cousin home, the complainant put her head on his chest and he asked her if they could kiss. She answered 'u'mm' and they kissed for a short period but they stopped when the other two boys came back to the car and the complainant then 'sat up straight.'

[27] Pita told the court that they then returned to Fifita's house where the incident occurred. At that point in his evidence, Mr Veikoso asked Pita for his response to the complainant's allegation in court that she had kept asking him to take her to the Billfish. Pita responded to Mr Veikoso: 'that is what she said in court but she never told me something like that.' Again, in cross-examination, Pita firmly denied that the complainant had at any stage mentioned going to the Billfish that night and he ridiculed the suggestion that he had agreed to walk with her to the Billfish pointing out that the Billfish was approximately 2 miles away from the Phoenix nightclub.

[28] Pita said that when the vehicle stopped outside Fifita's house, he was going to take the complainant over to his hut but Mahe and Moala entered Fifita's house and lit a candle and continued drinking. Moala asked Pita to join them but the complainant said that he (Pita) had had enough and they stayed in the car. Mahe then came back out and told Pita and the complainant that he was going to get a mattress and he walked off towards Pita's hut. Pita and the complainant then entered the living room of Fifita's house. A short while later Mahe returned with a mattress. Pita said that when Mahe entered the livingroom he told the complainant to stand up so he could give her the mattress to sit on but she told him it was okay and she asked him to put the mattress in the bedroom. Pita described how they were seated in the living room. He said that Mahe poured the drinks but the complainant did not have any. After a while she stood up and said that she was going to lay on the mattress and then she called out to Pita telling him to come into the room after he finished his cup.

[29] Continuing in his evidence in chief, Pita said that when he entered the bedroom the complainant was naked except for her bra and she told him to come and lay with her. He did so and she then told him to stand up and take off her bra but, as he put it in evidence, 'I told her that I did not know how to take off a bra and then she took it off herself.' Pita said

that he then lay on top of her on the mattress but he was not aroused. She told him that that was okay because she could arouse him and she proceeded to do so with her hands. He said that they then had sex. He described how during intercourse, the complainant used her hands to pull up her legs and after she let go of her legs she caressed his back.

[30] At one point Mahe pushed the door open and told them to have sex fast so he could have sex. Pita said that he could see what was going to happen and so after he finished having sex he told the complainant to put her clothes on and he suggested that he could take out the louvres to the bedroom window (which was not high off the ground) and she could escape over to his hut. He said that when he made that suggestion the complainant responded, 'it's okay, I'm going to lay here. If you want to join the other two boys drinking you can.' When Pita left the room the complainant was lying on the bed naked with a blanket over her. Pita was asked about the complainant's statement that the bedroom door had been locked from the outside but he told the court that there was no lock on the outside of the door.

[31] Pita said that after he entered the livingroom, Moala stood up and went inside the bedroom. Pita said at that point he was afraid of the other two boys and so he walked over to his hut and that was when he asked 'Iunesi, who is a cousin of Mahe's, to go and get the woman out of the house. She told him that she would not because she was afraid that Mahe might hit her.

[32] Pita then described how when he later went back to Fifita's house he helped the complainant find her clothing and then he led her back to his hut. He told her to stay the night with him and he would take her back to her home in the morning. He described how he held her during the walk back to his hut and how they had gone and sat on his bed and she had closed her eyes and rested her head on his chest. She then gave Pita her purse asking him to hold it. Pita then told how Mahe had come into the hut, taken the purse off him, put lipstick on his lips and then started 'repeatedly kissing the complainant's face.' Mahe then said to the complainant, 'when I say we are going to have sex we are going to have sex and we are about to have our second turn.' According to Pita, he also said that he was going to 'beat the shit out of her'. Pita said he told Mahe not to do anything like that and he went outside to get a wet cloth to wipe the lipstick from the complainant's face. He described how he then saw Mahe punch the complainant's leg and that was when she ran outside saying that she was going to lodge a complaint.

[33] The defence also called evidence from Pita's 49-year-old mother, Mele. She gave evidence of a visit she made to the police station after Pita had been apprehended and, as she walked along the pavement outside the police station after her visit, the complainant approached her and asked her if she was Pita's mother. Mele said that when she told her that she was, the complainant said, 'that she's all right with Pita because she consented but she's sad of the other two boys because of what they did to her.'

The law

[34] The essential elements the Crown needs to prove in order to establish a charge of rape were not in dispute. Section 118 of the Criminal Offences Act (Cap. 18) provides that a person commits rape when he carnally knows any female against her will. First, therefore, there must be carnal knowledge of the woman which means full or partial sexual intercourse. In other words, there must be an intentional penetration of the vagina of a woman by the penis of a man. The slightest degree of penetration will suffice. If there is any penetration at all, no matter how slight or for how short a time, that will be sufficient. There does not have to be an ejaculation by the male. Rape is complete upon penetration. Secondly, the penetration must be without the woman's freely given consent and, thirdly, the penetration must have occurred without a belief on the part of the man, based on reasonable grounds, that the woman did consent.

[35] It is the second and third elements which are keenly disputed in the present case. Mr Veikoso submits that the Crown has failed to prove that the complainant did not consent or that the accused had reasonable grounds for believing that she did consent. The question whether the complainant consented or whether the accused had reasonable grounds for believing that she was consenting to sexual intercourse is a question of fact.

Corroboration

[36] As was stated by the Court of Appeal in *Teisina v R* [1999] Tonga LR 145, 149, there is no requirement that the evidence of the complainant in a rape case must be corroborated. Section 11 of the Evidence Act (Cap.15) provides only that in criminal proceedings for sexual offences, evidence of complaint made by the victim shortly after the commission of the crime, may be given, not as corroboration, but as showing that the victim's conduct is consistent with his or her evidence at trial. As the Court of Appeal noted, the common law applies and 'though corroboration of the evidence of the complainant is not essential in law, it is the practice to warn the jury against the danger of acting on his or her uncorroborated evidence, particularly where the issue is consent or no consent.'

[37] The question of consent or no consent is, of course, precisely the issue at stake in the present case. Corroborative evidence means admissible evidence from an independent source which tends to confirm and support the victim's evidence that not only was the crime committed but that the accused committed it. When more than one accused is involved then there is a need to look for corroborating evidence implicating each accused separately in the commission of the offence.

[38] As noted in Blackstone's Criminal Practice (1993) para F.5.18:

> 'The justification for the rule (requiring a warning in the absence of corroboration) is the inherent danger arising from the fact that sexual allegations are simple and often tempting to make, but difficult to refute, and from the characteristic possibility of hysterical or malicious invention, or simply the instinct for preservation of the complainant's reputation or material interests.'

[39] The learned authors of Criminal Laws -- Materials and Commentary on Criminal Law and Process in New South Wales (1996) make the following observations in relation to the requirement for the rule:

> 'These doctrines were built on highly questionable assumptions concerning the ease with which sexual assault allegations could be made, the unreliability and hysteria of complainants, and the difficulties of disproving such an allegation. As the suspect nature of these assumptions and their highly gendered construction was revealed by feminist campaigners and writers, so legislatures moved to abolish or restrict the operation of these doctrines.'

[40] Be that as it may, as noted above, in Tonga the common law requirements as to the need for a judicial warning in the absence of corroborative evidence still prevails. In the present case given, in particular, the involvement of the two co-accused, there is no evidence capable of amounting to corroborative evidence implicating the accused. I do not understand Crown counsel to contend otherwise. As a judge sitting alone, therefore, I must adhere to the common law principle in question and, in the absence of corroborative evidence, there is a need for me to scrutinise the Crown case with particular care and to proceed with considerable caution before entering a conviction against the accused.

Credibility

[41] Both counsel conceded that this case falls to be decided on the issue of credibility. There is no way that the stories told by the complainant and the accused can be reconciled. There is, in fact, such a gulf between the evidence given by each that at times an independent observer could have been forgiven for wondering whether they were talking about the same case.

[42] On the face of it, with exceptions I will refer to shortly, both the complainant and the accused appeared to be credible witnesses. There is, however, evidence which, upon analysis, directly affects the intrinsic credibility of their respective stories in such a way that almost inexorably the court is driven to the one inevitable conclusion as to where the truth of the matter lies. I now propose to consider, seriatim, those particular aspects of the evidence:

(a) The purse

> In her evidence in chief, the complainant had said nothing about having given her purse to the accused to hold outside the Phoenix

nightclub when she went and said farewell to her daughter. She did not deny the proposition, however, when it was put to her in cross-examination by Mr Veikoso, although she offered no explanation for having done so. The evidence of the accused on the topic was that when he walked out to his car after the dance and was about to go cruising, the complainant followed him and called out asking where he was going. She asked if she could join them and she gave the accused her purse to hold while she went and said goodbye to her daughter. Mr Veikoso submitted that her actions in this regard supported the accused's evidence that it was the complainant who was taking the initiatives to have a relationship with the accused.

Leave was granted for the Crown to recall the complainant at the end of the case so as to put to her, for her reaction, certain matters that had arisen out of the accused's evidence which had not been covered in her cross-examination. During that session, Crown counsel tried to ascertain from the complainant exactly why she had given her purse to the accused to hold outside the nightclub. The following exchange took place:

> 'Q. Why did you give Pita your purse while you went to say goodbye to your relatives?
> A. When I came out of the nightclub the accused asked me where I was going. I told him, I'm going to the Billfish. He told me, he wanted to join me. I said it's okay you can join me but I'm walking to the Billfish. Then the accused asked me if it's okay for him to hold onto my purse and I told him yes, it's okay, he could hold onto my purse, I'm going to say goodbye to my daughter and relatives.
> Q. So why did you give him your purse when he asked for it?
> A. When I told him I was about to go to the Billfish, he asked if it was okay if he came with me. I said yes, it's okay. I turned to walk away. He asked me again to give him my purse to hold onto and I gave him my purse so I went and said goodbye to my daughter.
> Q. Could you give me only one reason, **the reason** why you would give someone you had just met your purse?
> A. I didn't give him my purse because we were about to go to the Billfish. The reason I gave him the purse was for him to hold onto while I -- because I was in a hurry to go and say goodbye to my relatives.'

Crown counsel's exasperation in trying to extract a simple answer from the complainant was all too evident. In the same passage of evidence, the complainant said that the reason she gave the accused her purse to mind again later on after the incident was because she was in a hurry to go to the police station. I say at once that I did not find the complainant's answers on this topic at all convincing.

(b) The Billfish

The complainant said repeatedly throughout her evidence that her intention after leaving the Phoenix was to go to the Billfish and she kept asking the accused to take her to the Billfish. For his part, the accused denied that she ever once referred to the Billfish. The complainant said that she was going to walk to the Billfish and the accused had asked her if he could join her in walking to the Billfish. When that proposition was put to the accused, he said that it was a lie.

The obvious question that arises from the complainant's evidence is, why would the accused have agreed to walk with her to the Billfish when he had a car available to drive them both anywhere they wished to go. The accused estimated the distance to the Billfish as approximately 2 miles. That estimate may be an overstatement but, even allowing for the distance to be half that estimate, the complainant's proposition defies credibility and commonsense.

(c) The door

In the passage quoted earlier from her evidence in chief, the complainant stated on two occasions (once in response to a specific question from the court) that the door to the bedroom where the incident occurred was locked from the outside. She repeated the same statement later on in evidence for a third time. The accused denied that the bedroom door had a lock on the outside.

The court decided to take a view of the premises in question. Unfortunately, Crown counsel had a prior commitment in Fiji and could not be present but the accused pointed out the bedroom in question. The door had no lock on the outside. When the complainant was later recalled to the witness stand, Crown counsel showed her a photograph of Fifita's house and asked her to identify the location of the bedroom where the incident occurred. The complainant pointed to another room at the very front of the house. When it was pointed out to her by the court that, upon inspection, the room she had identified did not appear to even have a door, the complainant maintained her stance and indicated that the front room was where the incident occurred.

A second inspection of the premises confirmed that the room which the complainant had identified did not have a door and appears not to have had a door within the foreseeable past. The complainant's admission that the room she was in may not have had a door is directly contrary, of course, to her earlier sworn testimony that the bedroom, not only had a door, but it was a door that was able to be locked from the outside.

(d) The clothing

The complainant said more than once that in the bedroom the accused forcibly removed her clothing. When she was asked in cross-examination why none of her clothing was torn she replied that her shorts and T-shirt were brand new and they were made of a strong fabric.

That may well be so, but each item of clothing the complainant was wearing on the night in question was produced as an exhibit and there is no evidence that any of her more fragile undergarments were torn or damaged in any way. The complainant's bra, for example, which figured fairly prominently in the evidence, had a fastener comprised of three small hooks and eyes. Not only were the hooks and eyes small in size but they were delicate and even the smallest application of force would inevitably have resulted in some type of damage.

There was no evidence that any force had been applied to the three small hooks and eyes on the bra. These observations obviously support the accused's evidence that the complainant, in fact, undid her own bra.

(e) Boyfriend/girlfriend

The complainant told the court that sometime after the preliminary inquiry had been held into this case in the Magistrates' Court, she had heard that the accused's mother had been spreading rumours that she had been the accused's girlfriend. She said that she was very upset over this rumour and she confronted the mother pointing out that it was not true and that it was the accused who had asked her to be his girlfriend. That proposition had not been put to the accused's mother when she was giving evidence and so the court does not know whether she accepts that the conversation took place or not. The matter, however, was canvassed by Mr Veikoso in cross-examination.

Mr Veikoso first put it to the accused that 'Iunesi had described observing Pita and the complainant walking into Pita's hut after the incident holding hands like 'boyfriend and girlfriend'. The complainant denied that allegation. Counsel then put it to the complainant that the man with the umbrella she had talked to on the way to the police station had given evidence that she had referred to Pita as her boyfriend. The complainant responded that the witness was lying.

One of the witnesses called by the Crown was Corporal Lavaki, an officer in the Criminal Investigation Division with 21 years experience in the police force. It was he who the complainant first spoke to when she arrived at the police station to make her complaint. In cross-examination Corporal Lavaki admitted overhearing the complainant say in the course of her interview by Constable Cocker that she liked Pita but she did not like the other two boys because their actions were abusive.

I accept all that evidence and I find it to be consistent with the evidence given by the accused's mother that the complainant had admitted to her outside the police station that she had consented to having sex with Pita.

The Crown's response

[43] At the end of her helpful submissions, I invited Crown counsel to highlight what she perceived to be the strongest evidence, in the absence of corroborative evidence, in support of the Crown's case. In response, counsel referred to some of the matters I have already dealt with plus the following further points.

[44] First, counsel highlighted an inconsistency in the accused's evidence and in his statement to the police. In one of the questions in his interview the accused had been asked: 'What happened after you finished your sexual intercourse?' He answered, 'Tahaafe (Mahe) came in and pushed (the complainant) and she fell onto the mattress then I went outside.' Crown counsel noted that in his evidence, the accused had said that he had finished having sex and had gone out of the bedroom before Moala had entered the room.

[45] The problem is that the accused was never cross-examined on this particular answer recorded in his record of interview and, in any event, I have already expressed reservations about the reliability of the police statements.

[46] Secondly, Crown counsel submitted that Corporal Lavaki's evidence that, during the course of the police interview, he, 'overheard the complainant say that she consented to Pita but not the others' was unreliable because the officer was only 'eavesdropping' and the admission was not recorded in writing. She submitted that the officer had 'heard wrong'. Crown counsel had actually asked Corporal Lavaki in re-examination if the remark had been recorded and he replied, 'I don't know if it was recorded but I heard it.'

[47] The prosecutor is bound by that answer given by her own witness. It is not open to her to impeach his credibility. I have no reason to doubt Corporal Lavaki's evidence on the subject.

[48] Thirdly, Crown counsel sought to rely on the accused's admission that the name 'Sifa' which he had given to the complainant at the dance was a false name and, as I understand the submission, his deception in this regard showed a propensity for the accused to lie and it deceived the complainant into getting into his car.

[49] I accept that there are situations where lying can be capable of amounting to corroboration but the lying must be deliberate; it must relate to a material issue; the motive for the lying must have been a realisation of guilt and a fear of the truth and, unless admitted, the statement must clearly be shown to be a lie from an independent source.

[50] I do not see how the giving of a false first name to the complainant at the dance can advance the Crown's case. Not only do I fail to see how the name the accused gave to the complainant could have made any difference as to whether or not she got into the car but, quite simply, the giving of the false first name was not a lie relating to a material issue in the establishment of the offence.

[51] The final, perhaps rather unusual, submission advanced by Crown counsel was that in this day and age of safe sex, 'if the accused wanted to have proper sexual intercourse with the complainant' then he would have used some form of protection. I do not see how any weight can be given to that submission. There is no evidence on the matter and, even if the issue was of some relevance, there is certainly nothing to indicate what the attitude of the accused and the complainant might have been on the subject. It may not be without significance, for example, that on the final day of the hearing when she was recalled to give evidence in rebuttal, the complainant had with her in the witness box her 12 month old baby. She said that the father of the child was Manu's son and that Manu (her surname was not disclosed) lived next door to the accused. The complainant said that she no longer lived with Manu's son.

Conclusions

[52] Having thus analysed the evidence, I have come to the very clear conclusion that it is the accused who has been telling the court the truth. With one or two inconsequential exceptions, wherever there is a conflict in the evidence given by the complainant and the accused, I prefer the evidence of the latter. In general, I found the accused to be a refreshingly honest witness and on the crucial question of whether or not there was consent, I am satisfied that the complainant fully consented to having sex with the accused on the night in question.

[53] There is no evidence to substantiate the second count and, quite properly, Crown counsel did not make any submissions to the contrary. The accused is, accordingly, acquitted on both counts.

Tafa v Viau anors

Land Court, Nuku'alofa
Ford Acting CJ, and Land Assessor George Blake
L 15/2005

16, 17 and 20 February 2006; 24 April 2006

Land law – hearsay rule exception – Minister made grant based on mistake – deed of grant set aside

On 13 November 1987 a town allotment of 30.1 perches was leased by the Crown to the plaintiff's aunt for a term 50 years. On 10 April 2004 the aunt, who resided in Australia, wrote to the Minister of Lands requesting the cancellation of her lease so as to enable the plaintiff, her nephew, to make application for a deed of grant to the land. Application was duly made and Cabinet approved the deed of grant which was issued to the plaintiff on 29 November 2004. When the plaintiff then attempted to clear the allotment preparatory to erecting a new home, he was confronted and threatened by the first and second defendants who claimed to be long-term occupiers of the land. The plaintiff consequently issued proceedings seeking an order for their eviction. The first and second defendants were husband and wife. They married in 1992 but the wife had lived on the property since moving there in 1986 with her parents and her paternal grandparents when she was only 11 years of age. The evidence for the defence was that the land in question was originally part of an 8 acre tax allotment which had belonged to 'One'one who, perhaps, was a very distant relative of the second defendants. In all events in 1985 'One'one, in the presence of his son and heir, Mosese, gifted the land in question to the second defendant's family. The plaintiff challenged this evidence and objected that the evidence relating to 'One'one, who had died in 1990, was hearsay and the defendant had failed to call his son Mosese as a witness. For their part, the defendants alleged that there had been negligence on the part of the Minister of Lands or a denial of natural justice in approving the deed of grant to the plaintiff. In the alternative, they contended that the Minister had made the grant to the plaintiff on wrong principle by mistake in that he had wrongly assumed that the land in question was vacant.

Held:

1. The Land Court traditionally recognised that land cases constitute an exception to the hearsay rule and the evidence relating to 'One'one was accepted.
2. Registration of a deed of grant was final unless it came about as a result of an error of law (i.e. was contrary to the Land Act) or as a result of fraud, mistake, breach of promise made by the Minister or breach of the principles of natural justice. (Note: the application of the principles of judicial review to land cases was now embodied in Order 6 Rule 1(4) of the Land Court Rules 2007).
3. There was no negligence or breach of the principles of natural justice on the part of the Minister of Lands.
4. In allocating an allotment the Minister of Lands was required to ascertain whether the land in question was "available". If the Minister made a mistake on this issue, whether as a result of an incorrect assumption on his own part or otherwise, the consequence would be that he failed to take a material fact into account and, in those circumstances, the court would intervene and grant relief.
5. Registration of the plaintiff's deed of grant was set aside and costs were awarded in favour of the defendants.

Cases considered:

Ali v Deportation Review Tribunal [1997] NZAR 208
Doyle and others v Northumbria Probation Committee [1991] 4 All ER 294
Fifita v Minister of Lands (1972) Tonga LR Vol III, 45
Fowler & Roderique Ltd v Attorney General [1987] 2 NZLR 56 (CA)

Hakeai v Minister of Lands & ors [1996] Tonga LR 142 (CA)
Kalaniuvalu (Noble) v Minister for Lands (1937) Tonga LR Vol 11, 40
Kioa v West (1985) 159 CLR 550
Na'ati v Motu'apueka (Land Court, L 3/96, Lewis J, November 1998)
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014
To'a v Veikune [PC] Tonga LR 1974-1980, 107
Tu'i'afitu and Foueti Halalilo v Mesui Moala (1956) Tonga LR, Vol 11,104
Vai v 'Uliafu [1989] Tonga LR 56
Wandsworth London Borough Council v Winder [1984] 3 All ER 976

Statutes considered:
Evidence Act (Cap 15)
Land Act (Cap 132)

Counsel for plaintiff	:	Mr Fakahua
Counsel for first and second defendants	:	Mr Niu
Counsel for third defendant	:	Mr Sisifa

Judgment

Introduction

[1] On 29 November 2004 the Minister of Lands issued to the plaintiff a registered deed of grant confirming that he was the titleholder of a 761.9 square meter town allotment at Fangaloto, Kolofo'ou. When the plaintiff then attempted to clear the allotment preparatory to erecting a new home, he was confronted and threatened by the first and second defendants who claimed to be long-term occupiers of the land. The plaintiff consequently issued the present proceedings seeking an order for their eviction. (In this judgment I shall refer to the first and second defendants as 'the defendants' and to the third defendant as 'the Minister').

[2] For their part, the defendants claim that, as they were living on the land, the allotment had never been available for allocation by the Minister to anyone else. They contend that the Minister's approval of the grant was unlawful in that it was made under a mistake of fact, namely, that he believed the allotment was unoccupied. They have filed a counterclaim seeking an order cancelling the plaintiff's deed of grant.

The case for the plaintiff

[3] The allotment in question is part of a subdivision which was developed out of an eight acre tax allotment towards the end of the 1980s. The legal description of the allotment is Lot 18 R.P. 4900. It is adjacent to Lot 17 which also figured prominently in evidence. The plaintiff, 38-year-old 'Inoke Tafa, is the master of a fishing boat. His case is that on 13 November 1987 Lot 18, containing 30.1 perches, was leased by the Crown to his aunt, Mele Fifita Borman. The lease was for a term of 50 years. On 10 April 2004 Mele Borman wrote to the Minister of Lands requesting the cancellation of her lease so as to enable the plaintiff, her nephew, to make application for a deed of grant to the land. Application was duly made and Cabinet approved the transaction on 28 September 2004. As already noted, the deed of grant was issued to the plaintiff on 29 November 2004.

[4] The plaintiff then pleads that in early January 2005 he showed his deed of grant to Sione Finau, the father of the second defendant, and he 'repeatedly gave opportunities' to Sione and the defendants to vacate the land but they refused to do so.

The case for the defendants

[5] The case for the defendants is more complicated. The first defendant, 32-year-old Siope, is a motor mechanic by occupation and his 31-year-old wife Cinderella, the second defendant, works for the Ministry of Justice as a cleaner in the courts. They married in 1992 and have six young children, the youngest of whom was born three days after she gave evidence in this case. Cinderella's father is Sione Finau (also referred to in evidence as Sione Noa). At some stage, the date was not revealed in evidence, Sione divorced Cinderella's mother, Ngaluafe, and married his present wife, Talafaiva.

[6] Cinderella told the court that she was brought up by her father's parents, Noa and Hevaha, who lived at Ngeleia. Noa died in September 1991 and her grandmother, Hevaha, died in March 2000. Cinderella related how in 1986, when she was 11 years of age, she was told by her grandmother that they had been given an allotment at Fangaloto and she recalled that same year then moving to the land in question with her father, his wife and her father's parents. Her father cleared the land and built a Tongan fale which they all lived in. He also built a kitchen and toilet and dug a well which was cemented on top.

[7] Helpful photographs were produced by the defendants in evidence which showed the Tongan fale, the kitchen and other points of interest in the case. By reference to a diagram, which was also produced as an exhibit by consent, Cinderella was able to identify a variety of trees which the family had planted on the property around the late 1980s.

[8] Cinderella explained how the original Tongan fale was replaced with a house made of plywood and then, by the time of her marriage in 1992, the plywood house had in turn been demolished and replaced by the present dwellinghouse which is built on a concrete foundation with timber frames, gib board wall linings and a galvanised iron roof. The dwelling house is a permanent structure and it has an adjacent water tank. That dwelling house is the home which Cinderella and her family have lived in since shortly after her marriage and they still live in it today. For her part, in other words, Cinderella has now lived on the allotment, which she understood had been given to her family back in 1986, continuously since she was an 11-year-old girl 20 years ago.

[9] By reference to the diagram referred to earlier, Cinderella was able to pinpoint the location of the original Tongan fale, the original kitchen, the well, the toilet and shower blocks, the plywood house, the present dwelling house and the water tank. Although there were some discrepancies in the spots identified by other witnesses, I am satisfied on the evidence that over the last 20 years, Sione Finau and his family have utilised the whole allotment, i.e. both lots 17 and 18, as their own. They lived on the land without any form of physical disruption between 1985/86 and 2005. The first inkling Cinderella had that there may have been a problem came in 2005 when she was at work one day and her husband called her from home telling her that the plaintiff was on their property cutting down some coconut trees.

[11] That, in essence, is the case for the defendants. They contend that, as they were lawfully in possession of the property for all those years, it was simply not open to the Minister to allocate the land to someone else.

The evidence

[12] Sione Finau, Cinderella's father, gave evidence on behalf of the defendants. He was an important witness. Sione, who is now 52 years of age, is a carpenter by occupation. He told the court that the land in question was originally part of an eight acre tax allotment which belonged to one, Tevita 'One'one Kamea. (During the trial this person was referred to as both "One'one' and 'Kamea'. I will refer to him throughout this judgment as "One'one' and, so as to avoid any confusion, I have also taken the liberty of altering any reference to 'Kamea' in counsels' submissions to read as "One'one').

[13] Sione referred to 'One'one as his 'grandfather' but when asked in evidence in chief whether they had a blood relationship, Sione explained that back in the 1960s when he was a schoolboy, his father, Noa, had told him that his (Noa's) mother, Pele, and 'One'one had 'a respect for each other' and, for this reason, Noa told Sione to take care of 'One'one. The Land Assessor has explained that in Tongan custom the expression 'a respect for each other' means that they were distant relatives; in many cases so distant that the exact connection may be difficult to define.

[14] Mr Niu described the expression in Tongan terms as follows:

> 'Also living at Ngele'ia at the time was Mele Finau, who, in the Tongan custom, was in respects (faka'apa'apa) to 'One'one and vice versa. In the Tongan custom that is the same respect that is kept between a brother and a sister. Often, and it is not uncommon, the exact relationship is not known except it is said to exist from relationship several generations in the past. Nevertheless, it is kept and respected by the present generation as was in the case of Mele Finau and 'One'one. Mele Finau's son, Noa Finau, told his own son, Sione

> Noa Finau of it, and he would send Sione on many occasions with food for 'One'one.'

[15] Sione Finau described how, after receiving the direction from his father, he and his older sister would regularly take food to 'One'one. Apart from the distant relationship through his paternal grandmother Pele, Sione was also able to point out through a family tree produced as an exhibit how his own mother, Hevaha, was a sister of 'One'one's son in law, Manu.

[16] Sione went on in his evidence to explain how one day in 1985 his mother, Hevaha, received a message from 'One'one to 'come over and choose a piece of land for herself because he was going to subdivide.' Sione said that he went to Fangaloto with his mother and they met with 'One'one and 'One'one's son and heir, Mosese. Hevaha selected the area of land she wanted to live on -- it was slightly higher than the surrounding land -- and the corner boundaries of the allotment she had chosen were marked out with four sticks. That same year, Sione cleared the bush off the allotment and began building what was referred to in evidence as the original Tongan fale made of Pola (plaited coconut leaves).

[17] The Tongan fale was completed in 1986 and that same year Sione, his wife and children along with his parents moved and began living on the allotment at Fangaloto. By referring to the diagram before the court, Sione was able to identify exactly where he had built the Tongan fale, the kitchen and the well. They were all situated on that area of land which now makes up the plaintiff's Lot 18.

[18] Sione then described how in 1990 he built the second house made of plywood which the family moved into but that soon decayed and so in about 1992 the existing dwelling house made of permanent materials was constructed. Sione's mother had joined a development group working with the American Peace Corps and the Peace Corps actually assisted the family in funding the new dwelling house. Again, by reference to the diagram before the court, Sione was able to describe the positions where the plywood house and the permanent dwelling house had been built. As it happened, the plywood house was erected on Lot 18 and the permanent dwelling house and water tank were built on Lot 17.

[19] 'One'one died in 1990. At some stage between 1985 and the date of his death, the precise point in time was not identified in evidence, 'One'one told Sione that Mosese, his son and heir, would deal with the matter of getting the allotment transferred to him (Sione). Although that was hearsay evidence, I accept that an assurance of that nature was given. It was confirmed in correspondence before the court.

[20] Sione said that the first indication he had of any other claim being made to the land came in 2003. He said that sometime during that year he received a letter from a law practitioner, Lesina Tonga, who was acting for Harry Sinclair, the widower of Ana Sinclair. The letter was hand delivered to Sione by a woman who may have been Ms Tonga and it required him to vacate the land because work was being carried out to transfer the allotment to the widower and children. The letter was produced in evidence. It is actually dated 5 June 2004 and I accept that Sione was mistaken in saying that he had received it in 2003. He also told the court that before he received the letter from Ms Tonga a man, who he could not now identify, confronted him and said that he had come for the allotment. Sione told this person to leave and he did so. When that evidence was put to the plaintiff in cross-examination, he recalled the incident and confirmed that the man who had entered onto the property was his brother, Penitikelu Tupou. The plaintiff told the court that Sione Finau had chased his brother off the property with a bush knife. According to the plaintiff, that particular incident had occurred in early 2004.

[21] Returning to the letter from Ms Tonga, Sione said that after he received it he went to see Mosese. In cross-examination by Mr Sisifa, the witness was asked about Mosese's reaction. Sione said that Mosese told him to go back and stay on the allotment because he would go to the Lands & Survey Office and deal with it.

[22] At this point, I should refer to an earlier incident between Sione and Mosese which was also dealt with by Mr Sisifa in cross-examination. Sione had given evidence about how 'One'one had assured him that his son, Mosese, would carry out all the work that was required to have the allotment Hevaha had selected transferred to him (Sione) and how at one point Mosese had told Sione that the allotment, using Sione's language, 'belongs to us'. Mr Sisifa asked when that assurance had been given and Sione replied that it was in 1987 after the surveyors had carried out their work on the subdivision. Sione said that he had gone to see Mosese about the surveyors' visit to the allotment and Mosese on that occasion

had reaffirmed that the allotment would be given to him. Sione stressed a number of times in the course of his evidence that he had no knowledge of legal matters or the workings of the Lands & Survey Department but he trusted Mosese.

[23] Mosese was not called as a witness. I accept that the defence had made efforts to try and trace his present whereabouts but those efforts were unsuccessful. The court was left with the impression from the evidence that these days Mosese, who is now in his 60s, is something of a drifter. Sione said that he had last seen him near a market approximately 1 month before the hearing.

[24] Sione gave evidence about being confronted by the plaintiff in early January 2005 and being shown his (the plaintiff 's) deed of grant. On 11 January 2005, Sione wrote to the Minister of Lands. As translated, the letter reads:

> 'FANGALOTO
> Tongatapu
> 11 January 2005
>
> To Hon Minister,
> Lands and Survey Department,
> Nuku'alofa
>
> Hon Minister,
>
> I write this letter with sincere respects to You.
>
> The reason for disturbing you is a problem concerning my town allotment at Fangaloto Kolofo'ou which has the following history.
>
> My grandfather Tevita 'One'one Kamea settled us his grandchildren on his tax allotment at Fangaloto in 1985. I shift then and lived on this allotment in accordance with his allocations and continued caring for him. Tevita 'One'one Kamea had of course advised us together with his heir son Mosese Kamea concerning our individual allotment and he advised Mosese not to change the allocations which he had made, and so we each began to care and develop our individual allotments. We trusted Mosese because he repeatedly told us not to worry about anything because he would later on do everything. At this time Tevita 'One'one Kamea was old and was at the stage he was blind and did not know how we were living. He finally died in about 1990. We again reminded Mosese about our individual allotments, and he again told us not to worry about anything and to leave it to him to do everything later. We were then content to continue after the death of our grandfather (Tevita 'One'one). It got to a stage I was aware that surveyors came and planted survey pegs on the allotment on which I was residing.
>
> I went to Vava'u on a family obligation but at that time the surveyors came and planted the pegs on my allotment which I had kept and on which I have resided up to now. I returned from Vava'u and again went to Mosese and his reply was like this, Sione your allotment has already been surveyed and be content that everything is finished.
>
> Hon Minister, forgive me but that is how foolish I have been, to have lived contentedly for these 20 years without any suspicion that there was any problem relating to this allotment. I only became aware of it when a woman came to see me last year. I did not know who she was and gave me a letter of a lawyer in connection with my allotment. From that, I then became aware that from the surveying which had been carried out my allotment was leased by one Ana Sinclair. From the allocation I received and which I kept, it became clear that my dwelling house is situated on the area which is leased by Ana Sinclair, and my kitchen and the trees I had planted were on the adjoining lot. I have just realised from a letter from another lawyer which I received yesterday 10/01/2005 that that lot was leased by one Mele F. Borman and which has been now registered by one Inoke Tonga Tafa.

Hon Minister, when the letter from the first lawyer was received I went to Mosese as he had resided with us at Fangaloto but he had shifted and lived in the east (Hoi). I looked for and found him at Hoi. I was most upset when we met that I almost did something to him. But he said for me to be content because he would come later and will go into the matter.

I then came and found out everything concerning my allotment from the map drafting office. Accordingly Hon Minister I am content to shift from the area which has been registered by Inoke Tonga Tafa. But I'm not satisfied with the lease of the lot of which I have my dwelling house. As to that lease, the leaseholder never once did anything on this land, and that is why I am disturbing you.

I forward herewith the letters of the two lawyers concerning the two lots of this allotment. I await your final decision.

Yours respectfully
(signed)
Sione Finau'

[25] That letter was written by Sione Finau before he had taken any legal advice in the matter. The response from the Minister's office came in the form of a letter from the Registrar of Lands dated 23 February 2005 which read as follows:

'Sione Finau
Fangaloto
Nuku'alofa

Sir,

The reason for this letter is to reply to your letter to the Minister of Lands on 11/01/2005 concerning the town allotment at Fangaloto on which you presently reside and look after.

So I convey my great respects to you in order that I convey to you the decision of the Minister of Lands on 10/02/05 concerning your letter. 'For me to inform you in a letter the facts of these allotments' and these are the records shown in the Register.

1. The allotment No.17 Plan 4900 was leased by a woman named Ana Sinclair by lease No. 4697 since 5/11/1987 to expire on 4/11/2037 of which the Government is lessor. That is the lot on which you say you have your dwelling house.

2. The allotment No.18 Plan 4900 (upon which your kitchen is situated) was leased by a woman named Mele Fifita Borman by lease No. 4703 which commenced on 18/11/1987 and will expire on 17/11/2037. Mele A. Borman requested that she cancel the lease and it was approved by Cabinet Decision No.1233 on 28/09/2004. The reason for the cancellation was to enable Inoke Tonga Tafa to apply to have it as his town allotment and that has been registered by Inoke Tonga Tafa on 29/11/2004.

3. You say that you have lived contentedly for 20 years without suspicion of any problem concerning this allotment. I ask that you do not say that because that is a lie, because the surveyors came there and surveyed and you did not try to come to this Office since 1986 to find out about the allocations made.

4. Accordingly I suggest to you it is better for you to shift from the two lots because they have been registered and the Minister will not be able to cancel them. Only the Land Court can do that if you wish to spend to claim the right you claim to have.

Yours respectfully
(signed)
Makakaufaki Matekitonga
Registrar of Lands.'

[26] Sione said that after receiving the letter from the Registrar of Lands he sought legal advice but no action was taken by the practitioner he approached and so he subsequently consulted his present counsel, Mr Niu. On 13 June 2005, Mr Niu wrote to the Minister of Lands:

> 'Dear Sir,
> re: Sione Finau, Fangaloto
>
> I have been instructed by the above named client.
>
> I have been shown a copy of a letter of my client to you dated 11/1/05 and a letter in reply to it dated 23/2/05 from the Land Registrar, Makakaufaki Matekitonga.
>
> In my client's letter, he stated that he was willing to vacate the area which has been registered as Inoke Tonga Tafa's town allotment, but not the area which is registered as the lease of Ana Sinclair. Your land registrar replied on your behalf that my client had to vacate both areas. He in effect called my client a liar and that is not fair because my client is not. My client did complain to Mosese Kamea when he returned from Vava'u and found that the surveyors had surveyed his allotment and Mosese told him that the surveying was for him (my client). My client believed him and it was supported by the fact that no one else came to occupy the allotment or to bother him until last year, when the widower of Ana Sinclair had lawyer Tesina Tonga write to him and lawyer Mo'ale Finau wrote to him for Inoke Tonga Tafa. That was why he wrote to you on 11/1/05.
>
> It is clear that when Mele Borman and Ana Sinclair had their leases registered, the Minister of Lands at the time was not informed of my client's presence on the areas to be leased by them. Had he been aware, he would have consulted my client as to why he was occupying the land. The Minister accordingly proceeded to grant those leases by mistake, that is, upon a wrongful assumption by him that the land was unoccupied.
>
> When you proceeded to grant the area of Mele Borman's lease as town allotment of Inoke Tafa, you assumed that the land was unoccupied or at least by Mele Borman. You were not aware that Mele Borman had never occupied the land or that my client had been in continuous occupation of it before then. You therefore granted Inoke Tafa's allotment to him by mistake, that is, upon your wrongful assumption that the land was unoccupied.
>
> Hon Minister, I am writing to ask that you please recall and cancel both the grant to Inoke Tafa and the lease of Ana Sinclair for the reasons I have stated. In both cases, you and your predecessor have been misled and been mistaken by the failure of both applicants to inform you and your predecessor of the true circumstances of this land.
>
> If I am wrong about these matters, please let me know. I will be grateful for your advice.
>
> Yours faithfully. . .'

[27] In his submissions, Mr Fakahua highlighted the statement made by Sione in the penultimate paragraph of his letter of 11 January 2005 in which he indicated that he was content to shift from the area which has been registered by the plaintiff (Lot 18) but not from the other lot (Lot 17) on which he has his present dwelling house. When Sione was cross-examined about the proposal he resiled somewhat from what was said in the letter and explained that he had been mentally affected by the lawyers' letters he had received and the visit from the police asking him to move off the allotment. As I understand the evidence, however, the police visit did not eventuate until later in the year.

[28] I do not read Sione's proposal to move off Lot 18 as anything other than a proposition which may or may not have resolved the issues between the parties had it been taken up at

the time by the officials at the Ministry of Lands. As it turned out, of course, that did not happen. The Registrar's response required Sione to move from both allotments.

[29] In addition to the Registrar of Lands, the court heard evidence from Viliula Mafi, the Assistant Secretary of the Ministry of Land, Survey and Natural Resources. The Assistant Secretary was able to confirm from official records that lots 17 and 18 were originally part of a tax allotment owned by 'One'one. 'One'one surrendered the allotment in two separate stages during the year 1985 and on 18 April 1986 the surrendered allotment was transferred into the name of 'One'one's son and heir, Mosese.

[30] The Assistant Secretary then explained how between April 1986 and September 1988 Mosese, in four separate stages, surrendered all of his land to the Crown apart, that is, from a small area of 1 rood 6 perches which still, apparently, remains in his name. Evidence as to exactly how the subdivision came into being was scant. The Assistant Secretary made no specific reference in his evidence to sections 50 or 53 of the Land Act which deal with subdivisions. It would appear, however, that the blocks of land were subdivided almost immediately after they were surrendered and that Mosese had a significant role in selecting the people who would be allocated lots out of the new subdivisions.

[31] The first block, which was surrendered with Cabinet approval on 23 April 1986, was made up of a total area of 2.7 perches. The Registrar confirmed that lots 17 and 18 were derived from the subdivision of this particular block. In 1987 lots 17 and 18 were then leased by the Crown to Ana Sinclair and Mele Borman respectively for a term of 50 years.

[32] It is clear from the evidence that, for reasons unknown to the court, Mosese reneged on the promise his father, 'One'one, had made and he (Mosese) had repeatedly reaffirmed, that the whole of the allotment (comprising the present lots 17 and 18) would be transferred to either Sione's parents or to Sione himself. For his part, Sione trusted Mosese and that misplaced trust endured over a period of some 20 years. When asked by the court how he had viewed the title position to the allotment immediately prior to 2004/05, Sione said that he understood that the land was still in Mosese's name but at some stage Mosese would give it to him as promised. As Mosese is not a party to the proceedings and as he did not give evidence, the court is unable to understand or even speculate on his motives for what would appear to be a deliberately orchestrated deception which ended up spanning in excess of two decades.

[33] I accept Sione Finau's evidence on all these matters. In general, I found him to be a thoughtful and conscientious witness. I also accept that, despite the rather tenuous links, he always treated and regarded 'One'one as his grandfather.

[34] I am further satisfied that Sione's false sense of security based on Mosese's oft repeated misrepresentations were exacerbated in no small measure through the failure of the two lessees, Ana Sinclair and Mele Borman, to reside on their leased lots or use the land in any way during the 20 years in question. Mr Niu put it to the Registrar of Lands in cross-examination that the lessee of Lot 18, Mele Borman, had effectively abandoned the land in breach of one of the specific covenants contained in the standard form of lease. On the evidence, that would appear to have been the position but the abandonment allegation was never pleaded and, in any event, the lease provides that a breach of such a covenant simply allows Cabinet to terminate the lease. The breach does not operate so as to provide a non-party to the lease with a defence to an eviction action.

Submissions

[35] In his closing submissions under the heading, 'Internal Migration and natural growth -- lawful occupation', Mr Niu submitted that, 'it was and is normal and natural for people to move from one village, island or estate to another within the Kingdom and it was customary for a holder of an allotment to allow such people, especially relations, in-laws and friends to occupy part of his allotment or estate.'

[36] Counsel went on to submit that such occupations were not unlawful but lawful in that they were recognised by section 8 of the Land Act (Cap 132) which provides:

> '8. 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 from the lands in such hereditary estate, and **if the applicant**

> **is lawfully residing upon Crown land shall be made from Crown land** . . . .'
>
> (emphasis added by counsel)

Mr Niu submitted that the words highlighted recognise that a person may reside on either an hereditary estate or Crown land 'lawfully' even though he does not hold a deed of grant.

[37] Mr Niu accepted that a person would not be 'lawfully' in occupation if he was an alien (s.15 of the Land Act) or if he had been refused permission by the estate holder to reside on the land (s.35 of the Land Act) but neither of those provisions had any application in the present case. Mr Niu also pointed out that the Minister of Lands did not have the power of an estate holder under section 35 of the Land Act to refuse permission to any person lawfully residing on Crown land by permission of the previous allotment holder.

[38] The basic proposition Mr Niu advanced under this head is consistent with the decision of the Privy Council in *Tu'i'afitu and Foueti Halalilo v Mesui Moala* (1956) Tonga LR, Vol 11,104, where it was held that, 'whilst registration is evidence of ownership, it is not always necessary to prove registration before ownership can be established.'

[39] Crown counsel did not take issue with any of Mr Niu's submissions on this issue and Mr Fakahua also appeared to concede the legal submissions but he argued forcefully that the principles had no application to the facts of the present case because neither Sione Finau or the defendants had ever been granted permission by 'One'one and Mosese to reside on the land.

[40] Mr Fakahua challenged the evidence relating to 'One'one as hearsay and he also made the point, which he made repeatedly throughout his submissions, that Mosese was not called as a witness by the defendants to confirm their evidence. As to the hearsay point, this Court has traditionally recognised that land cases constitute something of an exception to the hearsay rule. Thus, in *Na'ati v Motu'apueka* (Land Court, L 3/96, November 1998) Lewis J. said:

> 'Much of the evidence called on both sides here, would ordinarily be inadmissible on the basis that it offends the rule against hearsay created by section 88 of the Evidence Act (Cap 15). However, I accept the submissions of counsel that in Tofia cases in this jurisdiction and by parity of reasoning, in all claims determining title to land, an exception exists. The basis for the exception to the hearsay rule may be found in *Kalaniuvalu (Noble) v Minister for Lands* (1937) Tonga LR Vol 11, 40 and in *To'a v Veikune* [PC] Tonga LR 1974-1980, 107. I say no more about the admissibility question save I admit the evidence in issue.'

On the same basis, I admit the hearsay evidence in the present case all of which I found credible and reliable.

[41] The point Mr Fakahua made about Mosese not being called as a witness, does not advance the plaintiff's case. As I have already indicated, I found Sione Finau to be an honest witness. I accept what he told the court in relation to 'One'one and Mosese. There is no property in a witness and if the plaintiff wanted to challenge Sione's evidence then he could have called Mosese. There is an undated letter in the consent bundle of documents from the plaintiff's legal adviser to Sione Finau referring to an agreement with Mosese involving the plaintiff and the plaintiff gave evidence that he had met with Mosese in April 2005. Mr Niu could well have redirected Mr Fakahua's question to the plaintiff. Why did the plaintiff not call Mosese to rebut the defendants' evidence if he considered that Mosese had something useful to contribute to the case?

[42] Mr Niu then went on to make submissions regarding the practices that had developed over the years in relation to the surrender of allotments. He made the point that although an allotment surrendered by an allotment holder from Crown land will revert to the Crown, the Minister of Lands, in consultation with the ex-holder, will ensure that the allotment is then granted to the person nominated by the ex-holder. Mr Niu submitted that in accordance with this accepted practice, 'One'one had allocated 1r. 20.1p of his tax allotment to Sione Finau and, 'thereupon Sione became a lawful occupier and was lawfully residing upon 'One'one's tax allotment which was on Crown land.'

[43] Crown counsel conceded the practice as outlined by Mr Niu but, both he and Mr Fakahua, took issue with Mr Niu's statement that 'One'one had promised the allotment upon its surrender to Sione Finau and counsel stressed that there was no evidence that 'One'one had ever conveyed such an intention to the Minister.

[44] In reply, Mr Niu accepted that there was no evidence before the court that 'One'one or his heir had informed the Minister that the allotment was intended to be allocated to Sione but he submitted, 'it is equally true that there is no evidence that 'One'one ever allocated or intended that the portion was to be halved between Mele Boorman and Anna Sinclair either.'

[45] There is substance in both submissions but, of course, the onus of proof is always on the party making the particular allegation. There is no documentary or other evidence from the Lands Office on the issue either way but, significantly, I repeat that I accept Sione Finau's evidence on these background matters.

[46] Mr Niu referred to the official form of application for a grant of an allotment emphasising that it included a declaration that, 'there is no impediment to prejudice this grant.' The particular application form used by the plaintiff in the present case was not produced but, in any event, I do not see how the reference to this form assists the defendants. If the declaration of 'no impediment' was signed by the plaintiff then I could appreciate the relevance of the form because I am satisfied that the plaintiff was aware that the land was occupied by the defendants (an impediment) prior to the lodging of his application form. But, as Mr Niu acknowledged, in the case of Crown land, the declaration of 'no impediment' is to be signed by the Minister of Lands which appears to be a strange procedure indeed when the application is directed to the Minister. The declaration would be more meaningful, surely, if it was required to be signed by the applicant for the grant.

[47] Mr Niu also made submissions regarding the surveyors who had surveyed the allotment back in about 1987 and he asked the rhetorical question, why did they not inform the Minister at the time that the land was occupied. He submitted that their failure in this regard, 'was the Minister's failure as well.' In response, Crown counsel speculated that if Sione Finau was 'occupying the allotment at the time, the surveying team would have reported his presence and occupancy to the Minister of Lands.'

[48] I have found as a fact that Sione Finau and his family were occupying the allotment at the time the survey was carried out. I also accept that upon learning of the survey, Sione inquired of Mosese as to the reason for the surveyors' visit and he was led to believe by Mosese that they were surveying the land so as to identify the precise boundaries of his (Sione's) allotment. No witness was called from the survey party and no documentation was produced from the Ministry of Lands which recorded any aspect of their visit to the allotment. I am not prepared to speculate on the allegations made in the respective submissions relating to that historical piece of evidence.

[49] Finally, against that background, and after referring to several reported Land Court decisions, Mr Niu advanced his principal submissions which perhaps can be summed up in these two propositions: (1) that the grant to the plaintiff was unlawful because it had been made, in the mistaken belief, that the allotment was vacant whereas it was not; and, (2), in counsel's words, 'the plaintiff was aware that Sione Finau had a competing claim to the allotment and ought to have informed the Minister of it or informed Sione of his own application for the allotment so that Sione was afforded an opportunity of being heard before the Minister decided the plaintiff's application. This was a breach of natural justice and it was caused not only by negligence on the part of the Minister to inspect the land to be granted but on deliberate omission by the plaintiff to inform the Minister or his staff.' I will need to deal with these submissions in greater detail.

The law

[50] The principles relevant to any consideration of an application to set aside a registered deed of grant are now well documented and have been expressed in these terms: until it is established to the contrary, the court will presume that the register is correct. Registration is final unless it has come about as a result of an error of law (i.e. is contrary to the Act) or as a result of fraud, mistake, breach of promise made by the Minister or breach of the principles of natural justice.

[51] There is an obvious close correlation between the principles thus expressed, which have been developed in the Land Court jurisdiction over many years, and the more

familiar and well-recognised principles applicable to judicial review proceedings. Although the principles in both jurisdictions have developed separately, it seems to me that the time has come when the position should be regularised so that whenever this court is called upon to determine the legality of decision-making powers exercised under the Land Act, it should apply the same tried and tested judicial review principles that the courts in other jurisdictions apply when confronted with similar challenges. There is nothing in the Land Act or in the rules of court which would prevent this court from exercising the judicial review powers enjoyed by the Supreme Court.

[52] The present action, of course, has not been brought by way of review proceedings and the challenge to the legality of the Minister's actions has been made, not by a plaintiff, but by a defendant by way of counterclaim. The courts have, nevertheless, recognised that a defendant is entitled to challenge the validity of an authority's decision in this way and the issues can still be determined by application of judicial review principles. In *Wandsworth London Borough Council v Winder* [1984] 3 All ER 976 the respondent challenged, by way of counterclaim, the legality of a local authority's decision to increase his rent. The respondent accepted that judicial review would have been a more appropriate procedure for the purpose but he maintained that it was not the only procedure open to him and that he was entitled to wait until he was sued by the appellant and then to defend the proceedings by way of counterclaim. That approach was upheld by the House of Lords. *Wandsworth* was later followed, after extensive discussion of the authorities, in *Doyle and others v Northumbria Probation Committee* [1991] 4 All ER 294.

Conclusions

[53] I deal first with Mr Niu's final submission alleging a denial of natural justice. In *Hakeai v Minister of Lands & ors* [1996] Tonga LR 142, 143, the Court of Appeal stated:

> 'It is clear law that a person whose rights, interests or legitimate expectations are imperilled by an official's consideration of some other person's application will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made. This is what is known as natural justice . . . Whenever the Minister has competing claims for the same land, he should be careful to ensure that both sides get a hearing -- not, of course, as in a court, but an opportunity to put each point of view before a decision is made.'

[54] There is, thus, clear authority that the principles of natural justice apply whenever a Minister is exercising his powers in relation to the granting of allotments. The problem the defendants' face, however, in seeking to rely upon this principle in the present case is that, as Mr Sisifa submitted, in so far as the Minister is concerned, there was no competing claims to the allotment at the time he made his decision.

[55] Mr Niu submitted that the plaintiff was aware of the true position and he ought to have informed the Minister that there was a competing claim. I accept the first part of that proposition but no authority was cited to support the suggestion that the plaintiff was under some type of legal obligation (as distinct from a purely moral obligation) to disclose the true position to the Minister or the Minister's officials. It would have been quite different, of course, if the 'no impediment' declaration in the official application form for a grant had had to be signed by the plaintiff personally but that was not the case.

[56] The question posed by Mr Sisifa, which has not been satisfactorily answered by the defendants, is how could the Minister be expected to grant the defendants a hearing in accordance with the natural justice requirements when, at the time he was considering the plaintiff's application for a grant, he was completely unaware that there was a competing claim. It is easy to be wise with the benefit of hindsight but the circumstances to be considered are those that existed at the time the Minister made his decision.

[57] As Brennan J. observed in the Australian High Court decision of *Kioa v West* (1985) 159 CLR 550 at 627:

> 'What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of

> natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly.'

[58] I respectfully agree with that statement of law. In my view, the defendants' challenge to the registration of the deed of grant based on a denial of natural justice has not been established.

[59] Just as I have rejected the breach of natural justice submission, I also reject the defendants' allegation of negligence on the part of the Minister in failing to carry out an inspection of the land. The position was that the two pieces of land making up the allotment in question had been leased to Mele Borman and Ana Sinclair respectively. Mr Sisifa accepted that the Minister was aware that they both resided overseas but the Minister had before him a surrender of lease signed by Mele Borman and an application by her nephew, the plaintiff, for a grant to him of the land in Mele Borman's lease. Mr Sisifa acknowledged that the Minister had assumed that the land in question was vacant. In his reply, Mr Niu was very critical of the admission that the Minister had made such an assumption but, in the absence of any indication whatsoever of a competing claim at that stage, it does seem to me that the assumption made by the Minister was both understandable and reasonable. The defendants have failed to persuade me that there was any negligence on the Minister's part in failing to have an inspection carried out of the land in question before approving the grant to the plaintiff.

[60] I would add that neither the breach of natural justice allegation or the allegation of negligence on the part of the Minister were pleaded by the defendants. Neither the plaintiff nor the Minister took the point, however, and I have, therefore, dealt with the issues on that basis.

[61] I turn now to the issue of mistake which was fully pleaded and fully explored by counsel in their submissions. The essence of the pleading is that the Minister of Lands made the grant to the plaintiff on wrong principles by mistake in that he assumed that the land was vacant whereas it was not -- it had been occupied by Sione Finau and his family for 20 years. The question is whether that mistake is sufficient to have the deed of grant set aside. In considering this issue, I find guidance in some of the principles that have been applied in the judicial review jurisdiction I have referred to earlier.

[62] While traditionally there has been some reluctance by the courts to review inferential and factual matters as opposed to questions of law, that approach has changed over recent years and mistake of fact is now an accepted ground of review. See, for example, *Fowler & Roderique Ltd v Attorney General* [1987] 2 NZLR 56 (CA) where Casey J. accepted factual error as a ground for review if the information the decision-maker acted upon was clearly incorrect and *Ali v Deportation Review Tribunal* [1997] NZAR 208 at 218, where Elias J. (as she then was) accepted that a ground of review exists where there is a 'misunderstanding or ignorance of an established and relevant fact.' Elias J. cited in support the English Court of Appeal decision of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014. The authorities show that the courts will assess the facts at the time of the decision-maker's decision -- even if the decision-maker lacked actual knowledge of them.

[63] One of the submissions made by Mr Niu was that the land in question was not land 'available' for grant because of its occupation by the defendants. Reference was made in this regard to the decision of Webster J. (as he then was) in the case of *Vai v 'Uliafu* [1989] Tonga LR 56. *Vai*'s case was concerned with the interpretation of section 50 of the Land Act which sets out the rules for allocating allotments from hereditary estates. Subsection (a) states that an applicant shall have his allotment out of 'land available' for allotment in that estate. The judge held that 'land available' in that context did not include land occupied by other people.

[64] The present case is not concerned with land in an hereditary estate but with Crown land and there is no similar rule for the allocation of allotments from Crown land. Why that should be is somewhat puzzling. It may have been simply an oversight on the part of the legislature.

[65] On any view of the facts, the mistake in the present case is not an insignificant or insubstantial mistake. It is obviously a relevant factor of great importance that land which the Minister believed to be vacant had in fact been occupied by other people for 20 years.

[66] While the Land Act does not expressly state that in allocating an allotment out of Crown land the Minister is required to ascertain whether the land in question is 'available' (as is the case with hereditary estates under section 50(a)), I, nevertheless, consider that upon a consideration of the subject matter, scope and purpose of the Act, such a conclusion must inevitably be implied. As Mr Niu highlighted, section 8 of the Land Act actually recognises that a person can be in lawful occupation of Crown land without holding a deed of grant. To have a situation, therefore, where the Minister of Lands is able to make a grant of an allotment in total disregard for the rights of a long-term lawful occupant of the same piece of land, is quite untenable and is a recipe for lawlessness. I cannot accept that such a consequence could ever have been intended by the legislature.

[67] In *Fifita v Minister of Lands* (1972) Tonga LR Vol III, 45, the Privy Council, with reference to the Land Act, spoke about the need to give the statute a reasonable construction so as to avoid an 'unjust or totally unreasonable consequence' which might otherwise follow. I accept that approach and applying it to the matters in contention in the present case, it seems to me that upon any construction of the Land Act, before making a grant, whether it be from an hereditary estate or Crown land, the Minister is required to have regard to whether or not the land in question is available. If he makes a mistake on this issue, whether as a result of an incorrect assumption on his own part or otherwise, the consequence will be that he has failed to take a material fact into account and, in those circumstances, this court will intervene and grant relief.

Orders

[68] For the foregoing reasons, I uphold the defendants' claim that they are entitled to have registration of the plaintiff's deed of grant set aside. In terms of the defendants' prayer for relief, I dismiss the plaintiff's claim and order the cancellation of the registration of the deed of grant in favour of the plaintiff dated 29 November 2004 (Tohi 374 Folio 13). No other orders are sought.

[69] The defendants are also entitled to costs. In his submissions, Mr Niu seeks costs against the Minister but in their prayer for relief, the defendants seek costs only against the plaintiff. I will allow the defendants the opportunity of clarifying their position by filing a memorandum within the next seven days. Depending upon the response, I will then allow appropriate opportunity for a reply.

R v Lata anor

Supreme Court, Nuku'alofa
Webster CJ
CR 40-41/04

29 May 2006; 29 May 2006

Fisheries – possession of lobsters carrying eggs – insufficient evidence – charges dismissed
Statutory interpretation – English and Tongan version of legislation different – Tongan prevails

The two defendants were charged with possession of lobsters carrying eggs contrary to Regulations 13(2) and 23 of the Fisheries (Conservation and Management) Regulation 1994. There was only one witness for the prosecution, a fisheries officer who had witnessed the two accused allegedly in possession of the lobsters in question. The police officer who arrested the accused did not give evidence. The accused did not give evidence and called no witnesses. At the close of the evidence submissions in support of their respective cases were made by counsel.

Held:

1. There was insufficient evidence to the required standard of being beyond reasonable doubt of possession by the accused of the lobsters in question. By possession was meant physical custody and control of the alleged lobsters, with knowledge that they were lobsters carrying eggs.
2. In the Tongan version of Regulation 13(1) the reference was to "me'a mo'ui", meaning a living creature. Section 21 of the Interpretation Act provides that in criminal trials if the Tongan and English versions of the section under which the accused person is charged differ in meaning then the Tongan version shall prevail. Accordingly, there was a need to prove that the lobsters were alive whereas the context of the evidence suggested that they were not live.
3. Given that the offences carried a fine of $10,000 in the Supreme Court, fisheries prosecutions are serious matters and the whole business of fisheries prosecutions needed a long hard look by both the Crown Law office and the Ministry of Fisheries to ensure that prosecutors produced a much better and more professional standard of evidence.
4. The charges were dismissed and the two defendants were found not guilty.

Case considered:
R v Pohahau [2005] TOSC 3; (CR 72/02, 31.1.05)

Statutes considered:
Fisheries Act 1989
Fisheries Act 1999
Interpretation Act (Cap 1)

Regulations considered:
Fisheries (Conservation and Management) Regulation 1994
Fisheries Management Act 2002

Counsel for prosecution : Mr Sisifa
Counsel for defence : Mr Tu'utafaiva

Judgment

Napoleone Lata and Kalofiama Tovo were each charged under Regulations 13(2) and 23 of the Fisheries (Conservation and Management) Regulation 1994 with having in their possession on 18 February 2004 lobsters carrying eggs. Lata was charged with possession of 6 such lobsters and Tovo with possession of 1 such lobster.

Regulation 13 provides:

> 'PART IV – SPECIES CONSERVATION AND MANAGEMENT
>
> Lobster ('uo)
>
> 13. (1) In this regulation 'lobster' or "uo' means a crusatacean [*sic*] of the genus Panulirus.
> (2) No person shall harm, take, have in his possession, sell or purchase –
>
> (a) any lobster carrying eggs;
> (b) any lobster the carapace of which is less than 7.5 centimetres when measured along the mid line from immediately behind the rostral horns to the rear edge as illustrated in Schedule 3 to these Regulations;
> (c) any lobster the tail of which is less than 4.5 centimetres in width when measured between the lateral notches of the first tail segment with vernier calipers from the ventral side of the tail, as illustrated in Schedule 3 to these Regulations.
>
> (3) No person shall use destructive techniques to dig lobsters from their burrows.
> (4) No person shall remove the eggs from a lobster or take, have in his possession, sell or purchase a lobster from which the eggs have been removed.'

Regulation 23 provides that the penalty for contravention of Regulation 13 is a fine not exceeding $10,000 and forfeiture in accordance with section 42(1) of the Fisheries Act 1999.

There was only one witness for the prosecution, Mr 'Ofa Moala, Fisheries Officer, Ministry of Fisheries, who had witnessed the accused allegedly in possession of the lobsters in question. The Police officer who subsequently arrested the accused did not give evidence. The accused did not give evidence themselves and called no witnesses. At the close of the evidence submissions in support of their respective cases were made by Counsel.

Starting at the end, as it were, of the defence submissions, the crucial point in this case in my view is that there was insufficient evidence to the required standard of being beyond reasonable doubt of possession by the accused of the lobsters in question. By possession I mean physical custody and control of the alleged lobsters, with knowledge that they were lobsters carrying eggs. This has to be established on the same basis and principles as set out in detail in *R v Pohahau* [2005] TOSC 3; (CR 72/02, 31.1.05) – albeit that was a drugs case.

The whole tone of the Fisheries Officer's evidence was hesitant, and his evidence as I have noted it was:

> 'I can't clearly recall now whose lobsters they were, between the two of them there were seven lobsters and Lata said the lobsters were his.'

I do not think that is sufficient to satisfy the Court beyond reasonable doubt and on that ground alone, I would find both accused not guilty.

In general I also accept the other points raised by Mr Tu'utafaiva for the defence about the failure to prove that the articles in question were indeed lobsters within the definition. He submitted that in the Tongan version of Regulation 13(1) the reference was to 'me'a mo'ui', meaning a living creature; and he referred to section 21 of the Interpretation Act, which provides:

> 'Application of English or Tongan versions in criminal trials.

> 21. If upon the trial of any person for an offence against any law of Tonga it is manifest that the Tongan and English versions of the section which the accused person is charged with violating differ in meaning, then, in deciding the question of the accused person's guilt or innocence the court shall be guided by what appears to be the true meaning and intent of the Tongan version.
> *(Amended by Act 28 of 1978)'*

I accepted that the English and Tongan versions differed in meaning and that I should accordingly be guided by the true meaning and intent of the Tongan version, ie that Regulation 13 referred to living lobsters. There was no evidence that the lobsters were alive, indeed the context of the evidence suggested that they were not live.

I also accepted that, despite the Fisheries Officer being very experienced, there was no detailed evidence that in terms of the legal definition in Regulation 13(1) the lobsters were crustaceans of the genus Panulirus. This is particularly important because Regulation 14 deals in similar terms with another type of lobster, a slipper lobster or tapatapa of the genus Parribacus. In criminal cases sufficient detail must be established in evidence to prove beyond reasonable doubt that the offending articles fall within the provision in question.

It just is not enough in a criminal case for one witness to say they were lobsters carrying eggs, without more, especially as in the same breath he referred to the accused having undersize lobsters, though these were not mentioned in the indictments. I believe either the lobsters should have been produced, or they should have been photographed, or there should have been some description about how the witness knew or alleged they were carrying eggs.

It is not necessary to decide the preliminary point raised by Mr Tu'utafaiva about whether Regulation 13 has been overwritten by section 19(1)(a)(iii) & (7) of the Fisheries Management Act 2002 which empowers the Minister to prohibit certain activities by Notice in the Gazette. He submitted that was so in view of the words of the saving in section 105(2)(b):

> '(b) all regulations and orders made under the Fisheries Act 1989 and in force at the date of commencement of this Act shall subject to such modifications and adaptations as may be necessary to bring them into conformity with this Act continue until such time as new regulations or orders are made under this Act.'

However there are separate powers to make regulations in section 101 of the 2002 Act, and no submissions that either specific new regulations or specific notices under section 19 had been made. So I would not have accepted that the 1994 Regulations had been superseded. My reading of Section 19 of the 2002 Act is that the power there is permissive, and unless it is exercised it does not cut off the regulations (if that is ever the legal effect of new regulations) unless new regulations are made. In any event the 2002 Act was only given Royal Assent on 12 February 2004, just a few days before these alleged offences, and there was no evidence or submissions that it had by 18 February 2004 been brought into force by a proclamation by His Majesty in Council under section 1(1).

I have to finish by saying it is very clear to me that the whole business of fisheries prosecutions of this nature needs a long hard look by both the Crown Law Office and the Ministry of Fisheries.

Given that these offences carry a fine of $10,000.00 in the Supreme Court, I consider that a much better standard of evidence is required. Prosecutions are unlikely to succeed if the sole witness does not turn out to have a clear recollection of the events and has not taken the trouble to refresh his memory; if he produces no records to the Court of the events and has not taken the trouble to have his office records with him; and if the witness has not taken any photos to show the lobsters in question and/or has not taken the trouble to bring the evidence to Court. If the lobsters are brought to Court for that purpose, my view is that a chain of custody since they were seized must be established in a similar manner to a drugs case.

I regret to say that I find it very disappointing that the Government employs a Fisheries Officer to enforce the Fisheries Regulations and his approach seems to me not at all professional. I am amazed that the time of the Supreme Court had been taken up on such an ill-prepared case. Fisheries prosecutions are no doubt serious. That is why the Minister had made these Regulations and they should be treated seriously by the Ministry.

Training of Fisheries Officers in what is required to conduct in a successful prosecution of this nature is clearly needed.

I should also like to add that I do not understand why the Fisheries Officer had to get the Police to arrest the accused. I am glad to see, if I scan it quickly, that in the 2002 Act a Fisheries Officer does have powers of arrest and seizure, so that the evidence can be
170 seized before it disappears, although in this case that would have made no difference.

Napoleone Lata and Kalofiama Tovo, I find you both not guilty and dismiss the charges.

Pale v Pohiva anors

Supreme Court, Nuku'alofa
Webster CJ
CV 411/2006

31 May 2006; 31 May 2006

Practice and procedure – interim injunction – restraint of publication – court balanced free speech with defamation principles – application refused

The plaintiff sought an ex parte interlocutory injunction to restrain the defendants from repeating an alleged defamation of the plaintiff. Submissions were heard in chambers. The plaintiff had given no undertaking as to damages and no English translations of the alleged defamatory passages were appended as part of the plaintiff's affidavit. Although translations were incorporated in the statement of claim, they were not evidence as they would have been if appended to a sworn affidavit. The decision dealt with the principles applicable to the grant of interim injunctions to restrain publication of defamatory statements.

Held:

1. There should in general be no prior restraint on publication, though those who publish in possible breach of implied limitations do so at their peril and may find themselves liable to sanctions after the event if they have overstepped the mark -- *Taione v Lali Media Group Ltd & Ors* [2005] Tonga LR 67. The prior restraint of publication, though occasionally necessary in serious cases, was a drastic interference with freedom of speech and should only be ordered where there was a substantial risk of grave injustice -- *Attorney-General v BBC* [1980] 3 All ER 161, 183.
2. A clear case had not been made out that this was an exceptional case where it was appropriate to restrict the right of free speech nor was the Court satisfied that there was a substantial risk of grave injustice or clear and compelling reasons or exceptional circumstances so as to justify an injunction. The application was refused.

Cases considered:

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 (HL)
Attorney-General v BBC [1980] 3 All ER 161 (HL)
Auckland Area Health Board v Television New Zealand Ltd [1992] 3 NZLR 406
Bestobell Paints Ltd v Bigg [1975] FSR 421
Bonnard v Perryman [1891] 2 Ch 269
Church of Scientology v Readers Digest [1980] 1 NSWLR 344,350A
Coulson v Coulson [1887] 3 TLR 846
Harakas v Baltic Mercantile and Shipping Exchanges Ltd [1982] 1 WLR 959; [1982] 2 All ER 701 (CA)
Hector v Attorney-General of Antigua [1990] 2 All ER 103 (PC)
Hodgson v Stiassny & Ors NZ High Court CIV 2005-404-1808, 5.5.05
Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 129
New York Times Co v United States 403 US 713, 91 SCt 2140, 29 L Ed 2d 822 (1971)
New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd [1989] 1 NZLR 4
Paseka v Langi & Ors [1989] Tonga LR 1 (LC)
Pride of Derby v British Celanese Ltd [1953] 1 Ch 149
Primary Produce Exports Ltd v Lauti & Ors [1995] Tonga LR 162
Redland Bricks Ltd v Morris [1970] AC 652
Roseneath Holdings Limited v Grieve [2004] 2 NZLR 168

Taione v Lali Media Group Ltd & Ors [2005] Tonga LR 67
Tonga Development Bank v Pohiva [1992] Tonga LR 71
Touliki Trading Enterprises Ltd v Procorp Ltd [1999] Tonga LR 216
TV3 Network Services Ltd v Fahey [1999] 2 NZLR 129

Statutes considered:
Human Rights Act 1998 (UK)
New Zealand Bill of Rights Act 1990 (NZ)

Counsel for plaintiff : Mr Taumoepeau

Expanded Transcript of Oral Decision given in Chambers

This was an ex parte application for an interlocutory injunction to restrain the Defendants from repeating their alleged defamation of the Plaintiff. I heard submissions in support of the application from Mr Taumoepeau in chambers.

The principles on which the Court will grant an injunction in a defamation case are different to those applicable to injunctions in ordinary cases, such as those submitted by Mr Taumoepeau. As stated succinctly in the White Book 1997 at para 29/1/4:

> '(1) Defamation - The Court will not ordinarily restrain publication of a defamatory statement whether relating to the plaintiff personally or to his trade which the defendant genuinely intends to justify at the trial, since to do so would interfere with freedom of speech; but the Court will restrain the publication of obvious lies; *Bestobell Paints Ltd v Bigg* [1975] FSR 421 where the cases are reviewed; *Harakas v Baltic Mercantile and Shipping Exchanges Ltd* [1982] 1 WLR 959; [1982] 2 All ER 701 (CA).'

Halsbury's Laws (4th Ed) Vol 28 (Libel and Slander) para 167 also states:

> '167. Exercise of jurisdiction.
>
> Because of the court's reluctance to fetter free speech and because the questions that arise during the proceedings, such as whether the meaning is defamatory, whether justification or fair comment are applicable and as to malice, are generally for the jury, interlocutory injunctions are granted less readily in defamation proceedings than in other matters and according to different principles. An injunction will be granted only if the plaintiff can satisfy the court that any jury would say that the matter complained of was libellous and where, if it did not so find, the court would set aside its verdict as unreasonable.'

In Gatley on Libel and Slander (10th Ed) it is stated:

> '25.2 Delicate nature of jurisdiction.
>
> The jurisdiction to grant interim injunctions to restrain publication of defamatory statements is 'of a delicate nature', which 'ought only to be exercised in the clearest cases'. That was stated by Lord Esher MR in *Coulson v Coulson* [1887] 3 TLR 846 and it encapsulates the general approach of the court. The reluctance to grant peremptory injunctions is rooted in the importance attached to the right of free speech –
>
> 'The importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions':
> Lord Coleridge in *Bonnard v Perryman* [1891] 2 Ch 269,284."

Lord Coleridge further explained there:

> 'The right of free speech is one which it is for the public interest that individuals should possess and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed ...'

This statement of the law has been endorsed and applied consistently since 1891: Gatley para 25.6.

The procedure in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (HL) is inappropriate in defamation cases: Gatley para 25.2.

Gatley at para 25.2 Note 7 states that the authoritative statement of Hunt J in *Church of Scientology v Readers Digest* [1980] 1 NSWLR 344,350A could also be regarded as a succinct summary of English law:

> 'I accept as settled law that the power to grant interlocutory injunctions in defamation cases must be exercised with great caution, and only in very clear cases. A plaintiff must establish that a subsequent finding by a jury that the matter complained of was not defamatory of him would be set aside as unreasonable, that there is no real ground for supposing that the defendant may succeed on any defence of justification, privilege or comment, and that he, the plaintiff, is likely to recover more than nominal damages. In particular questions of privilege and malice are not normally appropriate to be decided upon an interlocutory application. Nor will an injunction go which will have the effect of restraining the discussion in the press of matters of public concern.'

More recently in *Hodgson v Stiassny & Ors* NZ High Court CIV 2005-404-1808, 5.5.05 it was stated:

> '[35] The parties are generally agreed on the applicable principles, in particular that the threshold for an injunction to restrain defamatory material is higher than that normally applicable for injunctive relief as set out in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129. (See, for a recent discussion of the *Klissers'* principles, *Roseneath Holdings Limited v Grieve* [2004] 2 NZLR 168.)
>
> [36] The approach to be taken to an injunction in a case like the present was discussed by the Court of Appeal in *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4. In that case, Cooke P observed that when justification is to be relied on as a defence, an injunction will not be granted 'except in cases where the statement is obviously untruthful and libellous.' (at 7). In that case, the Court could not conclude on affidavit evidence that the material was 'obviously untruthful and libellous' or that 'there is no reasonable foundation for the defence of justification.' (at 7). There, a significant opportunity to comment was given and advantage was taken of it. (I do not consider Mr Siemer's offer to allow the plaintiffs to put their side of the story on the website equates to the opportunity to comment in issue in the *New Zealand Mortgage Guarantee* case.)
>
> [37] Similarly, Cooke P in *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 referred to the effect of the principle of freedom of expression, as reinforced by s 14 of the New Zealand Bill of Rights Act 1990. That principle meant that the jurisdiction to grant an injunction in these cases should be 'exercised only for clear and compelling reasons.' Cooke P continued:
>
> > 'It must be shown that defamation for which there is no reasonable possibility of a legal defence is likely to be published.' (at 407)

> [38] As Cooke P observed, this requires a factual analysis and the assessment in a particular case will turn on the particular facts. Those facts 'may be such that the duty of the Court to restrain unlawfulness comes into force.' It was envisaged that cases in which either an injunction or an order for production of a script would be justified would be 'exceptional' (at 408).
>
> [39] The notion that the circumstances must be exceptional to justify an injunction rather than 'leaving the complainant with his or her remedy in damages' was reiterated by the Court of Appeal in *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 at 132.
>
> [40] Richardson P in *Fahey* also noted that the same principle, that of requiring clear and compelling reasons, applies also to the case of successive defamations. (See also the discussion of the higher threshold in Todd, *The Law of Torts in New Zealand* (3 ed at 16.6).)'

Here in Tonga, in *Taione v Lali Media Group Ltd & Ors* [2005] Tonga LR 67, I referred (at p 77) to the importance of there being no prior restraint on publication:

> 'The first aspect is that there should in general be no prior restraint on publication, though those who publish in possible breach of implied limitations do so at their peril and may find themselves liable to sanctions after the event if they have overstepped the mark. Authorities for that were set out at some length by Dalgety J in *Kingdom of Tonga v Pohiva* at 44-45'

As Dalgety J said, the guiding principle was put thus by Lord Scarman in *Attorney-General v BBC* [1980] 3 All ER 161,183 (HL) –

> 'But the prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice.'

I also referred (at p 29) to the Pentagon Papers case (*New York Times Co v United States* 403 US 713, 91 SCt 2140, 29 L Ed 2d 822 (1971), where the US Supreme Court said in relation to the First Amendment (which provides that 'Congress shall make no law ... abridging the freedom of speech, or of the press, ...') that:

> 'Any system of prior restraints of expression comes to the US Supreme Court bearing a heavy presumption against its constitutional validity, and a party who seeks to have such a restraint upheld thus carries a heavy burden of showing justification for the imposition of such a restraint.'

I also referred there (at p 39) to *Hector v Attorney-General of Antigua* [1990] 2 All ER 103,106 (PC):

> ' ... it would on any view be a grave impediment to the freedom of the press if those who print, or a fortiori those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based.'

Finally in that case (at p 41) I made it clear that the Press must also exercise responsibility and must take the consequences if what it publishes turns out to be unlawful:

> 'To repeat what I have said already, free speech means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth, ie freedom governed by law. It is equally important that freedom of the Press does not mean that a newspaper has licence to publish what it wants, when it wants, about whom it wants, and how it wants in any improper, mischievous or illegal manner: it is not limitless.
>
> This decision must not be taken as authority for a newspaper to publish anything it wishes, eg however pornographic, or untruthfully subversive, or race-hatred inspiring. If a newspaper publishes material

> which is improper, mischievous, or illegal, it must take the consequences if the result is illegal.'

In addition a claimant who does not know precisely what words the defendant intends to publish is in some difficulty in establishing the imminent publication of plainly defamatory statements: Gatley para 25.4.

While Clause 7(1) of the Constitution provides:

> 'Freedom of the press
>
> 7. (1) It shall be lawful for all people to speak write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever but nothing in this clause shall be held to outweigh the law of defamation, official secrets or the laws for the protection of the King and the Royal Family.'

it is therefore clear from all the authorities referred to above that the law of defamation is not outweighed by that provision in the Constitution, but in itself the law of defamation respects freedom of expression.

All these cases are based on the principle of the importance of free speech, together with the difficulty in determining before the full trial of whether or not any particular statement is or is not defamatory.

In this case, on the Plaintiff's affidavit I was unable to be satisfied that a clear case was made out that this was an exceptional case where it was appropriate to restrict the right of free speech, particularly as I was in no position to judge whether the alleged defamatory statements are true or not, or whether they are unarguably defamatory. I was not satisfied that there was a substantial risk of grave injustice. The affidavit did not set out convincing grounds why the Plaintiff feared further defamatory statements or evidence of an intention to repeat or publish the defamatory statement, and did not specify with any accuracy what these would say or that they were imminent. I therefore did not find that defamation for which there is no reasonable possibility of a legal defence is likely to be published, nor that there were clear and compelling reasons or exceptional circumstances so as to justify an injunction. I therefore exercise the Court's discretion by refusing the application.

In the United Kingdom there is a procedural requirement imposed by section 12(2) of the Human Rights Act 1998 that the person against whom the injunction is sought must be present or represented at the application, or notified about it, unless there are good reasons for not doing so. That does not apply as law in Tonga, but it appears to me an important procedural safeguard and, if I had been considering granting the injunction, I would have wanted to give the Defendants an opportunity of being heard first.

While in the event it did not affect my decision, I also noted that the Plaintiff gave no undertaking as to damages (which is still necessary in such cases – Halsbury para 167); and that no English translations of the alleged defamatory passages were appended as part of the Plaintiff's affidavit. Although translations were incorporated in the Statement of Claim, they were not evidence, as they would have been if duly appended to a sworn affidavit. A Plaintiff seeking discretionary relief from the Court must come with an application which is complete in all respects.

I was referred by Counsel for the Plaintiff to the following cases, but they all relate to applications for interlocutory injunctions in other types of cases:

> *Redland Bricks Ltd v Morris* [1970] AC 652,664 per Lord Upjohn;
> *Pride of Derby v British Celanese Ltd* [1953] 1 Ch 149,181 per Evershed MR;
> *Paseka v Langi & Ors* [1989] Tonga LR 1 (LC);
> *Tonga Development Bank v Pohiva* [1992] Tonga LR 71;
> *Primary Produce Exports Ltd v Lauti & Ors* [1995] Tonga LR 162;
> *Touliki Trading Enterprises Ltd v Procorp Ltd* [1999] Tonga LR 216.

However, as special considerations apply in defamation cases, these authorities are not applicable in this case.

Tau'atevalu v Police

Supreme Court, Ha'apai
Ford J
AM 8/2005

12 May 2006; 12 June 2006

Criminal law – appeal against conviction – summons process not complied with – de novo trial ordered

The appellant had been convicted in the Magistrates' Court on 3 December 2004 on one charge of assault. He was sentenced to one month's imprisonment and ordered to pay compensation of $50. On 6 December 2004 the sentence was "amended" and the term was increased to seven month's imprisonment when the one-month sentence was ordered to be served consecutively with two other earlier imposed suspended sentences of three months each. The appellant appealed against both his conviction and sentence. The appeal against conviction was on the basis that his conviction was a nullity because, in breach of the proviso to section 14 of the Magistrates' Courts Act, the summons had not been served on the appellant more than 24 hours prior to the hearing and there was no record that the appellant had consented to his case being heard within 24 hours of service of the summons. The second ground of appeal relating to sentence was that the earlier suspended sentences should have been regarded as concurrent rather than consecutive sentences.

Held:

1. Compliance with the procedural provisions in section 14 of the Magistrates' Court Act relating to service of the summons was mandatory. Non-compliance had resulted in a miscarriage of justice and the matter was referred back to the Magistrates' Court to be tried de novo.
2. *Obiter*: the earlier convictions either arose out of the same incident or were dealt with at the same court session and as a general rule where sentences were so interrelated, unless a contrary intention was stated, the sentences would be presumed to be concurrent.

Cases considered:

R v Blackmore [1994] 1 NZLR 268
Tone anors v Police [2004] TUSC 36 (28 June 2004)

Statutes considered:

Criminal Offences Act (Cap 18)
Magistrates' Courts Act (Cap 11)
Summary Proceedings Act 1957 (NZ)

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Mr Kefu

Judgment

Background

[1] On 3 December 2004 the appellant was convicted in the Magistrates' Court at Ha'apai on one charge of assault contrary to section 112(a) of the Criminal Offences Act (Cap 18). It was alleged in the summons that on 25 November 2004, inside the Mormon Church compound at Ha'afeva, the accused punched Unaloto Tanginoa's mouth causing swellings. He was convicted and sentenced to one month's imprisonment and ordered to pay compensation of $50.

[2] On 6 December 2004 the sentence was 'amended'. The term was increased to seven month's imprisonment when it was ordered to be served consecutively with two other earlier imposed suspended sentences of three month's imprisonment which, on that same day, were ordered to be served consecutively with each other and with the new one-month sentence.

[3] The appellant has appealed against both his conviction and sentence. At the beginning of the hearing, counsel for the appellant informed the court that the grounds of appeal would be confined to two issues only and, of those, the principal ground would be the first ground of appeal, namely, that the conviction was a nullity because in breach of the proviso to section 14 of the Magistrates' Courts Act, the summons had not been served on the appellant more than 24 hours before the hearing nor was there any record that the appellant had consented to his case being heard within 24 hours of service of the summons.

[4] The second ground of appeal related to the decision of the magistrate on 6 December 2004 to invoke the two previous suspended sentences of three month's imprisonment each and then order that they be served consecutively although there is no evidence that they were ordered to be consecutive sentences at the time they were imposed. The appellant contends, therefore, that the earlier suspended sentences should be regarded as concurrent sentences making a total suspended sentence of three month's imprisonment instead of the six month's ordered on the 6th of December.

[5] The appeal was initially scheduled to be heard during the March 2005 circuit of this court in Ha'apai but, unfortunately, the appellant was not then available and so the hearing had to be adjourned until the session which has just concluded.

The hearing before the magistrate

[6] When the case was first called before the magistrate on 3 December 2004, the appellant appeared and entered a plea of not guilty. He was at that stage represented by an unqualified law practitioner who held a licence to practise in the Magistrate's Court only. The case proceeded as a defended hearing on that same day. In normal circumstances the court should be commended for being able to dispose of a case in such short order. In any jurisdiction, it would have to be a remarkable achievement indeed for a court to be able to have a defended hearing within five days of the incident giving rise to the charge.

[7] The attributes of speed and efficiency, however, sometimes come at a cost and they must never be seen as an acceptable substitute for a failure to comply with the procedural requirements set out in the Magistrates' Courts Act. Unlike the situation in the Supreme Court, magistrates have no inherent jurisdiction. Their powers and jurisdiction are creatures of statute and the provisions in the Act defining and prescribing those procedures must be strictly adhered to. Any non-compliance, such as is alleged in the present case, will almost inevitably expose the proceedings to a jurisdictional challenge.

[8] At the hearing, the prosecutor called the 19-year-old complainant and two other witnesses. He then sought leave from the magistrate to tender a doctor's report as evidence without having to call the doctor who was at another village. Defence counsel objected upon the perfectly valid grounds that he required the doctor to be present for cross-examination. The magistrate, therefore, adjourned the case until 6 December 2004 for the taking of the doctor's evidence. At the same time, he ordered that the appellant was to be kept in custody until the resumed hearing.

[9] It appears from the transcript that at that point the appellant decided to change his plea to guilty. After listening to submissions on penalty, the magistrate imposed the sentence of 1 month's imprisonment and compensation of $50. On 6 December, as stated above, the case was recalled and the penalty was increased to seven month's imprisonment along with compensation of $50.

Case for the appellant

[10] I will deal at this point with the appellant's principal ground of appeal. There was no dispute between the parties that the summons was not served on the appellant more than 24 hours prior to his appearance in court as required by section 14 of the Magistrates' Courts Act. That section deals with the preparation and issue of summonses. The relevant provisions read as follows:

> '14 . . . Such a summons shall state concisely the offence with which the defendant is charged and the time and place at which it was committed and shall require the defendant to appear at a specified time before the Magistrate's Court to answer the charge in the summons and to be dealt with according to law:
>
> Provided that if it appears at the hearing that the summons has not been served on the accused more than 24 hours before the time and date stated in the summons . . . the case shall not proceed without the express consent of the accused, which consent shall be recorded in the record of the proceedings.'

[11] In the present case, the summons was issued on 2 December 2004 and it required the appellant to appear before the magistrate at 10 a.m. the following day. It was not served more than 24 hours prior to the hearing nor had the accused recorded his consent in the record of proceedings for the case to proceed. Mr Tu'utafaiva submitted that the requirements relating to service of the summons were mandatory and, as they had not been complied with, that is really the end of the matter - the conviction and sentence should be set aside as a nullity.

Case for the prosecution

[12] Whilst accepting that the service requirements of section 14 had not been complied with, Crown counsel submitted that the non-compliance did not result in a nullity but in a technical defect which the court, in its discretion, could put to one side unless it considered that a miscarriage of justice had resulted.

[13] Mr Kefu made the point that the appellant had been represented by counsel and counsel had cross-examined the three prosecution witnesses before, as Mr Kefu put it, 'the appellant and his counsel reconsidered the position and changed the plea. In other words, there had been a breach of section 14 but no injustice to the appellant had resulted.'

The law

[14] Crown counsel referred the court to an unreported decision of Ward C.J. in *Tone anors v Police* [2004] TUSC 36 (28 June 2004) where, in addition to other procedural irregularities, there had been a similar failure to comply with the service provisions of section 14. The four young accused had nevertheless appeared, pleaded guilty and been sentenced. The former Chief Justice described the requirements in section 14 relating to service of the summons as a 'vital matter' and he held that prosecutor's failure to serve the summons at least 24 hours prior to the hearing, along with the other procedural defects, were sufficient grounds to allow the appeal and have the case referred back to the Magistrates' Court.

[15] In the comparable legislation in New Zealand, there is a specific statutory provision giving effect to the proposition Crown counsel has put forward in the present case. Thus, section 204 of the Summary Proceedings Act 1957 provides:

> '**204 - Proceedings not to be questioned for want of form -** No information, complaint, summons, conviction, sentence, order, bond, warrant or other document, and no process or proceeding shall be quashed, set aside, or held invalid by any District Court or by any other court by reason only of any defect, irregularity, omission, or want of form unless the court is satisfied that there has been a miscarriage of justice.'

[16] In *R v Blackmore* [1994] 1 NZLR 268, the Court of Appeal referred to, 'the expansive language of section 204 with its obvious purpose of saving proceedings from unmeritorious challenge' but it went on to state that where a procedural requirement is 'so fundamental a safeguard to the accused that non-compliance goes beyond a mere defect or irregularity' non-compliance renders a guilty plea and subsequent committal and conviction a nullity to which s204 can have no application.'

[17] The absence of any similar provision in the Magistrates' Court Act to section 204 of the New Zealand legislation does not assist Mr Kefu in establishing his principal contention in the present case which in effect, is that this court should infer such a provision.

Conclusions

[18] Non-compliance with the procedural provisions in section 14 of the Magistrates' Court Act is a matter going beyond a mere technicality. The issuance and service of a summons is an originating process. It is the first step in a criminal prosecution. Prior to his appearance in court, an accused person is entitled to be fully informed of the charge made against him and he must be given fair notice of the hearing date.

[19] If the purpose of the requirement for giving not less than 24 hours notice was solely to ensure that the accused turned up for the hearing then one can see some merit in Crown counsel's submission. After all, the appellant did appear in court with his counsel at the nominated time and date and, in these circumstances, Mr Kefu asks rhetorically where is the prejudice in his not having been given the requisite 24 hours notice?

[20] It seems to me, however, that the object of the proviso to section 14 goes further than that. The proviso is designed not only to ensure that an accused is given adequate time to arrange his affairs so that he can be present in court to answer the charge made against him but it is also to ensure that he has been given reasonable time in which to prepare for the hearing.

[21] The final words to the proviso, 'the case shall not proceed without the express consent of the accused, which consent shall be recorded in the record of proceedings' make it clear that it is not sufficient simply to have the accused present in court (with or without his counsel) but if service of the summons was effected within the previous 24 hours then the accused must expressly acknowledge that he is ready to proceed and it would be implicit in such an acknowledgement that the accused considered that he had had reasonable time to prepare for the hearing. In this case, of course, there was no such acknowledgement.

[22] The court was told that the local practitioner who represented the appellant at the Magistrates' Court hearing was unaware of the provisions of section 14 of the Magistrates' Courts Act. The fact, however, that the appellant entered a change of plea at the end of the evidence of the prosecution's third witness indicates that the case was ill-prepared. It is impossible to avoid the conclusion that had the accused and his counsel been given more time to prepare for the hearing and perhaps interview potential witnesses the conduct of the defence may have taken a different course -- one less prejudicial to the appellant.

[23] In short, I am satisfied that not only has there been non-compliance with the mandatory provisions of the proviso to section 14 of the Magistrates' Courts Act but that a miscarriage of justice has also resulted. In either case, the conviction cannot be allowed to stand.

[24] Although there is no need for me to deal with the second ground of appeal, I simply observe that I do not have sufficient information before me relating to the two previous convictions to ascertain whether the magistrate erred in treating the sentences as consecutive. I have no knowledge, for example, of the date of the offending or the date the sentences were imposed. I observe, however, that the summons numbers for the two prosecutions were 8/04 and 9/04 which would indicate that the charges either arose out of the same incident or were dealt with at the same court session. It should have been expressly stated in the record of proceedings whether the sentences were to be concurrent or consecutive and as a general rule where sentences are so interrelated, unless a contrary intention is stated, the sentences will be presumed to be concurrent.

Order

[25] For the reasons mentioned above, I allow the first ground of appeal. Counsel agreed at the hearing that should I reach such a conclusion then the matter should be referred back to the Magistrates' Court to be tried de novo and I order accordingly.

Lasike anors v Noble Tu'iha'angana anors

Supreme Court, Nuku'alofa
Webster CJ
CV 431/2006

17 June 2006; 19 June 2006

Practice and procedure – inquiry into opening of Legislative Assembly – serious general inconvenience or injustice to those who had no control over the action if ruled void – opening of Parliament ruled lawful

The plaintiffs challenged the 1 June 2006 Opening of the Legislative Assembly on the grounds that section 17 of the Legislative Assembly Act (Cap 4) had not been complied with. Section 17 provides: "The sessions of the Legislative Assembly shall be opened and closed by the King either in person or by a commission of three nobles appointed by him." The Opening had been carried out by HRH Princess Salote Mafile'o Pilolevu Tuita who had duly been appointed Princess Regent during the absence of His Majesty the King abroad. Clause 43 of the Constitution of Tonga provides for the appointment of Prince Regent "who shall administer the affairs of the Kingdom during his [the King's] absence". A preliminary issue was whether the Supreme Court could inquire into the internal proceedings of the Legislative Assembly.

Held:

1. There was no jurisdiction in the court to inquire into the validity of the Assembly's internal proceedings where there had been no breach of the Constitution -- see *Fotofili v Siale* [1987] TOPC 2. It was borderline whether the formal ceremonial Opening of the Legislative Assembly was part of the internal proceedings of the Assembly but even if it was the issue before the court was a matter involving the interpretation, and thus a possible breach, of the Constitution and under clause 82 the court had jurisdiction to inquire into it.
2. The position in the United Kingdom and the UK Acts were not comparable because the UK did not have a written supreme Constitution.
3. The words in clause 43 of the Constitution giving the Prince Regent the authority to "administer the affairs of the Kingdom" are to be given a wide meaning and the act of opening the Legislative Assembly was within the powers of the Regent.
4. Section 17 of the Legislative Assembly Act should be so construed that its application will not infringe the supreme Constitution. The definition of "The King" in the Interpretation Act includes "the sovereign reigning for the time being" and those words included the Regent when acting for the time being.
5. The requirements of section 17 of the Legislative Assembly Act should be construed as directory as they relate to the formal performance of a public duty but even if actions such as the opening of the Assembly had been done in neglect of the requirements in section 17, it would not have been held avoid as that would work serious general inconvenience or injustice to those who had no control over the action.

Cases considered:

Bahamas Methodist Church [2000] UKPC 31
D'Emden v Pedder (1904) 1 CLR 91 (HC)
Fotofili v Siale [1987] TOPC; [1988] LRC (Const) 102; [1987] SPLR 339 (PC)
Fuko v Vaikona [1990] Tonga LR 148,150 (CA)
Taione v Kingdom of Tonga [2004] TOSC 48; [2005] 4 LRC 661
Tu'itavake v Porter [1989] Tonga LR 14
Vaikona v Fuko (No 2) [1990] Tonga LR 68

Statutes considered:
Interpretation Act (Cap 1)
Laws Consolidation Act 1988
Legislative Assembly Act (Cap 4)

Counsel for plaintiff	:	Mr Edwards
Counsel for first defendant	:	Mr Taumoepeau
Counsel for second defendant	:	Mr Waalkens QC
Counsel for third defendant	:	Acting Solicitor-General, Mr Kefu

Judgment

Preliminary

This case arises from the purported Opening of the Legislative Assembly on 1 June 2006 by HRH Princess Salote Mafile'o Pilolevu Tuita as Princess Regent, in the absence of His Majesty The King, abroad in Auckland. There was no dispute that that event took place - I myself was an eyewitness - and it has been taken for the purposes of this case that HRH Princess Pilolevu had been duly appointed as Princess Regent.

The legality of that Opening has been challenged by the Plaintiffs on the grounds that section 17 of the Legislative Assembly Act (Cap 4), which provides:

> 'Opening and closing of the Legislative Assembly.
> 17. The sessions of the Legislative Assembly shall be opened and closed by the King either in person or by a commission of 3 nobles appointed by him.'

was not complied with. The Plaintiffs seek a declaration that the Session has not been legally opened. If the Opening was not valid, it may cast doubt on the validity of what the Assembly does during the session.

The Defendants disputed that claim, broadly on the basis that regard had to be had to clause 43 of the Constitution, under which the Princess Regent was appointed; that section 17 had to be read with clause 43, and if that could not be done section 17 was ultra vires the Constitution; and that in any event the Opening of the Legislative Assembly was a matter of the internal proceedings of the Assembly and the Court could not inquire into that.

As I have made clear from the outset, this case is a legal case to decide legal issues and I have taken this decision on grounds of law, not for any political reasons. Under the judicial oath prescribed in clause 95 of the Constitution the Judges of the Supreme Court must be impartial, and under clause 82 the Court must uphold the Constitution.

In view of the statements in the media, it is also appropriate to mention that after the Statement of Claim was filed with the Court on 6 June, under normal civil procedure the initiative lay with the parties if they wished to seek an expedited hearing, but no request for that was made by any of the parties. It was only after the Legislative Assembly had been suspended on 12 June to await the Court's decision that I took the initiative and invited Counsel to Chambers to see whether an early hearing could be arranged in view of what I considered to be the urgency of the matter. I am grateful to all Counsel for cooperating so that the hearing could take place on Saturday 17 June.

Because of that urgency I am making this a brief decision concentrating on the essential factors in this case, but I was grateful to Counsel for the care they had all taken to make detailed submissions on the law at the hearing. I have taken them all into account in reaching this decision and because I may not mention some of them, it simply means that I did not see them as crucial to the essential points in the decision, not that I have neglected them.

Constitution of Tonga

One of the most important duties of the Supreme Court is to uphold the Constitution of Tonga and I believe that the Constitution and in particular clause 43 is at the heart of this case. The Court's decision on all the issues in this case is coloured by the fact that Tonga has a written Constitution, which is the supreme law in terms of clause 82, and that fact affects all the issues in this case, so that what happens in other countries, especially in the United Kingdom which does not have a written Constitution, is not necessarily helpful in coming to a decision here in Tonga.

Clause 43 provides:

> 'Prince Regent, how appointed
>
> 43. Should the King wish to travel abroad it shall be lawful for him to appoint a Prince Regent who shall administer the affairs of the Kingdom during his absence. And if the King should die whilst his heir is not yet arrived at the age of eighteen years and he has not declared in his will his wishes regarding a Prince Regent during his heir's minority the Prime Minister of the Cabinet shall at once convoke the Legislative Assembly and they shall choose by ballot a Prince Regent who shall administer the affairs of the Kingdom in the name of the King until the heir shall have attained his majority (but the representatives of the people shall have no voice in such election).'

the Court also has to look at the clause 38:

> 'King's relations with Parliament
>
> 38. The King may convoke the Legislative Assembly at any time and may dissolve it at his pleasure and command that new representatives of the nobles and people be elected to enter the Assembly. But it shall not be lawful for the Kingdom to remain without a meeting of the Assembly for a longer period than one year. The Assembly shall always meet at Nuku'alofa and at no other place except in time of war.'

and clause 82:

> '82. This Constitution is the supreme law of the Kingdom and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.'

as well as clause 90:

> 'Jurisdiction of Supreme Court
>
> 90. The Supreme Court shall have jurisdiction in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom (except cases concerning titles to land which shall be determined by a Land Court subject to an appeal to the Privy Council in matters relating to hereditary estates and titles or to the court of appeal in other land matters) and in all matters concerning Treaties with Foreign States and Ministers and Consuls and in all cases affecting Public Ministers and Consuls and all Maritime Cases.'

Internal proceedings of Legislative Assembly

The logical starting place is whether or not the Supreme Court can inquire into the internal proceedings of the Legislative Assembly. In this field there is an authoritative decision of the Tongan Privy Council in 1987 in *Fotofili v Siale* [1987] TOPC; [1988] LRC (Const) 102; [1987] SPLR 339 (PC), which, as well as being binding on this Court as the decision of a superior court, puts the issue in a Tongan context. The relevant passage in that decision is very brief and straightforward:

> '... there is no jurisdiction in the Court to inquire into the validity of the Assembly's internal proceedings where there has been no breach of the Constitution.'

The case from Kiribati referred to by Mr Waalkens, while interesting, thus has no binding force on this Court.

I consider that it is very much borderline whether the formal ceremonial Opening of the Legislative Assembly, attended by a great number of guests and following on the exercise of the power to convoke it under clause 38, is actually part of the internal proceedings of the Assembly. However the long title of the Legislative Assembly Act, which the Court can consider when interpreting its provisions, is 'An Act to regulate the [Elections and] Sittings of the Legislative Assembly' and the Opening of the Assembly is referred to in section 17 of the Act and the Assembly's Rules, so that it is certainly possible to argue that the Opening is part of the internal proceedings. But against that

there is the constitutional provision in clause 38 for The King to convoke the Assembly, which on the other hand can be argued to take the Opening out of the internal proceedings.

But I do not think that it is crucial in this case whether or not the Opening is part of the internal proceedings, because, even if it is, the issue before the Court is clearly a matter involving the interpretation, and thus a possible breach, of the Constitution and so in terms of clause 82 and the authority of *Fotofili v Siale* this Court has jurisdiction to inquire into it.

That being the case, although I accept that in terms of the case in the Privy Council in London of *Bahamas Methodist Church* [2000] UKPC 31 (referred to by the Solicitor-General) I have a discretion as to whether or not I should inquire into issues concerning the Assembly, I do not consider it is appropriate to refrain from hearing what I see as a case necessarily involving interpretation of the Constitution of Tonga.

Interpretation of Constitution

I was surprised that no Counsel specifically raised the issue of the principles to be applied in the interpretation of the Constitution (as distinct from ordinary Acts of Parliament, which I shall mention later). Some of these principles are the same as those applicable to ordinary Acts, but there are important differences, in particular that in the Constitution words are to be given a wide meaning and not interpreted literally or rigidly; restrictions are to be interpreted narrowly; and there must be flexibility for changing circumstances. In recent years there have been a number of cases in Tonga in dealing with this, particularly the recent case of *Taione v Kingdom of Tonga* [2004] TOSC 48; [2005] 4 LRC 661 and the older case of *Tu'itavake v Porter* [1989] Tonga LR 14 (both mentioned in submissions by Mr Taumoepeau), where the principles are set out in full.

Where there is inconsistency between the Tongan and English texts of the Constitution the Tongan text must prevail: *Vaikona v Fuko (No 2)* [1990] Tonga LR 68, at 76; *Fuko v Vaikona* [1990] Tonga LR 148, at 150 (CA).

Clause 43

Many submissions were made during the hearing about the meaning of clause 43 and especially the words 'Prince Regent who shall administer the affairs of the Kingdom during his [*The King's*] absence'. There is nothing remarkable about the meanings of the words 'administer the affairs' and these are very wide words. I do not consider there is any inconsistency, as submitted by Mr Edwards, with the literal translation of the Tongan version 'carry out Government's work', which are also very wide words and are the expression in Tongan of the English words. So in my view these words give the Prince or Princess Regent - and no issue was taken throughout this case by any of the parties that references to the masculine include the feminine - very wide powers to do what His Majesty The King would do if he were in Tonga. In the context of the whole Constitution, apart from clauses 42 (which deals with the appointment of a Prince Regent during the majority of the heir) and 43 there is no other mention of the Regent, which indicates clearly that what is said in clause 43 is taken to be sufficient to give the Regent the necessary powers without restriction. Even if there were an implied restriction, that has to be interpreted narrowly in terms of the principles of constitutional interpretation.

The position in the United Kingdom, referred to by Mr Edwards, and the UK Acts of Parliament spelling out the powers of a Regent in the UK, is not comparable because as already mentioned the UK does not have a written supreme Constitution.

Nor do I consider that the additional words in clause 43 in reference to the Regent during minority 'in the name of The King' detract from the wide powers given to the Regent during The King's absence abroad. Nor is the absence of any provision for the Regent to take the oath a significant determinative factor.

So I find that the Tongan words interpreted as 'carry out Government's work' and the English words 'administer the affairs of the Kingdom' are to be given a wide meaning.

Looking at the nature of the power exercised in convoking and/or opening the Assembly, it is not a one-off power and it is clearly envisaged in other clauses of the Constitution that it will happen from time to time, and at least once every year. There is nothing in the Constitution to indicate that convoking and opening the Assembly is outwith the powers of the Regent. While this may have been the first time that the Assembly has been opened by a Regent (at least in recent years), in practice the Regent has regularly exercised other weighty powers such as assenting to Acts passed by the Assembly.

So I hold that in terms of the Constitution the act of opening the Legislative Assembly is within the powers of the Regent appointed under the first sentence of clause 43.

In passing I mention that even section 17 of the Legislative Assembly Act, though not strictly relevant to the interpretation of the Constitution, except perhaps in its evolving historical context (and the Assembly's much more recent Rules), clearly envisage that the Assembly can be opened by a commission of 3 nobles appointed by His Majesty The King, which does indicates that when The King assented to the Legislative Assembly Act he did not count the opening of the Assembly as a matter of such importance that only the reigning monarch could perform it.

Section 17

Turning to the meaning of section 17 of the Legislative Assembly Act, the real basic principle of the interpretation of statutes or Acts of the Assembly can be summarised as ascertaining the intention of the Assembly through the plain and natural meaning of the words in their context in the statute as a whole: see eg Halsbury's Laws (4th Ed Reissue) Vol 44(1) Para 1369 onwards. While I was referred to a number of presumptions for interpretation as set out in Halsbury's Laws (4th Ed Reissue) Vol 44(1) para 1474 onwards, these are only presumptions and are not binding on the Court and I believe that they have to be applied with great care.

In the interpretation of a statute made under a written Constitution, some guidance can be obtained from the comparable position in Australia when looking at the compatibility of state legislation with the Commonwealth Constitution. The broad principle is that words in the Act should be so construed that the application of the Act will not infringe the supreme Constitution: *D'Emden v Pedder* (1904) 1 CLR 91 (HC). That position is supported by Para 83 in Joseph's Constitutional Law, to which I was referred.

Therefore although the words 'Prince Regent' are not used in section 17 or the Legislative Assembly Act as a whole, taking into account as part of the context the provisions of clause 43 of the Constitution, the Court must construe the words 'The King in person' as comprehending the Regent in person when there is a Regent administering the affairs of the Kingdom. Thus, even if this is the only reference in the laws of Tonga to The King in person (as submitted by Mr Edwards, though I cannot verify that), it does not affect the construction of section 17.

I believe that position is supported (rather than the reverse) by the definition in section 2(1) of the Interpretation Act of 'His Majesty' or 'The King' as:

> 'His Majesty,' 'The King' means His Majesty the King of Tonga or the Sovereign reigning for the time being over the Kingdom of Tonga;

It has to be borne in mind that under section 11(2) of the Laws Consolidation Act 1988:

> '(2) In the event of any doubt arising with respect to the meaning of any passage in the Revised Edition, or of any difference existing between the English text and the Tongan text of any such passage, the English text shall be held to give the true meaning of such passage.'

However an Act such as the Laws Consolidation Act cannot give the English text of the Constitution priority over the Tongan text: see *Vaikona v Fuko (No 2)* & *Fuko v Vaikona*.

I thus consider that the use of the words 'the Sovereign reigning for the time being' must be seen as referring to someone other than The King, and I accept that in this context the words mean the person exercising supreme jurisdiction or power and must include the Regent when acting for the time being. The two words 'reigning' and 'Regent' have the same derivation from Latin. So the particular terms of the definition in section 2(1) of the Interpretation Act support the general approach I have taken to interpretation of section 17.

I also accept that it would make no sense to apply a literal interpretation to section 17 to mean that the Regent could appoint 3 nobles as commissioners to open the Assembly but could not do so himself or herself. That interpretation would produce an absurd result and cannot be supported in law, and here I accept that the presumption against absurdity would apply: Halsbury Vol 44(1) para 1477.

If I were wrong in that interpretation of section 17, then I would find the section inconsistent with the provisions of clauses 38 and 43 of the Constitution and so null and void to that extent in terms of clause 82.

I have to add that, even if I had taken a different view on the construction of section 17, I would have accepted that the requirements of section 17 should be construed as directory, as they relate to the formal performance of a public duty. I would have gone on to hold that, even if the action such as the opening of the Assembly had been done in neglect of the requirements in section 17, it should not be held void as that would work serious general inconvenience or injustice to those who had no control over the action: see Halsbury Para 1238.

Conclusion

Therefore for all these reasons I cannot find for the Plaintiffs and I find in favour of the Defendants. I find that the Opening of the Legislative Assembly on 1 June 2006 by HRH Princess Salote Mafile'o Pilolevu Tuita as Princess Regent, during the absence of His Majesty The King abroad, was lawful.

Costs

As I made clear at the hearing, I did not hear submissions on the issue of costs, which is adjourned to a future hearing at which Counsel can make submissions.

R v 'Osai

Supreme Court, Ha'apai
Ford J
CR 35/2006

10-12 May 2006; 14 July 2006

Criminal law – self defence – Crown proved accused not acting in self-defence – accused convicted

The accused was charged with one count of causing grievous bodily harm and one count of causing bodily harm. It was alleged that on 19 May 2005 he shot the complainant in the right thigh with a .22 rifle causing him a severe wound and in the course of the same incident he hit the complainant on the forehead with a machete causing a deep laceration that showed the scalp bone. The accused operated a motel on the island of Uoleva in the Ha'apai group of islands. The complainant was in the process of building another resort on the island. On the day in question he and the young men assisting him had finished working on the foundations for their resort and they began consuming alcohol. At approximately 3 pm two of the group announced that they were going to get some cigarettes and the complainant assumed that they were going to take the boat back to the main island. After approximately 2 hours the complainant became concerned because the boys had not returned and he began to worry that the boat may have run out of fuel. The complainant and four others walked over to the accused's place to see if his boat was available. The complainant was carrying a can of benzene. When they arrived on the beach in front of the accused's place the accused suddenly appeared with a machete and told them to get off his beach. The complainant asked, "why" and the accused suddenly struck him on the forehead with the machete. The accused raised the machete to strike a second blow when two of the other boys intervened. After the machete attack, the accused ran back towards his house and the complainant started to follow him. The accused reached out and picked up a rifle from behind the door and told them all to leave otherwise he would shoot someone. One of the boys apologised to the accused and began to move the other boys back. The complainant and the boys then left the area. After having his head injury attended to the complainant decided to return to the accused's place and ask him why he had chased them off the beach. As he approached he looked up and saw the accused standing outside his house still holding the gun. The complainant asked him why he had chased them from the beach and suddenly he heard a shot ring out and he realised that he had been shot in the upper part of his right leg. The other boys came and assisted him and he was taken by boat back to Panga'i where he remained in hospital for one week. The defence advanced by the accused was "self-defence" he alleged that the complainant threatened to hit him prior to the machete attack and threatened to kill him before he shot him in the leg. The prosecution submitted that the complainant posed no threat to the accused and the degree of force used by the accused could not be justified.

Held:

1. In considering the issue of self-defence, the court needed to have regard to three factors. First, what did the accused, from his point of view, believe was happening at the time; secondly, bearing that in mind, was he acting from his point of view to defend himself; and, thirdly, was the force used reasonable given what the accused believed was happening at the time. Whether the accused thought it was reasonable was not the point. It was for the Crown to prove that there was an absence of reasonable grounds for the accused's belief that the degree of force used was necessary. It was irrelevant who hit or started the aggression first. The relevant question was whether the accused was defending himself.
2. The Crown had proved beyond reasonable doubt that in respect of both the machete attack and the shooting incident the accused did not believe that he

was acting in self-defence and for that reason the defence failed and the accused was convicted on both counts.

Cases considered:
Beckford v The Queen [1988] 1 AC 130
Palmer v The Queen [1971] AC 814
Zecevic v Director of Public Prosecutions (1987) 162 CLR 645

Counsel for Crown : Mr Kefu
Counsel for accused : Mr Kaufusi

Judgment

The charges

[1] The 61-year-old accused is charged with one count of causing grievous bodily harm and one count of causing bodily harm. The particulars to the first count allege that on 19 May 2005 at Uoleva he shot the complainant, Halani Mahe, in the right thigh with a .22 rifle causing him a severe wound. The particulars of the second count allege that on the same day the accused hit the complainant on the forehead with a machete "causing a deep laceration that showed the scalp bone."

The evidence

[2] The events giving rise to the charges occurred on the island of Uoleva which is the Island lying immediately to the south of Lifuka, the main Island in the Ha'apai group. The journey from the main centre of Panga'i on Lifuka to Uoleva takes approximately half an hour by boat. The court was told that there are no villages on Uoleva but there are two resorts or "motels" as they were referred to in evidence. One of the motels is called the "Captain Cook" and it is operated by Samisoni Kaifoto (referred to as "Soni"); the other is the Taiana Motel and it is operated by the accused.

[3] At the time of the incident on Thursday 19 May 2005 the 42-year-old complainant was in the process of building another resort on the island on an allotment owned by his father,'Ofa Mahe. The complainant had a group of approximately 10 young men assisting him. It seems that on the day in question the men were engaged in carrying out preparation work prior to the commencement of construction. The complainant told the court that he had been working on a fence and others said that they had been carting rocks for the foundation. In all events, the men finished their work for the day early in the afternoon and then the complainant and approximately 7 of the workers consumed between them a bottle of whisky mixed with water. The complainant said that they had about three or four cups each and afterwards he felt, "warm but very much in control of himself."

[4] At approximately 3 p.m. two of the group announced that they were going to get some cigarettes. The complainant thought that they were going back to the boat the men had been using which was moored at another point on the island but later one of the workers told him that the two boys had actually taken the boat and the complainant then assumed that they had gone back to Panga'i to buy the cigarettes. After a period of time, which I gather was approximately 2 hours, the complainant became concerned that the boys had not returned and he began to worry that the boat may have run out of fuel. He decided at that point that he would go and ask Soni at the Captain Cook Motel if they could borrow his boat to go and look for the boys. He took with him a can of benzine to use in Soni's boat. Four of the other workers walked over to Soni's place with the complainant but when they arrived they found that Soni was not there -- he had gone off to feed his pigs.

[5] The complainant and the four others, Fe'afa'aki, Fuka, Maketi and Sime, then decided to walk over to the accused's place to see if his boat was available. The complainant was still carrying the can of benzine. He told the court that while they were on the beach in front of the accused's place the accused suddenly appeared with a machete and told them to get off his beach. The complainant said that at that point he was standing on the sand only a few metres from the waters edge and he asked the accused, "why". In response the accused suddenly struck him on the forehead directly above his nose with a machete. After striking the complainant on the forehead with the machete, the accused raised the

machete again and was about to strike a second blow when two of the other boys, Sime Tamale ("Sime") and Solomone Maketi Falevai ("Maketi") intervened.

[6] Sime and Maketi both gave evidence. They were approximately 40 m away from the point where complainant had been struck with the machete. They told the court that they were filling in time by throwing stones into the sea. Sime said that he had noticed the accused coming down from his allotment and next thing he saw him attacking the complainant with the machete. He said he saw the accused swing the machete twice and he saw blood on the complainant's face. In cross-examination he seemed to accept that it may have only been the one blow that he witnessed but he said that he noticed the complainant "acting in a karate way" trying to avoid being struck again. He had his hands up to his face. Sime told the court that as soon as he saw the accused strike the complainant with the machete he ran over to where the two men were standing and shouted out, "No, no, stop it."

[7] Maketi told the court that he noticed the complainant fall down when he was struck with the machete and he could see that the accused was then trying to strike him a second time. He said that he immediately picked up a fau branch that was lying on the sand and ran over and struck the accused with the branch on his forearm. The machete then fell to the ground and the accused ran back to his house about 20 m away. An unusual feature of the case, which defence counsel highlighted often, is that the accused has only one arm. His right arm is amputated above the elbow.

[8] Sime said in evidence that after the machete attack the accused ran back towards his house and he (Sime) grabbed hold of the complainant who had started to follow him. He then saw the accused standing on the deck of his house and as he was watching he saw the accused reach out and pick up a rifle from behind the door. The accused then told them all to leave otherwise he would shoot someone. Sime said that he immediately apologised to the accused and moved the other boys back. The witness was asked why he had apologised and he replied, "because I was scared of the gun."

[9] Sime said that they then all started to walk back towards Soni's place. The accused called out to them to bring back his machete and one of the boys threw the machete back towards the accused's property. Sime said that back at Soni's place he used a bit of cloth that had been dipped in sea water to clean the blood from the complainant's face and he wrapped a length of lavalava around his head to stop the bleeding.

[10] The complainant told the court that after arriving back at Soni's place and having his head injury attended to he decided to return to the accused's place and ask the accused why he had chased them off the beach. He said that he walked back and as he was standing on the beach he looked up and saw the accused standing outside his house still holding the gun. The complainant said that he asked the accused why he had chased them from the beach. He said that he could not really hear what the accused was saying but suddenly he heard a shot ring out and he realised that he had been shot in the upper part of his right leg. He knew that he was injured because he could not lift his right leg. He tried to drag his leg and he was able to move away from the scene but he then fell down and eventually the other boys came and assisted him. He was taken by boat to the hospital at Panga'i. The complainant remained in hospital for a week. The injury to his forehead was treated but the doctor has been unable to dislodge the bullet from his thigh. The complainant said that in cold weather his thigh becomes very painful.

[11] That is really a summary of the evidence called by the Crown. Each of the Crown witnesses were subjected to a very lengthy cross-examination by Mr Kaufusi. They made some concessions and there were certain conflicts in their evidence but in general they were of a relatively minor nature.

The defence

[12] The accused elected to give evidence. He told the court that immediately prior to the incident he saw the complainant coming along the beach. He said that he was "walking and swaying" and carrying a black plastic bottle (the benzine for the boat). He said that they were coming straight to his motel where foreigners were and he asked them why they were coming there. He said that they then walked back towards the beach and he followed them. He said that the boys were standing in a shed by the beach and the complainant was standing away from the others. He said that the complainant told him that he (the accused) had no authority over them as it was government property and the complainant then

attacked him and told him that he would "hit him today." The accused said that he was scared of the complainant because he was a big guy and he thought that if he just stood there then he would be injured and so he ran to his dwelling house to get a bush knife thinking that the bush knife would help him get them off his land.

[13] The accused told the court that when he returned with the bush knife the complainant was approaching him -- the others were still down on the beach. He said that the complainant was standing there crouched in a karate position and he said to the accused, "hit me". The complainant said that he noticed his feet and the complainant was about to kick him and so he hit him on the forehead with the bush knife. His actual words were, "I hit him with the bush knife. I thought that was the only way of stopping (the complainant) from getting hold of me and my being injured."

[14] Referring to the subsequent shooting incident, the accused told the court that he saw the complainant approaching his home. He said that the complainant was shouting and saying words which he could not understand and so he told him to go away. He said that the complainant walked away and then he turned and said to the accused, "Go ahead, shoot me, shoot me. Today I will kill you." The accused said that at that point the complainant looked very angry and he started walking towards him in "a karate way". The accused said, "I told him to go but he did not go and so I shot him in the leg."

The evidence

[15] In cross-examination Mr Kaufusi was able to extract an important concession from Maketi. The witness agreed that shortly prior to the machete incident he had heard the complainant saying to the accused words to the effect, "this is government property, I am going to hit you." When that same allegation had been put to the complainant earlier he had denied that anything like that had happened. Maketi said that after the complainant made that threat he noticed the accused ran back towards his motel and then he returned with the machete. Sime made no mention in his evidence about this particular confrontation and I am prepared to accept that he did not witness the exchange. In other words, Sime's first awareness of something untoward happening between the complainant and the accused began when the accused arrived on the scene with his machete. I do not find the gap in Sime's evidence in this regard surprising because they were on the beach some 40 m away from where the incident took place.

[16] It was significant that neither Fe'ofa'aki or Fuka were called as witnesses. The evidence satisfied me that they were standing close to the complainant when the preliminary skirmishing was going on prior to the machete attack. I suspect that they may well have confirmed the concession made by Maketi in cross-examination.

[17] The accused was not a particularly impressive witness and his evidence in court was disjointed but he did make a voluntary statement to the police on 23 May 2005 which I did find easy to follow. The statement, made in the form of a so-called "Confession Statement," was produced by the police as an exhibit. In my view, with one significant exception which is dealt with in para [36], it fairly accurately described what most likely happened at his motel property on the day in question and I, therefore, set out the translation in full:

> "Yes, it is true, on Thursday 19 May 2005 around 5.30 in the afternoon, I was at my motel at Uoleva cleaning up the allotment when I noticed Halani Mahe walking around the back of my motel. I approached him and chased him away for he's got no reason to be on my motel property. He then walked to the beach and I followed him, I there saw some other youth who I did not know. They were standing there and I told them to get off my allotment. Halani then told me that this place belongs to the government and I told them to get off for they are disturbing the foreigners. Halani then told me that he is going to beat me up and they started to move up therefore I ran towards my allotment and brought my bush knife. When I came with it, they were standing on the sand. I told them to go away from here and Halani told me that they were going to beat me up today and when he approached me I then hit him with the bush knife which caused injury to his forehead. Then another guy attacked me with a tree branch which he hit my hand with and caused the knife to slip from my hand. I then ran to my house and brought a .22 gun. I told them to get off the property

> and then they did so. After a short while, Halani returned back. I told him to get off the property, he did so,. After a short while, he returned back and I shot his right leg. He then turned around and returned and by that time, I confirmed to myself that the reason why he was going back was because my shot hit him but I had no knowledge of the part of his right leg that the shot hit."

Submissions

[18] Mr Kaufusi made no reference to any case law on the subject but he analysed the evidence in minute detail and submitted that the defence to both charges was self-defence. In relation to the machete incident counsel described the actions of the complainant which constituted the imminent threat to the accused in these terms:

> "(a) The complainant told the accused three times that he or they will assault him then the complainant moved his hands in a karate action and walked towards the accused.
>
> (b) If the complainant was weaving his hands in a karate action and moving backwards it meant that he did not pose any imminent threat to the accused but because he was weaving his hands in a karate action and moving towards the accused it meant he posed an imminent threat to the accused.
>
> (c) In cross-examination of Solomone Maketi Falevai he told the court that Halani, the complainant, told Kalafi, the accused, that this is government land, he will assault him."

[19] Mr Kaufusi prefaced his submissions by inviting the court to take particular note of the fact that the accused was 61 years of age and the complainant 42; the accused has only one arm and the complainant has two arms; that the complainant is strong and healthy and the accused had no one to call in aid except the two ladies (guests at the motel, referred to as "the foreigners").

[20] In response Mr Kefu submitted:

> "From the evidence in court it seems that the complainant may have made some karate motions to the accused before he was struck with the machete. If that is accepted by the court, the Crown submits that they were just mindless childish motions without any substance or intention of inflicting violence against the accused. According to Sime, the complainant became emotional when he cried after he was struck with the machete and kept on asking why the accused had done this to him. This is a sign of the childlike mannerisms of the complainant and is an indication and confirmation of his lack of serious aggression towards the accused before he was struck with the machete."

[21] In relation to the shooting incident, Mr Kaufusi submitted that the complainant had come back to the accused's property to seek revenge for what the accused had done to him. Mr Kefu, on the other hand, submitted that the complainant simply intended to discuss with the accused what had happened earlier. The specific actions of the complainant which gave rise to the need for self-defence on the part of the accused in relation to the shooting incident were summed up by Mr Kaufusi in these terms:

> "The accused submits that if the complainant wanted to discuss then the complainant should have told him but in fact he did not. The complainant told the accused to shoot, he didn't care if the accused shot. The complainant was told three times to go but the complainant turned back and shouted to the accused to shoot him, also he told the accused that he will kill him today then he walked towards the accused moving his hands in a karate action."

As to the reasonableness of the degree of force used by the accused on that occasion, Mr Kaufusi submitted that the accused had no alternative to using the rifle "to make the situation safe." He said that the accused could not get help from Soni's place because Soni was not there.

[22] In response, Mr Kefu submitted that the accused could not have believed that the complainant posed any imminent threat to the accused, his property, his employees or his guests. Crown counsel's principal submissions on this aspect of the case were:

> "VI. Knowing the accused had a rifle, the complainant confronted the accused directly which supports more his intention to discuss what had happened earlier.
>
> VII. Knowing the accused had a rifle, the complainant did not recruit the assistance of Sime and Maketi when he returned to the accused's resort, indicating he did not want to use violence against the accused.
>
> VIII. The complainant shot at a distance from the accused, and so, being unarmed, the complainant was not in close proximity to the accused to cause any physical harm."

[23] As to the degree of force used by the accused, Mr Kefu submitted that the accused's actions in shooting the complainant could not be justified because the complainant was unarmed, by himself and he did not carry out any attack. Crown Counsel further submitted that if there was a need to mitigate any threat, the accused could have fired a warning shot in the air or given a verbal warning that he would shoot but he did neither of these things.

The law

[24] The common law recognises that a person who acts reasonably in self-defence or in defence of others commits no unlawful act. One of the most oft cited authorities on the subject is the judgment of Lord Griffiths in the (UK) Privy Council case *Beckford v The Queen* [1988] 1 AC 130. At p144 his Lordship said:

> "The common law has always recognised as one of the circumstances the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict violence on another in so doing if no more force is used than is reasonable to repel the attack such force is not unlawful and no crime is committed. Furthermore a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike . . . . The test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in defence of himself or another."

[25] In the leading Australian authority on self-defence, *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645, 661, the High Court of Australia commended the wisdom of the observation of the Privy Council in *Palmer v The Queen* [1971] AC 814 that an explanation of the law of self-defence required no set words or formula:

> "The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal."

[26] To like effect, **Blackstone's Criminal Practice** (2006) **A3.30** suggests that the law as to self-defence:

> "can be formulated quite simply and neatly along the following lines: A person may use such force as is reasonable in the circumstances for the purpose of self-defence . . . Although this formulation makes no express mention of any requirement that the use of force should be necessary, it should be remembered that if the use of force is clearly unnecessary (e.g. because the initial aggressor has started to retreat it will not be "reasonable in the circumstances" to use force."

[27] Although the defence raised is self-defence, it is not for the accused to prove that he was acting in self-defence. The onus remains on the Crown to prove beyond reasonable doubt that the accused did not believe that he was acting in self-defence. If the Crown does not exclude self-defence as a reasonable possibility then the accused should be acquitted.

[28] In considering the issue of self-defence, therefore, the court needs to have regard to three factors. First, what did the accused, from his point of view, believe was happening at the time; secondly, bearing that in mind, was he acting from his point of view to defend himself; and, thirdly, was the force used reasonable given what the accused believed was happening at the time. Whether the accused thought it was reasonable is not the point. It is for the Crown to prove that there was an absence of reasonable grounds for the accused's belief that the degree of force used was necessary.

[29] As Blackstone puts it A3.35:

> "The basic rule is that if the accused misjudges the degree of force permissible and uses excessive force, he is deprived of the defence . . . . It would seem that the reasonableness of the degree of force used is coming close to being treated as merely evidence of whether the accused was genuinely motivated by self-defence or whether he was in fact acting with some other illegitimate motive, excessive force being evidence that self-defence was not the accused's real purpose."

[30] There is another aspect of the law of self-defence which has particular relevance in the present case. It relates to the situation where an accused person is the original aggressor coupled with a failure to retreat. The issues were dealt with in *Zecevic* as follows (663):

> "Where an accused person raising a plea of self-defence was the original aggressor and induced or provoked the assault against which he claims the right to defend himself, it will be for the jury to consider whether the original aggression had ceased so as to have enabled the accused to form a belief, upon reasonable grounds, that his actions were necessary in self-defence. For this purpose, it will be relevant to consider the extent to which the accused declined further conflict and quit the use of force or retreated from it, these being matters which may bear upon the nature of the occasion and the use which the accused made of it. Indeed, even in circumstances in which the accused was not the original aggressor, retreat in the face of the threat of violence before resort to force may be relevant to the belief of the accused or the reasonableness of the grounds upon which the accused based his belief. There is, however, no longer any rule that the accused must have retreated as far as possible before attempting to defend himself. It is a circumstance to be considered with all the others in determining whether the accused believed upon reasonable grounds that what he did was necessary in self-defence."

[31] **Blackstone A3.34** makes the same point in these terms:

> "A failure to retreat is only an element in the consideration upon which the reasonableness of an accused's conduct is to be judged. Similarly, there is no hard and fast rule that a person who initiates a confrontation cannot rely on self-defence."

[32] In New Zealand the position is covered by a specific statutory provision. As a result of an amendment in 1980 to section 48 of the Crimes Act 1961 which deals with self-defence, it is irrelevant who hits or starts the aggression first. The relevant question is whether the accused was defending himself.

Conclusions

[33] It is well settled that it is a matter of law as to whether there is sufficient evidence to justify a defence of self-defence but the matter must be considered on a view of the evidence most favourable to the accused.

[34] Turning to the facts of the present case, the accused referred throughout to "his allotment". The evidence showed that he is not the allotment holder. The land appears to be designated as government land. The accused, however, did produce a letter confirming that in 2001 he had been given permission from the Minister of Lands to build a guesthouse on the Island and he had also been instructed to make sure that no unlawful dredging of sand occurred on the beach.

[35] I am prepared to accept that when the accused was initially confronted by the complainant after he had asked the men to get off his allotment, he was facing what he genuinely apprehended was imminent danger to himself. The complainant, Fe'ofa'aki and Fuka had started walking towards the accused and the complainant was threatening to beat him up. No one was armed at that stage. The accused was not only outnumbered but he would have been very conscious, of course, of the fact that he had only one arm.

[36] Faced with that threat of violence, it must have appeared to the others that the accused had sensibly and reasonably elected to retreat. He ran back up towards his motel. That should have been the end of the matter. The complainant and the other two boys did not bother to chase after him. They returned back down to the beach. At that point in time, therefore, the threat of violence the accused had been facing was over.

[37] What then happened, however, was that the accused provocatively returned to the scene with the machete and from that point on, rather than acting in self-defence, he embarked on an escapade of aggression. I do not accept the accused's statement that when he returned with the machete, the complainant repeated his earlier threat to beat him up. At that point both Sime and Maketi were witnesses to what was going on and I prefer their evidence, which supports the complainant's evidence, that no threats were made by the complainant. I accept that the complainant was probably acting in a karate-like a way, as the witnesses described his movements, but I am also satisfied beyond doubt that in doing so, he was simply trying to avoid being struck with the machete. He was not trying to attack the accused nor was he threatening him.

[38] As the High Court stated in *Zecevic* (664):

> "A person may not create a continuing situation of emergency and provoke a lawful attack upon himself and yet claim upon reasonable grounds the right to defend himself against that attack."

[39] My conclusion, therefore, in relation to the machete incident is that the use of force by the accused was clearly unnecessary because, adopting the words from **Blackstone** cited above, "the initial aggressor had started to retreat". The complainant and the other boys had walked back down to the beach. The accused's actions, therefore, in returning to the scene and carrying out the machete attack were unreasonable and motivated not by genuine self-defence, but out of a sense of angry retaliation or pure aggression on his part.

[40] In relation to the shooting incident, I prefer the complainant's description of events and I find that what he told the court is not dissimilar to what the accused said in his Confession Statement. My finding is that there were no acts of aggression or threats made by the complainant when he returned to try and speak to the accused about what had happened earlier.

[41] Mr Kaufusi submitted that the complainant returned to the accused's property seeking vengeance but I reject that contention. For one thing, the complainant was fully aware that the accused had a machete and a .22 rifle. If he had been intent on seeking revenge I am satisfied that he would have armed himself with a weapon of some sort or brought with him more of his workers. Instead he returned alone and unarmed.

[42] The Crown has proved beyond reasonable doubt that in respect of both the machete attack and the shooting incident the accused did not believe that he was acting in self-defence, and for this reason the defence must fail.

[43] Why the accused acted in the foolish and dangerous manner he did is quite beyond me, but the law does not protect a person from the consequences of acting out of some implausible motive. At the end of his evidence, the accused was asked by the court whether he was annoyed or upset because the complainant was starting to develop a resort which would be in competition to his own motel. The accused denied that proposition and said that he was happy to see the new development on the Island. As it turns out, however, the complainant has not proceeded any further with his proposed development.

[44] In his written submissions, Mr Kefu suggested that the motive for the attack was that the accused was overprotective of his business; angry that the complainant had disputed him about his rights over the land and the beach; and simply lost his temper under trivial circumstances. It is not necessary, of course, for the Crown to establish a motive but the accused's aggressive reaction certainly remains one of the puzzling features of the case.

[45] The accused was not asked to demonstrate how he held or fired the rifle with his one arm but he did tell the court that at the time of the incident the rifle had 18 bullets in its magazine and when he fired the shot the complainant was standing approximately 15 meters away. In all the circumstances, he is perhaps very fortunate not to be facing more
450 serious charges.

[46] Mr Kaufusi, quite rightly in my view, did not challenge the prosecution evidence regarding the nature of the injuries sustained by the complainant and I am satisfied that the Crown has proved beyond reasonable doubt that they did amount to grievous bodily harm and bodily harm respectively.

Finding

[47] I am satisfied that the Crown has established all the necessary elements of each charge beyond reasonable doubt and the accused is convicted accordingly.

Langi v Televave

Supreme Court, Ha'apai
Ford J
AM 7/2005

6 and 23 June 2006; 14 July 2006

Criminal law – appeal against conviction and sentence – criminal defamation – inadequate decision – appeal allowed

The appellant appealed against her conviction and sentence in the Magistrates' Court in Ha'apai on one charge of criminal defamation. Upon conviction she had been fined $200 and ordered to pay compensation of $100 to one of the complainants and in default four months imprisonment. The incident giving rise to the charge occurred in July 2004 in the small village of Faleloa in the Ha'apai group of islands. As the respondent and her sister along with two female companions walked by the appellant's home the appellant called out and asked why they had raised their dresses when the matrimonial bed of her daughter had been taken to the house. The respondent then swore at the appellant and the appellant swore back. The appellant then accused one of the women of having "a spotted arse and a rash (ring worm) thigh." The appellant then said, and these were the words that formed the substance of the defamation charge, "I will say only one word and you will shut up. It was your sister who gave birth to your own uncle." The respondent's sister responded by calling out, "we will solve this in court." The appellant denied saying the words complained of but she admitted swearing and making a reference to the uncle. The principal grounds of appeal were that the magistrate, in a brief two sentence decision, failed to apply the correct standard of proof or to consider the essential elements of a charge of criminal defamation. It was also submitted that the magistrate gave no opportunity for submissions before giving his decision.

Held:

1. A magistrate called upon to sign a summons in a criminal defamation case should first satisfy himself, especially in the case of a private prosecution, that it was in the public interest that the prosecution should be allowed to proceed and that the publication complained of constitutes a grave, as distinct from a trivial, defamation of the complainant.
2. The two sentence decision was totally inadequate for dealing with the complex issues involved in a criminal defamation case.
3. Given that a defamation claim can proceed either as a criminal prosecution or civil action it was critical that a magistrate should apply the correct standard of proof. The statement by the magistrate in his decision that he believed that the prosecution had proved the defamation told one nothing about the standard of proof that he had in mind and it left the issue in doubt. The accused was entitled to the benefit of such doubt.
4. In his decision, the magistrate spoke only about one complainant, namely the respondent, but the charge set out in the summons had identified both the respondent and her sister as the complainants. There was no finding on the crucial point as to whether the words spoken reflected upon both complainants.
5. The appeal was allowed and the conviction and sentence quashed.

Cases considered:

Dhayananadan v Police [1999] TOSC 15
Gleaves v Deakin [1980] AC 477
R v Awatere [1982] 1 NZLR 644
R v Deverell 86 LTJo 300
R v Wicks [1936] 1 All ER 384
R v Wilson [1948] 1 KB 46

West London Metropolitan Stipendiary Magistrate ex parte Klahn [1979] 1 WLR 933

Statutes considered:
Defamation Act (Cap 33)
Magistrates' Courts Act (Cap 11)

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Mr Kaufusi

Judgment

The appeal

[1] The 46-year-old appellant was charged pursuant to a private prosecution in the Magistrates' Court in Ha'apai with criminal defamation. On 28 July 2004, after a defended hearing, she was convicted, fined $200 and ordered to pay compensation of $100 to one of the complainants and in default four months imprisonment. She was also ordered to pay the legal costs of that complainant.

[2] The appellant now appeals against both conviction and sentence. The appeal was first called during the March 2005 session in Ha'apai but the appellant was granted an adjournment until the 2006 circuit of the court in order to instruct a lawyer. As it turned out, there was insufficient time during the May 2006 session for the appeal to be heard and counsel, therefore, sensibly agreed that the appeal could be dealt with by way of written submissions. The court is obliged to counsel for their cooperation in this regard.

[3] One unsatisfactory aspect of the case on appeal is that, although the appellant filed her notice of appeal within six days of the hearing, the Magistrates' Court was unable to make available a transcript of the hearing. The reason given was that the responsible clerk in the Magistrates' Court at Ha'apai had been transferred to the Niua Government Representative Office and he was, therefore, unable to provide the necessary transcript.

[4] Section 77 of the Magistrates' Courts Act provides that whenever an appeal is lodged, the clerk in the Magistrates' Court is required, as soon as notice of the appeal has been given, to forward to the Registrar of the Supreme Court the relevant documents including "a correct transcript of all proceedings in the case in the Magistrates' Court." The excuse offered for the failure of the clerk to provide a transcript of the proceedings in the present case is totally unacceptable. In the end, the presiding magistrate made available a copy of his own record of the case and counsel agreed that the appeal could be determined on the contents of those notes. That still does not explain, however, why the clerk did not fulfil his statutory function. The procedural provisions contained in the Act are there for a purpose. Litigants and this Court are entitled to expect that they will be observed. It is important that the tardiness obvious in this case should not become commonplace.

Setting the scene

[5] In Tongan culture the action of a woman in lifting her dress in a public setting to reveal her thighs or buttocks is regarded as very bad behaviour designed to cause maximum embarrassment and offence, particularly if the onlookers include people who are in a brother and sister or first cousin (tapu) relationship.

[6] Traditionally as part of a wedding ceremony one of the customs the participants go through is that after the wedding the bride presents her "beddings" to the groom and his family. In this regard, it is commonplace to see a vehicle arriving at the groom's family home on the wedding day carrying the beddings and other items of household furniture. The vehicle will be accompanied by the bride and members of her family. Members of the groom's family will also be in attendance.

[9] If at any stage during the presentation of the beddings a female relative of the groom lifts her dress in the manner I have described and none of the other relatives of the groom intervene to dissuade her from doing so, such action can be interpreted as dissatisfaction or disgust on the part of the groom's family with the bride or contempt for her family.

[10] The behaviour is regarded as insulting and a major putdown of the bride and her family. The message is that the groom's family does not think much of her and that their

young man is wasted on her. In such a situation it is not uncommon for members of the bride's family to immediately retaliate and the scene can then rapidly deteriorate into something of a free for all between the respective families. Fortunately, such occasions are relatively rare.

The incident

[11] The incident leading to the present prosecution occurred in July 2004 in the small village of Faleloa which is the northernmost village on the Island of Fua in the Ha'apai group of Islands. Relying on the learned magistrate's notes, and accepting for present purposes the evidence of both sides, it would seem that the incident in question can be summarised reasonably briefly.

[12] The 29-year-old respondent, 'Oli Televave, was walking to the local shop with her sister the other named complainant in the summons, 37-year-old Teisa Televave, and two friends, 19-year-old Vaikoloa Leha and another woman, Mafile'o Leha. It is not altogether clear from the evidence and the submissions whether the names Vaikoloa and Mafile'o refer to the same woman. That is a possibility. In all events, as the group walked by the appellant's home, the appellant called out to them and asked why they had raised their clothes when the matrimonial bed of her daughter had been taken to the house.

[13] In her evidence the respondent described the appellant as being "very angry" when she was speaking to them. The respondent then swore at the appellant and the appellant swore back at the group. She accused Vaikoloa, according to the translation, of having "a spotted arse and a rash (ring worm) thigh." Mr Kaufusi translated the offending words as meaning "shaven or clipped or hoed etc in patches, the inner side of your thigh got ring worm." Either way the words were not very pleasant. Vaikoloa admitted in cross-examination that the appellant had apologised to her for making those particular remarks.

[14] It is the words which followed on immediately from that exchange, however, which form the substance of the defamation charge. According to the respondent, the appellant then said:

> "I will say only one word and you will shut up. It was your sister who gave birth to your own uncle." Teisa Televave then responded by calling out, "we will solve this in court."

[15] The summons issued on the 26 to July 2004 reads as follows:

> "To Pilma Langi of Faletau
>
> Because of the charge brought against you for what you did on the 24th of July 2004 at Faletoa you did defame contrary to section 5 Cap 33 of the Laws of Tonga 1988 Vol 1 in which you said words to the effect that 'Oli Televave and Teisa Televave have a sister who gave birth to their uncle and other words which Vaikoloa Leha and others heard. What you said is not true and defamed them and it can cause negative rumours. You are therefore hereby summoned to appear before me at the Magistrates' Court at Pangai on the 28th day of July 2004.
>
> 26.7.04
>
> (Signed by Magistrate)"

[16] At the hearing the respondent had a lawyer acting for her. The magistrate inquired as to whether the appellant wished to have a lawyer representing her but she responded that she would defend herself. The complainants, 'Oli and Teisa, along with Vakoloa then gave very brief evidence, the gist of which is summarised above. In her evidence, the appellant told the court, "I called out to them why did they raise their clothes when the matrimonial bed of my daughter was taken to their house. I swore at them because 'Oli Televave swore at me. I said, "the uncle" and that was all that I said." In cross-examination she denied saying the words complained of but she admitted making a reference to the uncle. She was not asked to clarify or elaborate on her reference to the uncle.

[17] No other witnesses were called and it does not appear from the record that the magistrate invited either party to make submissions before he gave his decision. His

failure in this regard is one of the complaints on appeal. The magistrate's decision, as recorded, read as follows:

> "I believe that the prosecution have proven that there was defamation. Therefore, you are guilty of defamation that you have been charged with."

The magistrate then immediately proceeded to impose the penalty mentioned earlier.

The grounds of appeal

[18] The first ground of appeal which is the only ground of appeal against conviction, is something of a composite. It is alleged that the finding of guilt was against the weight of evidence but under this head a number of separate and quite distinct issues were raised. Thus it was submitted by the appellant that the magistrate failed to apply the correct standard of proof or to consider the essential elements of the charge such as whether the words complained of were defamatory of the complainants. Then it was submitted that the magistrate gave no opportunity for submissions before giving his decision. Mr Kaufusi did not take any issue with the way in which the grounds of appeal were presented.

[19] In his written submissions in response, Mr Kaufusi examined the evidence in detail and invited the court to reject the appellant's contentions. Neither counsel cited any authorities which is disappointing given the complexity of criminal defamation and the wealth of available authorities.

Discussion

[20] The case proceeded as a private prosecution. In many common law jurisdictions, including New Zealand, proceedings for criminal defamation have now been abolished altogether. In other jurisdictions such proceedings are able to proceed only with the prior consent of a judicial officer such as the Attorney General. In England and Wales oral defamation (slander) is not a crime but written defamation (libel) is a common law misdemeanour. No criminal prosecution can be commenced in respect of a publication in a newspaper, however, without leave of a judge. The learned authors of **Gatley on libel and slander** 10th edition (2004) at para 22.1, note that the primary reason for excluding defamatory spoken words (slander) from criminal defamation proceedings lies in the "difficulties of proving in relation to words spoken in the heat of the moment exactly what was said and with what intent."

[21] Commenting on the English situation where leave from a judge is required, **Halsbury** Vol 28 p 280 states:

> "Leave will only be granted where there is a prima facie case, where the libel is so serious that the criminal law ought to be invoked and where the public interest requires the institution of criminal proceedings."

On the same subject**, Gatley** (para 22.14) notes that judges are increasingly reluctant to grant leave to potential prosecutors and the learned authors observe that since 1940 the number of criminal libel trials in England has "fallen sharply".

The rationale of criminal defamation

[22] In recent years several private prosecutions for criminal defamation have come before this Court on appeal. Although it is not strictly relevant to the case before me, it may be an appropriate opportunity to try and give some broad guidance on the complex subject.

[23] Referring to criminal defamation proceedings in general, **Halsbury** Vol 28 p 5 states:

> "An indictment will lie (1) where the libel tends to provoke the person defamed to commit a breach of the peace; or (2) where it is in the public interest that criminal proceedings should be brought."

[24] **Gatley** at para.22.5 refers to the historical rationale of criminal libel as being the concern with the maintenance of social order and keeping the peace and notes that the survival of the crime of libel into contemporary times may be questioned. In *Gleaves v Deakin* [1980] AC 477 the House of Lords confirmed that it no longer need be shown that a criminal libel is likely to disturb the peace of the community or to provoke a breach of

the peace but their Lordships appeared to be divided over whether a criminal libel must involve the public interest.

[25] Lord Edmund Davies (p 491) adopted part of a passage from the direction of Lord Coleridge C.J. in *Reg v Deverell* 86 LTJo 300 which confirmed that:

> "there ought to be something of a public nature about [the defamatory remarks] to justify the interference of the Crown and when "it was clearly an individual squabble between two people it was well settled law that it ought not to be, and was not, in point of law, a proper subject of indictment."

His Lordship said that the necessity of the wrong to be of a public nature is emphasised by the requirement in the Act that if truth is to be pleaded, it must also be asserted that publication was for the public benefit. The same requirement exists in section 7 of the (Tonga) Defamation Act (Cap 33) which reads:

> "7. In criminal proceedings for defamation of character, proof of the truth of the matter charged shall not entitle the defendant to be acquitted unless it is also proved that the publication of the matter charged was for the public benefit."

Viscount Dilhorne took a different view from that of Lord Edmund Davies. He said, p.486, that he did not think it was right to say that a libel to be criminal must involve the public interest.

[26] It seems to me, with respect, that the approach suggested by Lord Edmund Davies is persuasive and more in keeping with the apparent objective of the Defamation Act. It is difficult to see how any sensible meaning can be given to the defence provided for in section 7 of the Act unless public interest is recognised as a relevant element in a criminal defamation prosecution. At common law, it is a complete defence to a defamation action to show that the words complained of are true. If public interest is not to be an ingredient of criminal defamation then surely, as with civil defamation at common law, it should be an absolute defence to any criminal charge if the person who uttered or published the defamatory words can simply establish that they are true. That is clearly not the position, however. Section 7 provides that in order to establish a defence of truth in criminal defamation not only must a defendant prove that the statement was true but he or she must also establish that the publication was for the public benefit. Expressed in a rhetorical sense the question a defendant might want to ask is, if public interest is not an essential element in all criminal defamation cases, why would the legislature not have restricted the application of the public benefit requirement in section 7 to those cases only where public interest is, in fact, an ingredient?

[27] Quite apart from the public interest element, the authorities do seem to be in agreement that the defamatory words in criminal defamation must be serious, not trivial -- see **Archbold** (2003) para.29.33. In *Gleaves* p.495, Lord Scarman said:

> "The logic of the law was finally exposed by du Parcq J. in *Rex v Wicks* [1936] 1 All ER 384. In giving the judgment of the court, he said at p.386 that a prosecution ought not to be instituted "when the libel complained of is of so trivial a character as to be unlikely either to disturb the peace of the community or seriously to affect the reputation of the person defamed." It is plain from the passage in the judgment where these words appear that the learned judge was emphasising that it is the gravity of the libel which matters. The libel must be more than of a trivial character. In my judgment, the references in the case law to reputation, outrage, cruelty or tendency to disturb the peace are no more than illustrations of the various factors which either alone or in combination contribute to the gravity of the libel. The essential feature of a criminal libel remains -- as in the past -- the publication of a grave, not trivial, libel."

[28] The decision whether or not to issue a summons is a judicial decision, not an administrative one. Commenting on the position in England which is not dissimilar, Lord Widgery C.J. stated in *West London Metropolitan Stipendiary Magistrate ex parte Klahn* [1979] 1 WLR 933:

> "The duty of a magistrate in considering an application for the issue of a summons is to exercise a judicial discretion in deciding whether or not to issue a summons. As Lord Goddard C.J. stated in *Rex v Wilson* [1948] 1 KB pp 46-47:
>
> > "A summons is a result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons." "

Lord Widgery went on to state that as the matter was properly within the magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given but he did say that, "it is clear that he may and indeed should consider whether the allegation is vexatious". In other words, the magistrate should give consideration to whether the complainant is simply attempting to harass the defendant by means of malicious or trivial litigation.

[29] Although it is not in general the duty of a magistrate to enter upon a preliminary survey of the evidence when called upon to sign a summons, he is required, in the exercise of his discretion, to be satisfied on the complaint before him that the issuance of the summons is justified and that the summons itself identifies a criminal offence. Until such time as the issues I have touched upon relating to criminal defamation are fully argued and determined in this Court or the Court of Appeal, a magistrate called upon to sign a summons in a criminal defamation case should first satisfy himself, especially in the case of a private prosecution, that it is in the public interest that the prosecution should be allowed to proceed and that the publication complained of constitutes a grave, as distinct from a trivial, defamation of the complainant. If the principles referred to above are correctly applied, it will be found that the occasions when it is appropriate to allow a private prosecution for criminal defamation to proceed will be rare and exceptional.

The instant appeal

[30] Before turning to the specific grounds of appeal before me, there are two general observations I wish to make about the present case which were not canvassed in counsels' submissions. The first matter relates to the summons itself. As was stated by Ward C.J. in *Dhayananadan v Police* [1999] TOSC 15:

> "It is well established that a charge of defamation must specify the defamatory words. It is usual to quote them in direct speech but in this case the magistrate was right, if he considered the point, to accept the principal defamatory words were set out clearly enough to allow the defendant to know the case alleged against him."

The charge in that case read that the appellant, "defamed a man, namely Lilo Finau, when you told 'Emosi Fanagatua and some others that the cut of your dog was because Lilo Finau hit the dog with the bush knife and also other defamation."

The Chief Justice held that, "the last words in the summons were totally defective and should have been struck out." Likewise, the reference to "and other words" in the summons in the present case were defective and should have been struck out by the magistrate.

[31] The second general observation relates to the brevity of the decision under appeal. The two sentence decision is totally inadequate for dealing with the complex issues involved in a criminal defamation case. There is nothing in the record of appeal before me to indicate that the decision comprised of anything other than the two sentences quoted above and counsel did not suggest otherwise. Although there is no general rule of law which requires reasons for a decision to be given and the absence of reasons does not nullify a decision, the case for giving reasons is overwhelming.

[32] In the leading New Zealand authority on the giving of reasons, *R v Awatere* [1982] 1 NZLR 644, 649, the Court of Appeal said:

> "Judges and Justices should always do their conscientious best to provide with their decisions reasons which can sensibly be regarded as adequate to the occasion. Indeed failure to follow that normal judicial

> practice might well jeopardise the decision on appeal. It could do so because of potential appellant might seem to be unduly prejudiced or it could do so by leaving it open for the appellate court to infer that there are in fact no adequate reasons to support it."

The first point on appeal -- burden of proof

[33] Mr Tu'utafaiva referred to the first sentence of the magistrate's decision, "All right I believe the prosecution has been able to prove that there was defamation" and submitted: "With respect it is difficult to understand the standard of proof applied. It is further submitted that the learned magistrate erred in law when he used his belief as the basis of his decision and not the required standard of proof beyond reasonable doubt." Mr Kaufusi did not respond specifically to this ground of appeal.

[34] As Ward C.J. stated in the *Dhayananadan* case, "defamation is a highly technical offence and the magistrate must be satisfied to the criminal standard of proof beyond reasonable doubt." Given that a defamation claim can proceed either as a criminal prosecution or civil action it is critical that a magistrate should apply the correct standard of proof. In the present case the magistrate made no reference in his decision to the fact that the burden of proof was on the complainants to prove their case to the criminal standard of beyond reasonable doubt. His statement that he believed that the prosecution had proved the defamation tells one nothing about the standard of proof that he had in mind and it leaves the issue in doubt. As with any criminal case, once a reasonable doubt has been established then the accused is entitled to the benefit of such doubt. This point alone is sufficient to dispose of the appeal but I will briefly deal also with the second point raised by Mr Tu'utafaiva.

The second point on appeal -- person defamed

[35] Mr Tu'utafaiva submitted that the magistrate failed to make any finding on the crucial element of whether the words complained of were published of the complainants. Counsel submitted that even accepting that the words complained of were uttered by the appellant (and he stressed that the magistrate made no specific finding on this point) if the words "were defamatory of anyone it was the sister of the complainants and their uncle but not the complainants themselves."

[36] Mr Kaufusi in his submissions referred to there being only one complainant, namely 'Oli Televave, and he submitted that, "the implication of the words complained of will stir up public hatred and cause considerable public distrust against the complainant, the complainant cannot be trusted, a dishonest person. She is a crook." The magistrate obviously shared Mr Kaufusi's view that there was only one complainant. He spoke in his decision about "the complainant" (singular) and when it came to sentencing he awarded compensation of $100 to 'Oli Televave only. Clearly, however, the summons identifies both 'Oli Televave and her sister Teisa Televave as the joint complainants.

[37] Whether the words were capable of reflecting upon the complainants was indeed, as Mr Tu'utafaiva submitted, an essential element of the prosecution case and it had to be proved not simply on the balance of probabilities but to the criminal standard of beyond reasonable doubt. **Gatley** at para 71 states:

> "It is an essential element of the cause of action for defamation that the words complained of should be published of the claimant. There is no cause of action, for instance, if words are defamatory of the **claimant's relatives**, unless they reflect on the claimants" (emphasis added).

In the present case there was simply no finding at all on this crucial aspect of the case and Mr Tu'utafaiva's submission must be correct. Again, therefore, I uphold the appeal on this ground also.

Decision

[38] I uphold the first two points on appeal and find it unnecessary to have to deal with the other issues raised. The appeal is, therefore, allowed and the conviction and sentence quashed.

R v Lasike

Supreme Court, Nuku'alofa
Webster CJ
CR 99/2006

24-27 July 2006; 28 July 2006

Criminal law – rape charge – all elements not proved – not guilty

The defendant, a Noble of the realm, was charged with one count of rape contrary to section 118(1)(a) of the Criminal Offences Act and two counts of indecent assault contrary to section 124(1) of that Act. The offences were alleged to have occurred on 15 October 2005 in a room at a motel which was owned by the defendant. The complainant had been working as a receptionist for a few weeks at the motel. The prosecution claimed that it had been a classic scenario where an employer with power and status used his position to abuse and rape an employee. The defendant accepted that he had sexual intercourse with the complainant on the date and at the place alleged but denied that it was against her will. The defence was that what occurred in the motel room on the night in question was consensual. The defendant contended that had the complainant done anything to indicate that she did not consent to what was happening then he would have stopped.

Held:

1. The essential elements to be established to make out a charge of rape were: it was the defendant; who carnally knew -- i.e. had sexual intercourse (i.e. by his penis penetrating her vagina); the (female) complainant; against her will (knowing that she did not consent to the intercourse or being reckless as to whether she consented to it).
2. Carnal knowledge was a legal term for sexual intercourse, and for the purposes of the offence that was deemed complete on penetration. Under section 140 of the Criminal Offences Act, on the trial of any person on a charge of carnal knowledge it was not necessary to prove the actual emission of seed and the offence was deemed complete on proof of penetration only.
3. In relation to corroboration and the delay in making complaint and the absence of physical injury or damage to clothing, the court adopted and applied the law as stated in *Teisina v R* [1999] Tonga LR 145 (CA).
4. The court found that the necessary elements of these 3 counts had not been established beyond reasonable doubt and found the defendant not guilty as charged of Counts 1, 2 and 3 and acquitted him of the counts of rape and assault.

Cases considered:

Kaitamaki v R [1984] 2 All ER 435 (PC)
R v C [1992] Crim LR 642 (CA)
R v Court [1988] 2 All ER 221 (HL)
R v George (1956) Crim LR 52
Teisina v R [1999] Tonga LR 145 (CA)

Statutes considered:

Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)

Counsel for prosecution : Mr Kefu
Counsel for defendant : Mr Edwards

Judgment

Preliminary

The defendant Hon Lasike pleaded not guilty to 1 offence of rape, contrary to section 118(1)(a) of the Criminal Offences Act, and 2 offences of indecent assault contrary to section 124(1) of that Act.

Evidence and submissions

On the application of Crown Counsel and with the agreement of Defence Counsel I made an order directing that the identity of the complainant and her evidence taken in the proceedings shall not be published in the Kingdom in a written publication available to the public, or be broadcast in the Kingdom.

I heard evidence for the prosecution from 10 witnesses, the complainant [referred to in this decision as AB]; Miss Malia Nive Letisi, formerly a receptionist at the Sandy Boyz Motel; Mr Siaosi Tupou Ha'apai Lasike, bar tender at the Motel and nephew of the defendant; Mr Subramani Sami, formerly Manager of the Motel; Mrs Adeleen Sauliloa Leaman, Executive Director of the Motel and an aunt of the defendant; Mr Tokaloni Emil Tu'uhetoka, builder and another nephew of Mrs Leaman; the de facto husband or partner of the complainant AB [to protect AB's identity, referred to in this decision as CD]; Inspector Lolesio Hausia, CID, who had interviewed the defendant; PC Patelesio Tu'itavuki, Police photographer; and Cpl Latu Lavaki, CID, in relation to the exhibits. The prosecution also produced a number of documentary and material exhibits.

At the close of the prosecution case on 26 July a submission of no case to answer was made for the defendant, but I did not uphold that submission.

The defendant Hon Lasike gave evidence himself; and the defence led evidence from Miss Muna Pahu, formerly a bar tender at the Motel. The defence also produced 2 documentary exhibits.

On completion of the evidence, on 27 July the Court made a site visit to the Motel. The Court then heard closing submissions in support of their respective cases for the defence and prosecution.

Indictment

The offences with which the defendant was charged were:

> RAPE, contrary to section 118(1)(a) of the Criminal Offences Act (Cap 18).
> Hon Lasike of Kolofo'ou, on or about 15 October 2005, at Nuku'alofa, you did rape AB by carnally knowing her against her will.
>
> INDECENT ASSAULT, contrary to section 124(1) of the Criminal Offences Act (Cap 18)
> Hon Lasike of Kolofo'ou, on or about 15 October 2005, at Nuku'alofa, you did indecently assault AB when you kissed her neck and breasts against her will.
>
> INDECENT ASSAULT, contrary to section 124(1) of the Criminal Offences Act (Cap 18)
> Hon Lasike of Kolofo'ou, on or about 15 October 2005, at Nuku'alofa, you did indecently assault AB when you licked her vagina against her will.

The burden is on the prosecution in a criminal trial to prove beyond reasonable doubt every element of the offence alleged.

Essential elements of rape

Section 118 of the Criminal Offences Act provides:

> Rape.
>
> 118. (1) Any person committing rape that is to say any person who carnally knows any female -
> (a) against her will, or ...
>
> shall be liable to imprisonment for any term not exceeding 15 years.

> (2) ...
>
> (3) For purposes of sub-section (1) a man commits rape if at the time of sexual intercourse with a woman he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it. ...

Carnal knowledge is a legal term for sexual intercourse, and for the purposes of this offence that is deemed complete on penetration: *Kaitamaki v R* [1984] 2 All ER 435 (PC). Under section 140 of the Criminal Offences Act, on the trial of any person on a charge of carnal knowledge it is not necessary to prove the actual emission of seed and the offence is deemed complete on proof of penetration only.

There was no dispute on the law in this case, though the prosecution referred to *Teisina v R* [1999] Tonga LR 145 (CA) in relation to 2 aspects. I quote the relevant passages.

In relation to corroboration the Court of Appeal stated:

> "[*It was*] submitted that it should be implied from s 11 of the Evidence Act (Cap 15) that the evidence of the complainant must be corroborated. That is not so. Section 11 provides that in criminal proceedings for sexual offences, evidence that the person, at or shortly after the crime was committed, voluntarily made a statement relating to its commission, may be given, not as corroboration, but as showing that the person's conduct is consistent with his or her evidence at the trial. The Chief Justice was correct when he said that there was no requirement for corroboration of a complainant's evidence in the law of Tonga. The common law applies.
>
> Though corroboration of the evidence of the complainant is not essential in law, it is the practice to warm the jury against the danger of acting on his or her uncorroborated evidence, particularly where the issue is consent or no consent: Archbold *Criminal Pleading Evidence & Practice* (38th Ed) 2888 and the cases there cited. However this issue does not arise here once the two written statements of the appellant are admitted, since, as the Chief Justice found, they provide corroboration of the complainant's evidence."
> (p 149-150)

In relation to the delay in reporting the matter to the Police, which in this case the defence accepted was not necessarily fatal to the complaint, it was stated (at p 150):

> "We do not accept that submission [*that the complainant should have gone to the Police immediately*]. It is perfectly understandable that a young girl, having been raped and sexually assaulted, should choose to go straight to the house where her mother was, rather than go to the police station. The taxi driver came from the same village as the appellant and knew him personally. That the complainant elected to make no complaint to him does not give rise to any inconsistency in her evidence.
>
> The complainant did later that morning make a complaint to her friend Seilose who had been with her at the party the previous night. She told that friend that she had been raped. Her friend gave evidence of that complaint in the same terms. That evidence was admissible pursuant to s 11 of the Evidence Act as showing that her doing so was consistent with her evidence at the trial."

And in relation to physical injuries the Court Of Appeal said:

> "Evidence of Resisting
> [*It was*] submitted that the Chief Justice was justified in rejecting the evidence of the appellant only if there were some evidence to corroborate the complainant's account of sexual intercourse without consent in the form of medical evidence of injuries or bruising, or evidence of damaged clothing. We do not accept that submission either. Sexual intercourse without consent or belief of consent can and frequently does occur without physical injury or damage to clothing.

> The issue was entirely one of credibility. The Chief Justice was entitled, for the detailed reasons he gave, to accept the evidence of the complainant and reject the evidence of the appellant."
> (p 150)

The essential elements to be established in this case to find that there has been rape are that:

> it was the defendant;
> who carnally knew –ie had sexual intercourse (ie by his penis penetrating her vagina);
> the (female) complainant;
> against her will (knowing that she did not consent to the intercourse or being reckless as to whether she consented to it).

In this case the defendant accepted that he had sexual intercourse with the complainant on the date and at the place alleged, but denied that it was against her will.

Consent may be absent even where there is no force, fear of force, or fraud – ie submission does not disprove consent.

Essential elements of indecent assault

Section 124(1) of the Criminal Offences Act provides:

> Indecent assault.
> 124. (1) Any person who shall commit an indecent assault on any female shall be liable on conviction thereof to imprisonment for any term not exceeding 2 years.

An assault (in this sense meaning deliberate physical contact) is indecent if right-minded persons would consider the conduct so offensive to contemporary standards of modesty and privacy as to be indecent (*R v Court* [1988] 2 All ER 221 (HL)); ie it is objectively capable of being regarded as indecent (*R v George* (1956) Crim LR 52; *R v Court*).

R v Court was considered in *R v C* [1992] Crim LR 642 (CA), in which it was held that where an assault was indecent in itself, it was unnecessary to establish a specific indecent intent.

The essential elements to be established in this case to find that there has been an indecent assault are that:

> it was the defendant;
> who intentionally assaulted the complainant;
> and that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent;
> the defendant intended to commit an assault of that kind;

Again the essential issue in this case is whether the complainant consented to what occurred.

Grounds of decision

Complainant's evidence

The complainant AB had been working as a receptionist for a few weeks at the Sandy Boyz Motel, which is owned by the defendant, Hon Lasike, when the alleged incident took place on the evening of Saturday 15 October 2005. Her evidence about the essentials of the alleged incident was as follows:

She gave evidence that in the evening the defendant told her to come with him while he took another member of staff home. When they returned he told her to turn off the air-conditioning in Room 10, while he was standing at the door of that room, though she said she clearly recalled that she had checked all the rooms that evening and all the air-conditioners were turned off, because there were no guests. When she went into the room she stood on a table and turned off the air-conditioning, but as she did so the lights in the room were put off and the door closed. She could hear the defendant's breathing, because he is a very big person, and he touched her. She said she could clearly make out that it was him, as the walls in the room were white and he had on black clothing, although no light came into the room. She said that he pulled her shirt, then the buttons on it became torn and he threw her on the bed.

The complainant said that she fell on the bed, lying on her back, and the defendant got on top of her. He had tried to kiss her, but she moved her head from side to side, then he started on her neck. He had sucked her breasts after kissing her neck.

She said her hands were on the side and he was keeping them down, but she said in answer to the next question that her hands were level with her head, he held her wrists. She said he also had her legs pinned down with the lower part of his body. She said she told him to stop many times, but he did not say anything. She also tried pushing his shoulders and chest away when her hands became free, but was not able to do that. His hands were touching her head, as he was trying to kiss her. Then she kicked him in his stomach with her right foot and he fell down, but got up again and held her onto the bed once more. She said she had tried to stand up so that she could get up, but was held by the defendant when she was just getting up from the bed.

She said he pushed her skirt up and pulled her underwear down; and he hooked her legs with his arms, one leg to each arm, and his head between her legs. He had then licked her vagina: she did not consent to that and she had wriggled around but he was very strong in holding her legs. Then she felt him getting on top of her and the lower half of his body was naked. He inserted his penis into her vagina. She had cried because she was very sad because she did not consent to what he was doing. She said she told him to stop and she would tell her partner CD and was not coming back to work, but he said nothing as he was having sexual intercourse. She said she was trying to push him on his chest. She said he had sex with her for about 3 minutes. She said she was calling out the name of Malia Nive, another receptionist, many times, but she did not come.

The complainant said she then heard a sound as if someone was trying to open the door. The defendant jumped down and she got up off the bed and opened the door. She noticed her cellphone lying there beside the door. She had held her clothes and tried to do up the buttons on her shirt, but she still had her skirt and her underwear on the lower part of her body, as the defendant had pulled her underwear down and while they were having sex it was down at her legs and did not come off completely, as it was round her ankles. She said that when she opened the door and the light came in she looked back and saw the defendant sitting on the bed.

The complainant went through into the ladies toilet and called Malia Nive on her cellphone. After about a minute Malia Nive came and the complainant hugged Nive and cried and said she was only grateful what happened was to her and not Nive, because Nive was still a virgin.

Burden on prosecution

In any criminal case the burden is on the prosecution to prove the case against the defendant beyond reasonable doubt. That means that the prosecution must make the Court sure of it: nothing less than that will do. If after considering all the evidence the Court is sure that that defendant is guilty, it must return a verdict of 'Guilty'. If the Court is not sure, the verdict must be 'Not Guilty'.

To that extent I do not accept the submission for the prosecution that the main issue before the Court in this case is who is telling the truth. The principle issue is and remains whether the prosecution has established the essential elements of the offences alleged beyond reasonable doubt – and especially in this case whether the complainant consented to what happened.

Assessment of complainant's evidence-in-chief

I have to say that in this case I began to have some doubts about the evidence of the complainant AB herself, even during her evidence-in-chief, ie before she was cross-examined for the defence. My first doubts related to her description of her alleged struggle with the defendant: she described being pinned down by the defendant, who is a large man, but at the same time the complainant said that at one point she kicked him in the stomach with her right foot and he fell down, but got up again. She did not enlarge on these aspects, but I have difficulty envisaging how she managed to kick him that way in the stomach if she was constantly pinned down; and also why, if he fell down, she did not seize that opportunity to get out of the room.

The complainant said that her hands were on the side, pinned down by the defendant, then in her next answer demonstrated them as being in a hands-up position, level with her head, which did not seem consistent.

She said that her shirt was torn in the struggle as the defendant pulled her by the front of her shirt, and there was certainly 1 button off the shirt near the neck (but only 1) and no other tears to the buttons, although a small tear lower down the front (and she

accepted in cross-examination that the shirt was not torn). So the state of her shirt was not entirely consistent with her evidence of the alleged struggle.

The complainant's black skirt, which was about knee-length, was made of thin material, with a lining. She said that the defendant had pulled her skirt up and her underwear down, but her underwear had not come off completely and was down round her ankles. It is difficult to envisage how any sexual intercourse occurred in those circumstances. It is also difficult to see how the defendant could pull the complainant's skirt up and her underwear down if his hands were occupied holding her hands down.

I also had in mind that while the defendant is a large, well-built Tongan man and undoubtedly stronger than the complainant, she is herself a tall, well-built young woman. Although not as tall nor as big as the defendant, she is not a slip of a girl.

After the incident the complainant said she thought of going to the Police, but did not do so – though the Central Police Station can only be about a hundred yards from the Motel. She said she wanted her partner CD to know about it, which I found strange as she had given evidence that she was not still living with CD after an argument over the phone on the morning of that day, and he had gone to his sister's in Vaini: she described it as a minor misunderstanding, but that did not tally with her saying that she was not still living with him.

While the Court must not speculate, it also appeared at least a possible inference that, if the complainant had split up that morning with her partner, that evening she may have wanted to be loved or, as was later submitted for the defence, that what happened may have been done to get sympathy from her partner, or to get him back.

Then the complainant described how later that evening, about 15 minutes after she had returned to the front desk of the Motel, the defendant returned and she went with him alone to buy meat for them for Sunday's meal and then dropped him off at a kava club at Fasi and returned to the Motel. Then she slept at the Motel until 5 am. Even though the defendant is a Noble and was the complainant's employer, it seemed inconsistent with her allegations that he had forced her to have sexual intercourse with him against her will, that she was willing to go out alone with him again at night only an hour or so after the alleged incident. If the complainant had been raped in a forcible manner as she described, I considered it inherently improbable that she would have done that, even with her employer who was a Noble.

On her own evidence the complainant was not a shy virgin, who only knew Tonga, but a mature young woman of around 25 at the time, who had been at Brigham Young University in Hawaii, then spent 2 years as a Mormon missionary in San Francisco, and who had been in a de facto relationship with CD for around 18 months at that time (and this June gave birth to a child) – so I inferred that she could have made an excuse or refused to go with the defendant if she had wished.

I did not accept that the complainant may have felt under any duress or undue influence of the defendant (because he was a Noble) that would have prevented her from going to the Police that night. It was important that her allegations in evidence were of a forcible rape (though she did not say she was hit), but her subsequent behaviour was not at all consistent with that. I accept that delay in going to the Police may not be fatal to the prosecution case, but it does not help it.

For the same reasons I found it even more inconsistent with the complainant's allegations that the following day she ate a meal with the defendant, Malia Nive and Siaosi Lasike and then they all played cards. The complainant's explanation for doing that was "I was trying to make Lasike not think I was dissatisfied with what he had done so that he would not do what he did to me again". That explanation did nothing to dispel my doubts about the alleged incident.

The complainant had the defendant's phone no entered in her cellphone, and received a call from him on Monday 17 October, with the inference that she was accustomed to making or receiving calls to or from him, although it is possible that these were connected with work.

The complainant did not go to the Police until 10 days later, on 25 October, after her partner had gone with her to see a lawyer, Mr Sifa Tu'utafaiva: that struck me as most unusual and inconsistent with the gravity of the allegations in the indictment.

All the above is simply a narration of aspects of the complainant's own evidence-in-chief, before she was cross-examined, that raised a number of doubts in my mind about the nature of the alleged incident and the credibility of the complainant. In brief her evidence about what happened in Room 10 appeared, even at that stage, not entirely consistent in itself and thus inherently improbable.

Assessment of complainant's evidence in cross-examination and re-examination

Further inconsistencies and matters raising doubts emerged in the cross-examination of the complainant:

The complainant had said earlier that she was afraid of the defendant when he dismissed 2 employees, but in cross-examination she said that gradually she felt comfortable with him, because he was not like that.

Although she had earlier said that the intercourse lasted about 3 minutes, she said the whole incident lasted for up to half-an-hour, and it seems somewhat inconsistent for a struggle between the 2 of them to last as long as that.

The complainant accepted that after the incident Malia Nive had told her they should leave work and that money was not important; and that she had told her to go to the Police, but she did not want to because she wanted to inform her partner CD first, which would tie in with the defence submission that she may have been seeking his sympathy.

The complainant also accepted that on the Saturday evening she had gone to see the defendant at Fasi a further 2 or 3 times (in re-examination she said to take him a music book and then cigarettes), which she had not mentioned in her evidence-in-chief. That was a further inconsistency with her allegations of rape and indecent assault.

Though the complainant had made no mention of it in her evidence-in-chief, she accepted, after some prevarication, that she had just recalled that she had seen her partner CD on the Saturday evening and called out to him to stop, but he did not do so as he was very angry. She denied that he said he was going to come and hit her.

The complainant accepted that when she saw Mrs Leaman, who is the aunt of the defendant and an Executive Director of the Motel, on Monday 17 October, that was the first time she had used the word "rape" to describe what had happened to her. Even taking into account Tongan sensibilities on talking about rape, that rather contrasts with the situation in Teisina v R where the complainant told her friend that she had been raped (p 146,150). She also accepted that she had told Mrs Leaman she had no injuries (which contradicted her earlier evidence of bruises), she said because she did not want to show Mrs Leaman her body. She also said she had not subsequently told the Police about the bruises; and said in re-examination that they were no longer visible on her body at that time. Later re-examination elicited that the bruises were above her breasts and on the sides of her stomach, done by the defendant with his mouth, apparently so-called love bites, which if true seem inconsistent with a scenario of rape.

There were also a number of inconsistencies, mostly minor, between what the complainant said in evidence before this Court and the Magistrates' Court. But the major inconsistency was that she said that during the incident she had called out to Malia Nive, which she had not mentioned in the Magistrates' Court and which she claimed she had just recalled, which did not seem credible.

It also transpired from the site visit that the switch to the air-conditioning could easily be reached standing on the floor (even by a person smaller than the complainant), which cast doubt on her evidence that she stood on a table to do so.

All these matters reinforced my doubts about the complainant's evidence, so that overall I very much regret that I was unable to accept her as completely credible and reliable all her evidence, including particularly her evidence about the alleged forcible rape and indecent assaults. I could not accept that the inconsistencies in her evidence were all minor.

Other prosecution witnesses

I regret to say that aspects of the evidence of the other prosecution witnesses, whom I generally accepted as credible and reliable, except to some extent Malia Nive and the complainant's partner CD, only increased my doubts about the complainant's allegations.

In Malia Nive's evidence she said that when the complainant went alone to the defendant with his music book later in the evening of the incident she was away 20-30 minutes, which seems a long time to make a delivery to a place within 5 minutes of the Motel. Once again the fact that the complainant went at all to the defendant alone after the alleged rape is inconsistent with what she alleges. I did not accept the submissions for the prosecution that the complainant did so because she was overawed by the defendant and under his influence to do what he told her.

Malia Nive also gave evidence, contradicting the evidence of both the complainant and later her partner CD, that when they eventually stopped CD that evening at the Peace Corps building, the complainant told him to take her home, but he told her to go or he would "beat the shit out of her". All 3 were prosecution witnesses and the contradictions cast further doubt on the truthfulness of the complainant's evidence as a whole.

Malia Nive said, and this was also confirmed by Siaosi Lasike, that when they played cards with the defendant on the Sunday they were all (including the complainant) laughing, joking and happy. Once more that does not seem consistent with the conduct of a rape victim in the presence of her alleged assailant within 24 hours of the alleged incident.

Malia Nive also said that the complainant had not told her exactly what had happened to her, but she had told her to bring charges. She confirmed that they had driven past the Police Station on the Saturday evening.

Mr Sami said that the complainant had asked him for $350 for a house the previous week; and that on the Sunday after the alleged incident she had seen him and told him that something bad had been done to her by the defendant and had been very quiet and distressed. That appeared inconsistent with the complainant's demeanour earlier in the day when she had been playing cards and laughing and joking with the defendant.

Mrs Leaman said that the complainant had told her in English "I was raped by Lasike" and had cried, but she had no bruising. Mrs Leaman had advised the complainant to go to the Police, but she said she was sorry for the defendant's wife Luolua, who was a nice woman; and that she had not told her family because they would send her to the Police.

Tokaloni said that on the Monday, when he asked the complainant what happened, Nive said "Ouch, Ouch, Ouch" and they all laughed. They had all laughed again after the defendant had phoned the complainant while they were having lunch. Again that appeared to be another inconsistent mood swing by the complainant.

While the complainant's partner CD denied saying near the Peace Corps office that he would beat her up, he said that on the Saturday she had sent him text messages, which I found strange as she had not specifically mentioned in her own evidence.

No witness gave evidence about hearing the complainant shouting when she was in Room 10. Nor was there any evidence that the door to Room 10 had been locked during the incident.

The prosecution led no medical evidence of any kind.

These further aspects of the prosecution evidence increased my doubts about the truthfulness of the complainant and her allegations against the defendant. For all these reasons, therefore, I had considerable doubts about the complainant's allegations of rape and indecent assault.

On the other side it has also to be said that several responsible prosecution witnesses, who because of their position or relationship to the defendant I would have expected to support him, (ie Mr Sami, Mrs Leaman, and Tokaloni Tu'uhetoka) gave the clear impression from their evidence that they either assumed or knew privately that something improper had occurred between the defendant and the complainant. Mr Sami appeared to have accepted when the complainant saw him in a distressed state on the Sunday and said that something had happened to her, done by the defendant, that she needed support and took her home; and he also phoned Mrs Leaman and told her that something had happened to the complainant. Mrs Leaman said that she had gone to see the complainant and had tried to comfort the complainant, though she expected rape in Tonga to have involved violence; and she had never heard the defendant's side of the matter as that would have been contrary to Tongan culture. Tokaloni had taken the complainant for lunch because he

had told Mrs Leaman that he felt sorry for her after he had heard what had happened from other people.

While these pieces of evidence have to be seen as to some extent supporting the complainant's story, on their own they are no substitute for solid evidence about the alleged incident itself. And as that was lacking, they cannot bolster the weak foundation to these allegations.

Defence evidence

The defendant gave evidence himself. I shall narrate for the record the essential points of it.

The defendant said that on the day before the incident, Friday 14 October, the complainant had asked him if he could assist her as she needed $350 for the rent of a house, to be repaid by deductions from her wages, and he told her that he could do so the following week, as the money had already been drawn for the wages for that week. (The complainant had denied in cross-examination that she had spoken to the defendant at all about money.)

In relation to the incident, he accepted that immediately before it the complainant had come with him in the Motel's minibus to drop off Muna. He said that he had noticed that the door to Room 10 was open, the lights were on and the air-conditioning on, so he called to the complainant to see if there were guests in the room, and if not to turn off the lights and air-conditioning, as the bills were accumulating, and to check if any of the other rooms were the same. He had then walked past her to his office to get some tobacco and tidy up his desk, then gone to the back of the Motel towards his vehicle.

As he passed Room 10 he saw that the door was ajar and noticed the complainant lying on the bed. He had gone in and asked her what was happening and she had said to him that there was something she wanted to talk to him about, so he went in and closed the door. The complainant sat up at the foot of bed and he sat down beside her and asked her what was happening. She had not said anything but had just looked at him, they looked at each other and their eyes met. She had not said anything, but he had noticed that her thoughts were wandering elsewhere and just to break the silence he leaned towards her, she also leaned towards him and he kissed her cheek. She turned her face and her lips touched his and they kissed and went on kissing and she had hugged him. Then they lay down on the bed and kissed and he kissed her neck and asked her to remove the upper part of her clothes. She sat up, but did not say anything.

The defendant said the complainant got up and went to the air-conditioner and turned it off; and as she turned towards him it looked as if she was going to take her clothes off. She looked at the lights and he had gone and turned off the lights and closed the door, but did not lock it. She could not have locked the door because she was on the other side of him (ie away from the door). At the time the room was dark, but the door to the bathroom was open, letting in the light from the parking area outside. The defendant had seen the complainant taking off the upper part of her clothes and they laid down on the bed and he kissed her and she kissed him. He kissed her neck and her breasts, but did not do anything. He had got up and taken off his trousers and she took off her skirt and her underwear.

The defendant denied that he had kissed the complainant's vagina at any time. He said she took off the lower part of her clothing and they made love; and after that they lay there facing each other kissing. Then he told her that he would go outside to make a telephone call and smoke, as smoking was not allowed in the rooms. He had put on his clothes and done that.

The defendant said that the complainant had not done anything to indicate that she did not want him to kiss her or her breasts, or have intercourse with her, but if she had, he would have stopped. He said that the incident was nothing that was planned, it was a spur of the moment thing.

The defendant said that it was unfortunate that the complainant had said that they had wrestled for half an hour, because if that had happened her clothes would have been torn, something would have changed in the room and she would have scratched him or he her.

Record of interview of defendant

In his closing submissions Crown Counsel referred to the defendant's answer to Question 6 of the Record of Interview:

> Q 6: Are you married?
> A 6: I am very sad about what has been the alleged against me. And I strongly deny these allegations. It has very much degraded my

> reputation in the work that I do and my daily life. That is the end of my answer, if there is anything else I shall explain in court.

Crown Counsel submitted that the defendant had never mentioned in the record of interview or the preliminary inquiry that the intercourse with the complainant had been by mutual consent, but submitted that an innocent man would have provided that answer right from the start. He submitted that Answer 6 seemed to say that the incident had never happened, but now the defendant said that the incident had happened, but had been consensual.

I did not accept that submission, as under the law of Tonga the right of a defendant to silence is a fundamental part of the legal presumption of innocence: a defendant is entitled to sit there without saying anything throughout the entire criminal process and see if the prosecution proves the case against him. It is essential for the rights and freedoms of individuals accused of crimes that the Court respects this right to silence.

Conclusions on evidence

I have to make it clear, with the greatest respect to Hon Lasike, that I approached this case on the basis that the laws of Tonga apply to Hon Lasike as they do to other people in Tonga. I reached my decision on the evidence before me, and not on the basis of his position in the Kingdom. Under the judicial oath prescribed in clause 95 of the Constitution the Judges of the Supreme Court must be impartial, and under clause 82 the Court must uphold the Constitution.

But I also have to make it clear that in a criminal trial it is not a question of the Judge taking a decision on the balance of probabilities between the two sides. It is absolutely clear that the ultimate question for the Court is whether the prosecution has proved the charges beyond reasonable doubt – ie to make the Court sure of them.

As I have explained above the prosecution did not succeed in doing that in this case because, for all the reasons given above, the evidence did not establish that what occurred between the complainant and the defendant was done without the complainant's consent.

The issue is not whether I believed the defendant, but whether I believed the complainant and the other prosecution evidence. At the end of the day I had reasonable doubts about that: particularly and mainly about the complainant's description of the struggle and alleged forcible rape that went on in Room 10, but also because, in a case where consent was a key issue, I had doubts about whether that was corroborated or substantiated by her subsequent conduct.

Both Counsel accepted that in the circumstances all 3 counts stood or fell together.

I further have to say that on all the evidence I was unable to accept that it was established, in the words of the opening submission for the prosecution, that this was a classic scenario where an employer with power and status used his position to abuse and rape an employee. The complainant may have felt anxious and nervous in the presence of the defendant at the start of her employment, but it was very clear that by the date of the alleged incident, in her own words gradually she felt comfortable with him, to the extent of driving alone with him on the night of the alleged incident, both before and after the alleged incident; and remarkably laughing and joking when eating and playing cards with him the following day.

Overall for all those reasons I therefore had a reasonable doubt that the complainant's allegations of rape and indecent assault had been established. It is therefore my duty to find the defendant not guilty of all 3 counts and dismiss the charges.

Questioning of defendant

I should add that I was disturbed by one aspect of the evidence of Inspector Hausia in relation to the record of interview of the defendant. The caution given before that interview, at which the defendant's Counsel was present, was:

> "I wish to ask you some questions about the allegations brought against you. You are not obliged to answer any of the questions put to you, but the questions and answers will be taken down in writing and will be used as evidence."

Despite that, at the end of the interview Inspector Hausia asked Question 10 "Why do you not answer the questions I have put to you, instead you say that you will answer in court?".

For the information of Police officers I must make it clear, not for the first time, that it is a fundamental part of the legal presumption of innocence that a defendant has a right

to silence and is not obliged to answer questions from the Police, as stated in the very words used in the formal caution used on this occasion. It is essential that Police officers
570 do in practice respect this right to silence.

Overall conclusion

I therefore found that the necessary elements of these 3 counts had not been established beyond reasonable doubt and I find the defendant not guilty as charged of Counts 1, 2 and 3 and acquit him of these counts of rape and assault.

Uata anor v Kingdom of Tonga

Supreme Court, Nuku'alofa
Webster CJ
C App 69/99

3 May 2005 and 31 March 2006; 31 July 2006

Practice and procedure – Marine Inquiry made costs order – no power to award costs – costs order revoked

A Marine Inquiry had been set up under section 196 of the Shipping Act (Cap 136) to inquire into the sinking on 24 December 1996 of the motor vessel Fakalolo which sank close to 'Atata Island in Nuku'alofa Harbour on a trip from Ha'apai. The Court delivered its decision on 29 October 1997 finding the Master of the motor vessel negligent and cancelled his certificate of competency. The appellants, who were the owners of the ship, were ordered to pay to the respondent, the Kingdom of Tonga, costs amounting to $41,282.56. They sought to have that part of the decision of the Marine Inquiry quashed on the principal ground that the Marine Inquiry had erred in fact and in law in interpreting section 196(2)(e) to mean that they were liable for the costs of setting up and running the Marine inquiry. The respondent contested the appeal.

Held:

1. Superior Courts of general jurisdiction have power in the exercise of their discretion to award costs, with full power to determine by whom and to what extent they were to be paid, although with the number of limitations on the exercise of that discretion. However, the same did not apply to courts or tribunals of limited jurisdiction which were wholly creatures of statute, where the power to award costs must be found in the statute giving them existence.
2. A Marine Inquiry was a creature of statute and not a Superior Court of general jurisdiction so that its power to award costs could only be found in the words of the statute establishing it, the Shipping Act. Section 196(2)(e) allowed the Marine Inquiry "to order costs to be paid by whomsoever it thinks proper" but that did not mean that they were open-ended or the costs could be awarded at large.
3. A Marine Inquiry could not go beyond what were generally understood to form costs in ordinary litigation, i.e. limited reimbursement of the expense of litigation incurred, being fees, charges, disbursements, expenses and remuneration but rarely complete reimbursement of expenses as costs were never intended to be a comprehensive compensation for any loss suffered.
4. The Marine Inquiry erred in making its order as to costs. The appeal was allowed and the order of the Marine Inquiry revoked.

Cases considered:

Cachia v Hanes (1994) 179 CLR 403
Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd (1988) 81 ALR 397
John Fairfax and Sons Ltd v Police Tribunal of New South Wales (1986) 5 NSWLR 465
Logwon Pty Ltd v Warringah Shire Council (1993) 33 NSWLR 13
London Scottish Benefit Society v Chorley (1884) 13 QBD 872; [1881-5] All ER Rep 1111 (CA)
R v a Wreck Commissioner, ex p Knight [1976] 3 All ER 8 (DC)
VGM Holdings, Re [1941] 3 All ER 417 (ChD)
Walton v McBride (1995) 36 NSWLR 440 (CA)

Statutes considered:

Civil Law Act (Cap 25)
Magistrates' Courts Act (Cap 11)
Merchant Shipping Act 1970 (UK)
Shipping Act (Cap 136)
Statute of Gloucester 1278 (UK) 6 Edw I c 1
Supreme Court Act (Cap 10)

Judgment

Preliminary

This was an appeal under section 201 of the Shipping Act (Cap 136), read with Part VII of the Magistrates' Courts Act (Cap 11), against Part III of the decision, on 16 November 1998, of a Court of Marine Inquiry [the Marine Inquiry] set up under section 196 of the Shipping Act (Cap 136). Section 196(1) provides that the Magistrates' Court, sitting with assessors, is to be the Court of Marine Inquiry.

The Marine Inquiry was set up to inquire into the sinking on 24 December 1996 of the MV Fokololo, owned by the present Appellants, 'Uliti Uata and Pacific Trading (Tonga) Ltd. In Part III of the decision the Appellants were ordered to pay to the Respondent, the Kingdom of Tonga, the costs of instituting Parts I and II of the Court of Marine Inquiry, amounting to $41,282.56.

The Appellants sought to have that part of the decision of the Marine Inquiry quashed, the principal grounds of appeal being that the Marine Inquiry erred in fact and in law in interpreting Section 196(2)(e) to mean that the Appellants were liable for the costs of setting up and. running the Marine Inquiry. The Respondent contested the appeal.

Statutory provisions

Section 196 of the Shipping Act (Cap 136) provides:

> *Magistrates' Court to hold formal inquiry.*
> 196. (1) The Magistrates' Court shall be the Court of Marine Inquiry. The Court shall sit with assessors for the purpose of inquiring into any shipping casualty.
> (2) When holding an inquiry into a shipping casualty the Court, in addition to the jurisdiction it may exercise under any other law or by custom shall have jurisdiction:-
>
> (a) to inquire into any charge of incompetency or misconduct arising, in the course of the investigation, against any owner, master, mate or engineer, as well as into any charge of a wrongful act or default on his part causing the shipping casualty;
> (b) to go on board the vessel and inspect it or anything on board;
> (c) to enter and inspect any premises;
> (d) to order the cancellation of any certificate of competency of any master;
> (e) to order costs to be paid by whomsoever it thinks proper.

Further relevant provisions of Part XI (Investigations and Inquiries) of that Act are:

> *Shipping casualties*
> 194. (1) For the purpose of investigations and enquiries under this part of this Act a shipping casualty shall be deemed to occur:-
>
> (a) when any Tongan ship is lost, abandoned, or damaged, or causes loss or damage to any other ship; or
> (b) when loss of life ensues by reason of any casualty on board any Tongan ship; or
> (c) when any ship has been lost or supposed to have been lost, stranded, or damaged, or blown away, provided such

event occurs on or near the coasts of Tonga or when occurring elsewhere a witness is found in Tonga; or

(d) when on or near the coasts of Tonga any loss of life ensues by reason of any casualty happening to or on board any ship on or near the coasts of Tonga.

(2) In the cases mentioned above, the master of the ship, pilot, harbour master, the owner or other person in charge of the ship, as the case may be, or where 2 or more ships are concerned, the master in charge of each ship at the time of the shipping casualty or any of the above persons shall, on arriving in Tonga, give immediate notice of the shipping casualty to the Minister.

Report of shipping casualties

195. (1) Whenever a shipping casualty comes to the knowledge of any concerned person mentioned in subsection (2) of the preceding section he shall make a preliminary inquiry into the casualty and report the information along with his report to the Minister as soon as possible.

(2) The Minister, unless he decides that it is not necessary to do so, shall request the court to make a formal investigation into any shipping casualty, and the court shall thereupon make such investigation.

.....

Report by Court to Government.

200. The Court shall transmit to the Minister a full report of all cases of investigation or inquiry.

Right of appeal.

201. Any owner, master or other person may appeal against the decision of the Court of Marine Inquiry to the Supreme Court. The fees on an appeal shall be those chargeable for appeals in civil cases.

Background and previous events in the Inquiry

On 24 December 1996 the motor vessel Fokololo 'o e Hau sank close to 'Atata Island in Nuku'alofa Harbour on a trip from Ha'apai.

The Minister of Marine and Ports then set up the Court of Marine Inquiry to make a formal investigation into that shipping casualty. On 29 October 1997 the Court delivered its decision in what is referred to as Part I of the Inquiry and found the Master of the motor vessel negligent and cancelled his certificate of competency. The Court also held that the costs of the Tonga Defence Services and the Marine and Ports Ministry should be left to be decided by them and the owner; but it did not at that time make any order for the Appellants to pay any costs for establishing and running the Court.

On 5 November 1997 the Acting Prime Minister and Minister of Marine contacted the Chairman of the Court to recall the Court to deal with the costs involved in the rescue and cleaning up operations incurred by the Tonga Defence Services and the Ministry of Marine and Ports, which had already been held by the Court in Part I of its decision on 29 October 1997 to be left to the parties to deal with. It was not held by the Court on 29 October 1997 that should there be any disagreement the parties might come back to the Court for further orders or directions.

On 11 November 1997 the Court commenced sitting again to deal with the request by the Acting Prime Minister and Minister of Marine in respect of the rescue and cleaning up costs. On 14 November 1997 witnesses were called to give evidence in Court in relation to that request. On 1 April 1998 the Court delivered its decision in Part II, ordering the Second Appellant to pay the costs totalling $5,620.50, relying on Section 196(2)(e) of the Shipping Act for its jurisdiction to order those costs. The total costs that the Tonga Defence Services and the Marine and Ports Ministry had sought were $7,754.61.

Then on 8 April 1998 the Cabinet in decision CD 428 directed the Crown Law Department to submit to the Court to make a decision for the payment of the costs of establishing and running the Court. On 30 April 1998 the Crown Law Department filed an application for such costs with the Court. For the first time during the sitting of the Court dealing with the application for costs, Counsel appeared for the Appellants, along with Crown Counsel from the Crown Law Department appearing for the Respondent. On 16 November 1998 the Court made its decision in Part III which is the subject of this appeal.

Findings in Part III of Court of Marine Inquiry

The relevant parts of the findings in Part III of the Court are:

> 12. But the casualty of the 24/12/96 which the "Fokololo" sunk was a different nature, the Master of the ship and his crew were shortfall in their duties and are listed.
>
> (a) The Court thinks that the Master of the Ship acted carelessly in choosing crew for the "Fokololo" before the voyage of the 18/12/96 to Niuatoputapu before it return to sink. Even though that there were enough crews the Ship's Captain and Engineer had certificate of navigation and were experience enough.
>
> The ship's captain said that he did not pick the crews and the Court thinks that he had no involvement.
>
> Even though he said that had he been given the task of picking the crew he would have only pick the engineer but he hadn't mention this to 'Uliti Uata the owner of the company which owns the boat.
>
> (b) This court believes that the Ship's Captain was incompetent in tieing the ships cargo when they sail from Niuatoputapu until it sunk. The captain did not tie the cargoes properly because when the waves struck the vessel the cargoes shifted to the left side of the vessel which the vessel then nearly went on it sides until it sunk.
>
> (c) The Court believes that the Captain did not do the proper thing. He should have checked the damage to the vessel at the Pangai wharf. The left front was dented when it reached Pangai and the back was dented when they depart for Ha'afeva. Both of these sides were confirmed that that was where most of the water rushed in to the vessel which was one of the main reason the vessel sunk.
>
> (d) The Court believes that the Captain had erred when he did not go down to the cargo hull to check how much damages were there for there was plenty of time to do that. If he had done that he would have an idea of how serious the incident was and would have think of how to tackle the casualty. He should have asked in details of the incident from the person who reported it but he did not.
>
> (e) The Court believes that the Captain should have called for Mayday at approximately 11 and 12 noon and for the crew and the passengers go down to level the cargoes. He erred also when he stopped the Pulupaki from sailing to their rescue and asked them to standby at 1:00 pm.
>
> (f) The Court believes that there was no mate in this voyage. Lopeti Sisifa was not told he was the mate and he did not know he was the mate.
>
> 13. The Court says that they did not do anything to try and avoid the casualty. They did not do their best to try and avoid the sinking of the Fokololo 'o e Hau but was fortunate that no lives were lost only the cargoes. Was it their error in their duties and being negligent and employing the wrong person that the Government should bear the cost but the owner of the vessel?

14. This is how this court interprets sub section (e) of s 196(2)(e) Cap 136 where it reads that this Court may exercise its power to order costs to be paid by whomsoever it thinks proper for setting up and running of this court. The counsel for the vessel submitted that we should only use the amendment of s 196(2)(e) and should not use any foreign laws. That this section should be interpreted broadly and should not be limited as submitted by the counsel for the owner of the vessel that it is only for costs for investigation not cost for setting up and running this court.

15. Research was made into English Law that it might assist but s 196(2)(e) was sufficient only to be properly interpreted. The Court believes that costs that sub section (e) speaks about is for costs in respect of setting up and running of courts like this.

16. Therefore it was a major shortfall by the captain and the crews by incompetency negligent and employing an unqualified mate and the company who owns the vessel should be vicariously liable for the cost.

17. This was the failure of the employee and Mr Tu'utafaiva's submission was that vicarious liability was not part of the application.

18. Based on the what the court have considered it is ordered that the application by the Crown Law for the cost to be paid by the owner of the vessel for setting up and running this court Part I and Part II which is a total of $41,282.56.

19. The Cost of this Part III be paid by the Government.

To be paid with 12 months from the day 'Uliti Uata and the company who owns the vessel which is Pacific Trading (Tonga) Limited receives this judgment and if in lieu to be distraint. Each parties pay their cost.

Applicable law

The law in England, apparently referred to by the Court of Inquiry in its Para 15 [*above*], is not the same as the law in Tonga, as the power in England to award costs in a marine inquiry is since 1983 contained in section 56(5) of the [British] Merchant Shipping Act 1970, which cannot have applied under the Civil Law Act (Cap 25) applicable in 1997-8, as section 4 of that Act provided at that time:

> *Extent of application*
> 4. The common law of England and the rules of equity and the statutes of general application referred to in section 3 shall be applied by the Court –
>
> > *(a)* only so far as no other provision has been, or may hereafter be made by or under any Act or Ordinance in force in the Kingdom; and
> > *(b)* only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary.

and in this case it is quite clear that other provision has been made in the law of Tonga in section 196(2)(e) of the Shipping Act.

Section 56(5) of the British 1970 Act reads:

> (5) The wreck commissioner or sheriff may make such order with regard to the costs of the investigation as he thinks just and shall make a report on the case to the Board of Trade.

Formerly the power in England was contained in section 466 of the [British] Merchant Shipping Act 1894, to which the same applies, and which made a different provision:

> (8) The court [so holding a formal investigation] may make such order as the court think fit respecting the costs of the investigation, or any part thereof, and such order shall be enforced by the court as an order for costs under the Summary Jurisdiction Acts.
> (9) The [Department] of Trade may, if in any case they think fit so to do, pay the costs of any such formal investigation.

Also under the then Rule 16 of the [British] Shipping Casualties Rules 1923:

> 16. The Judge may order the costs and expenses of the investigation, or any part thereof, to be paid by the Board of Trade or by any other party.
> (See *R v a Wreck Commissioner, ex p Knight* [1976] 3 All ER 8 (DC))

These powers, referred to in *ex p Knight*, are very different from the simple words of section 196(2)(e) of the Shipping Act of Tonga, and although the Marine Inquiry stated that it was only interpreting paragraph (e) of section 196(2), it does appear that it has followed the same approach as the English law, notwithstanding its disclaimer that it was not doing so.

Turning therefore to the meaning of the words in section 196(2)(e), superior courts of general jurisdiction may have power in the exercise of their discretion to award costs, with full power to determine by whom and to what extent they are to be paid, although with a number of limitations on the exercise of that discretion: Halsbury's Laws (4th Ed) Vol 37 paras 713-4. Indeed the power of the Supreme Court of Tonga to award costs, contained in section 15 of the Supreme Court Act (Cap 10), gives this Court a wide discretion:

> *Costs.*
> **15.** In every action the costs of the whole action of each particular proceeding therein and the costs of every proceeding in the court shall be in the discretion of the court as regards the person by whom they shall be paid: ...

However the same does not apply to courts or tribunals of limited jurisdiction which are wholly creatures of statute, where the power to award costs must be found in the statute giving them existence. Costs are the creation of statute: *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872, at 876; [1881-5] All ER Rep 1111 (CA), at 1113 per Bowen LJ; Words & Phrases Legally Defined.

In *Walton v McBride* (1995) 36 NSWLR 440 (CA) it was stated by the New South Wales Court of Appeal:

> In the case of courts which are created by statute, at least where they are not superior courts of general jurisdiction in law and equity, the source of the court's power to order costs of any kind, must be found in the enabling statute. This is because costs are not, as such, a right or privilege created by the common law. The power to award costs in common law countries is ancient. But, as the High Court pointed out in *Cachia v Hanes* (1994) 179 CLR 403 at 410 it is usually traced back to the Statute of Gloucester 1278 (UK) 6 Edw I c 1.

Where a subordinate court of limited jurisdiction is created, it must find its powers in the express language of the statute which gives it existence, in the implications which derive from that language and are necessarily involved in it or such powers as may be inferred from the very fact that the legislature has created a court, with jurisdiction to perform and therefore with the necessary means of carrying out that jurisdiction and giving it effect: cf *John Fairfax and Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, at 476.

The distinction between inherent and implied statutory powers is ... an important one: see *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13, at 16f. But it is not necessary to revisit the question here because the body whose powers are questioned in these proceedings is undoubtedly a creature of statute and is in no view a superior court of general jurisdiction.

For at least a century courts in England, which partook of the Royal Prerogative, considered that they had the power to make special orders as to costs. ..... it is important to see the cost powers of superior courts of record as distinguishable from the powers of inferior courts and tribunals. The former have traditionally had large (and often inherent) powers. The latter must always source their power to the statute which establishes them.

Many statutes which create courts and tribunals of limited and particular jurisdiction provide, in differing ways, for the making of costs orders. When this is done, it is necessary, in each case, to consider whether the court or tribunal in question has power to make the order which is challenged. The decision-maker will then look to the terms by which the power is conferred, consider the implications of the grant of the facility for ordering costs and reflect upon the nature and purposes of the body afforded that power.

Just because a power to award "costs" is conferred in general terms, does not mean that the power is entirely open-ended. It cannot authorise the making of an order which is entirely at large. Nor will it sustain idiosyncratic orders or orders beyond the provision of what can truly be described as "costs". If *Cachia v Hanes*, in the High Court of Australia, establishes nothing else, it makes the foregoing plain, for in that case both the Supreme Court Act 1970 and the rules of court spoke of "costs" in perfectly general terms. A fortiori, a judge, magistrate or tribunal member of a limited and inferior statutory body given the power to award "costs" may have, thereby, a large discretion. But it is one to be exercised judicially, for the purpose of achieving the objects of the legislature which has conferred the power, not for the attainment of some personal view about justice in the particular case ... .

(P 447 B – 448 B)

The fact that "costs" are left undefined ... far from suggesting the large power to provide indemnity costs suggests to my mind the contrary, that is, that no such power is intended. The word "costs" must be read in the context of the legislation here in question (as of legislation empowering other tribunals). It must be read against the backdrop of the provisions authorizing orders for the payment of costs by the courts. As *Cachia v Hanes* in the High Court and in this Court demonstrates, that power is severely limited. From its earliest days in the Statute of Gloucester it was "never intended to be a comprehensive compensation for any loss suffered by a litigant": see *Cachia* (at 410). Where parliament intends a larger provision, it will say so expressly, at least in the case of inferior courts and tribunals ... *Cachia* (at 416);

(P 449 E)

Nothing was said by the minister or by anyone else when the [Medical Tribunal] was empowered by parliament to award costs which even hinted at a power to award other than "costs" in the ordinary sense of that word. That ordinary sense is the sense long accepted by the courts of common law, that is, party and party costs: cf *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 400. On the contrary, the minister made it plain that what was concerning him was empowerment of the Tribunal to award costs against [a medical practitioner]. To the extent that the Second Reading Speech or other material may be looked at, they lend no support to the notion that "costs" was intended to extend to indemnity costs;

(P 449 G – 450 A)

Whilst it is true that the word "costs" is unconfined in the language of the statute, it is equally true that no express source of power is given to enlarge the ordinary meaning of the word, which would be party and party costs. Assuming such express power to be unnecessary to a superior court of record, such as the Supreme Court or the Federal Court of Australia, it is far from clear that it is unnecessary for a subordinate tribunal of limited jurisdiction. Yet if it is true of this Tribunal that it has such powers, it is presumably true of all the other tribunals of the State which have a general power to award undefined "costs".

(P 450 D)

In *Cachia v Hanes* (1994) 179 CLR 403 at 410 it was said by the High Court of Australia:

> It has not been doubted since 1278, when the Statute of Gloucester (30) introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant. As Coke observed of the Statute of Gloucester, the costs which might be awarded to a litigant extended to the legal costs of the suit, "but not to the costs and expences of his travell and losse of time" (31).

(P 410-411)

Grounds of decision

As the Marine Inquiry in its original finding in Part I did rule on the costs of the Tonga Defence Services and the Marine and Ports Ministry (albeit leaving those to the parties), but did not reserve power to reach a subsequent decision on any other costs, at that stage it had exhausted its powers when it made its report to the Minister under section 200 and so, having done that and completed its work, it was functus officio, in the sense of having discharged its duty by exercising its authority and brought it to an end in this particular case, eg *Re VGM Holdings* [1941] 3 All ER 417 (ChD). It thus had no further

power to make any orders for costs, except with the consent of the parties, as appears to be the case in relation to these costs of the Tonga Defence Services and the Marine and Ports Ministry in Part II. It is always important that there is finality in litigation and that parties do not get two bites at the cherry, as it were. This is underlined by the power of appeal in section 201, and if the Cabinet did not like the Marine Inquiry's failure to award it the costs of running the Inquiry, its proper course was to appeal to this Court, not to seek to have the matter raised again with the Marine Inquiry. The Marine Inquiry's award of the costs of establishing and running that Court is therefore ultra vires and this appeal succeeds on this ground alone.

In any event in this case, following the authoritative cases of *Walton v McBride* and *Cachia v Hanes* referred to above, it is clear that the Marine Inquiry is a creature of statute and not a superior court of general jurisdiction, so that its power to award costs can only be found in the words of the statute establishing it, the Shipping Act. The terms of section 196(2)(e) are general, but equally not specific, as to whether the Marine Inquiry can award costs at large, but that does not mean that they are open-ended or that costs can be awarded at large. The implications of that are very severe, as it means that a Marine Inquiry cannot go beyond what are generally understood to form costs in ordinary litigation, ie limited reimbursement of the expense of litigation incurred, being fees, charges, disbursements, expenses and remuneration, but rarely complete reimbursement of expenses, as costs have never been intended to be a comprehensive compensation for any loss suffered. A Marine Inquiry's discretion is to be exercised judicially for the purpose of achieving the objects of the legislation, ie in this case as set out in Part XI of the Act, and particularly sections 194-196, to inquire into a shipping casualty in the public interest of safety at sea, including safety of life at sea. Because the power to award costs is undefined, it is clear that no special powers are intended, and the actual power is severely limited.

It comes down to a simple question of interpretation of the words in the Tongan Shipping Act, as the Marine Inquiry rightly concluded, but unfortunately in answering that question they went further than the meaning the words can bear. There is a great difference between the straightforward word "costs" in section 196(2)(e) and the words "the costs of the investigation" in the [British] 1894 and 1970 Acts and 1923 Rules. Although section 196(2)(e) refers to the power to order costs to be paid *by whomsoever it thinks proper*, these latter words cannot enlarge the meaning of the word "costs" and I cannot accept the submission for the Respondent to that effect.

The passage referred to in the written submissions for the Respondent in my view underlined the restrictive interpretation which must be given to the word "costs" in section 196(2)(e), rather than supporting the Respondent's interpretation:

> "They [Courts of Marine Inquiry] are therefore administrative courts of a special character, and at a time when the rapid growth of the system of administrative justice is the subject of an increasing volume of criticism, the origin and nature of their jurisdiction, and the precise place which they occupy in the system of British jurisprudence, are questions of some interest."

ARG McMillan, Shipping Inquiries and Courts, Stevens & Sons Ltd London, 1929 p iii

I also accepted the submission for the Appellants that the Marine Inquiry was still a Magistrates' Court, although sitting with assessors to carry out the special task of inquiring into a shipping casualty, and so did not have any jurisdiction under the Magistrates' Court Act to order payment of the costs of its establishment and running. I further accepted the submission for the Appellants that, as the setting up of the Marine Inquiry was requested by the Minister under section 195, without any control by the Appellants, it would be highly unjust for them to be ordered to pay its costs.

I was unable to accept the submissions for the Respondent that the interpretation of the word "costs" should be distinguished from the approach taken in *Walton v McBride*, especially in the context of this legislation (with reference to 449 F-G). Nor is the reference at 452 D to the possibility of awarding costs of attendance to a party relevant in this question in relation to the costs of running and establishing the Marine Inquiry. The whole question of whether legal representation should be allowed at an inquiry such as this, or whether there should be an independent counsel to such an inquiry, as suggested by this Marine Inquiry, is a live issue, but I do not consider that justifies the extension of the meaning of "costs" in this way. As was said in *Walton v McBride* (450 D), there is certainly a large question of policy, but in the absence of specific legislation by the Legislative Assembly that is not a matter for this Court.

I am thus satisfied that the Marine Inquiry erred in making its Part III finding; and so I shall therefore allow the appeal and revoke and reverse the Marine Inquiry's Part III finding that the present Appellants pay the costs of setting up and running Parts I & II of the Marine Inquiry.

I see no reason why at this stage costs should not follow the event and so under section 80(1) of the Magistrates' Courts Act I shall award costs, as agreed or taxed, to the Appellants against the Respondent in this Court and in Part III of the Marine Inquiry.

R v Vaioleti

Supreme Court, Nuku'alofa
Ford J
CR 213/2004

26-28 July 2006; 31 July 2006

Criminal law – 16 year old accused – no parent at interview – admissibility of evidence
Evidence – 16 year old accused – no parent at interview – inadmissible evidence

The accused was charged with one count of unlawful entry into a building by night contrary to section 174 of the Criminal Offences Act. It was alleged that on the night of Thursday 9 September 2004 he was found without lawful justification in the house of the complainant at Haveluloto. There was a challenge to the admissibility of statements the accused had made to the police on the grounds that he was only 16 years of age at the time and he had wanted to have his mother present at the police interview but that did not happen. The arresting police constable was only 22 years of age and this was his first criminal investigation. He told the court that he had telephoned the accused's home and had been told that the mother was at a funeral. He said that he asked the accused whether he wanted to wait until after the funeral for his mother and the accused had replied that he wanted to finish the interview. The accused told the court in relation to the police interview that he had denied from the outset any involvement in the alleged offence and he only agreed to initial each of the answers the constable had written down in the record of interview because the constable had said that he would be released from custody that same evening as soon as the interview was completed. As it turned out, the accused was kept in custody until noon the following day.

Held:

1. When it came to any issue relating to the detention of a child, the court in the exercise of its discretion, was to be guided by the safeguards provided for in article 37 of the International Convention on the Rights of the Child. The accused had told the police constable that he wished to have his mother present for the interview. He was entitled to make that request and have it honoured. The police record of interview and supporting documents had not been given voluntarily and were, therefore, inadmissible under section 21 of the Evidence Act (Cap 15).
2. After analysing the evidence, the court expressed very real doubts about the complainant's alleged identification of the accused as the intruder and he was acquitted accordingly.

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

Counsel for the Crown : Mr Sisifa
Counsel for the accused : Mr Fifita

Judgment

The charge

[1] At the end of this trial last Friday I acquitted and discharged the accused and indicated to counsel that I would give the reasons for my decision as soon as time permitted. I now do so.

[2] The accused was charged with one count of unlawful entry into a building by night contrary to section 174 of the Criminal Offences Act (Cap 18). It was alleged that on the night of Thursday 9 September 2004 he was found without lawful justification in the house of the complainant, Vika Langi, at Haveluloto.

The voir dire hearing

[3] There was a challenge made by defence counsel to the admissibility of all the police documentation and I heard evidence on this aspect of the case on the voir dire. I had no hesitation in upholding the challenge. The accused was only 16 years of age at the time. He was arrested without warning one month after the incident while he was playing pool with friends close to his home. None of his family were informed by the police of the arrest. They only learned of what had happened because the accused's four-year-old niece had witnessed the arrest and was able to tell her mother (the accused's sister) that Motesito had been taken away in a police car. The arresting constable was then only 22 years of age. The court was told that this was his first criminal investigation.

[4] When the constable began to interview the accused at 4:20 p.m. that same day, he very properly asked him whether he wished to have a lawyer or anyone from his home to assist him during the interview. The accused replied that he wanted to have his mother present. That exchange is recorded in question and answer No.1 in the record of interview. The next question and answer reads:

> " 2. (The police constable) contacts Motesito Vaiolet's (the accused's) home and informs them of what he wanted as stated in his answer to question 1. (The police constable) continues on with the work upon Motesito Vaioleti. Did (sic) contact his home and it was said that his mother is attending a funeral at Makaunga, informed him of the situation and he agrees to continue on the work upon him.
>
> Q. Motesito Vaioleti, do you agree to continue on with the legal work upon you?
>
> A. Yes."

[5] The constable told the court that the accused had given him his home telephone number and when he telephoned the house someone had told him that the mother was at a funeral. He said that he then asked the accused whether he wanted to wait until after the funeral for his mother and the accused had replied that he wanted to finish the interview. On the face of the record of interview, it appeared that the constable had simply gone away for three or four minutes to make the phone call and had then returned and carried straight on with the interview. Such was not the case.

[6] What the accused told the court in relation to the interview was that he had denied from the outset any involvement in the alleged offence. He also denied having given any telephone number to the constable. The accused said that after he told the constable that he wanted to have his mother present, he was returned to his cell at the police station and kept in the cell for another three or four hours. As it was getting dark, the constable returned and told him that he had not been able to get hold of his mother because she was at a funeral but he was going to finish the work on him so that he could be released from custody. The accused said that he then agreed to initial each of the answers the constable had provided and had written down to the various questions contained in the record of interview. He said that he had co-operated in this way in the expectation that he would be released from custody that same evening as soon as the interview was completed. As it turned out, the accused was kept in custody until noon the following day.

[7] The constable was recalled to give further evidence. He admitted that there had been a 3 -- 4 hour gap in the interview which is not apparent from a perusal of the record of interview. He also admitted that the time gap ought to have been recorded. He was adamant, however, that he had telephoned the accused's home and that it was the accused who had supplied him with the home telephone number.

[8] The accused made other allegations during the voir dire hearing about three threats of violence made to him leading up to the interview by two other police constables one of which he identified as the countersigning officer. The countersigning officer denied the allegations but I did not find him a particularly convincing witness. The other officer who

allegedly threatened to hit the accused with a stick or similar object, whose name was disclosed to the court, was not called to give evidence.

[9] As it turned out, it was unnecessary for me to have to make any firm finding on the allegations of threats of violence. As I indicated to Crown counsel, when it comes to any issue relating to the detention of a child, this court, in the exercise of its discretion, will be guided by the safeguards provided for in article 37 of the International Convention on the Rights of the Child. As noted earlier, at the time of his arrest, the accused was only 16 years of age. He told the police constable that he wished to have his mother present for the interview. He was entitled to make that request and have it honoured.

[10] I am satisfied that during the 3 -- 4 hour period when the accused was confined to his cell, the constable made no effort at all to contact the boy's mother. No telephone call was made to the accused's home. The subsequent unchallenged evidence called by the defence was that the family's telephone had been disconnected several years earlier and had been not reinstated until December 2005 -- more than 12 months after the incident. There was, in other words, no telephone at the house in September 2004. The constable simply kept the boy in the cells until darkness set in and then he persuaded him to carry on with the interview on the false pretext that he would then be released from custody and allowed to return home. There was no reason why the interview had to be rushed through and completed that same night. The constable could easily have waited until the accused's mother was available the following morning. After all, the boy was kept in custody until noon the following day. As I indicated to Crown counsel, it is disappointing to have to make such harsh findings against a police officer who has just completed his training for criminal investigation duties.

[11] It was for these reasons that I ruled that the police record of interview and supporting documents had not been given voluntarily and were, therefore, inadmissible under section 21 of the Evidence Act (Cap 15).

The Crown case

[12] After the voir dire hearing, the prosecution was left with only one witness, namely, the 38-year-old complainant. The witness told the court that she was asleep around 2 a.m. on the night in question when she was woken by someone bending over her face. She sat up and saw this person standing about 1 m away. She ran to the kitchen to call for help from a neighbour. She said that she knew the person as the son of Vai and Pala and she called out his name - "Motesito". She said that she could not see him properly in the bedroom because it was dark but the lights in the kitchen and living room were still on and as he ran towards the living room she could see him. She said that she identified him straight away as the accused.

[13] The complainant told how the intruder was naked when she saw him but he was holding onto his clothes. At one stage he picked up a glass tray from the sideboard in one of the bedrooms and threw it towards her but it missed her and smashed onto the floor. The complainant tried to wake her children but she was unable to get into their bedroom because the door was locked from the inside. Eventually, however, the children woke up and opened the door and about the same time the intruder ran off into the night.

[14] A layout of the house was produced. It showed the complainant's bedroom and four other bedrooms. The complainant said that her seven children aged between 13 and 5 years were all sleeping in one of the bedrooms and the other three bedrooms were unoccupied. The complainant was living apart from her husband at the time. It was later found that the intruder had entered the house by removing the louvers from a window in one of the empty bedroom windows.

[15] In cross-examination the complainant said that she knew the accused because he was a friend of one of her in-law's sons and he had been to her house on one occasion with the other boy and she had given them the task of making soup. She said that she also saw him often in the playground opposite her house playing touch rugby. She told Mr Fifita in cross-examination that she had no doubt at all from the outset that the accused was the intruder. The complainant explained that the accused's home was a long way from her home. From the witness box, she indicated a distance from the court which would perhaps be close to half a mile away.

The Saturday morning visit

[16] The complainant was also asked in cross-examination about a visit she made to the accused's home on the Saturday after the incident. As it turns out, the evidence relating to this visit became quite crucial and in the end it was determinative of the outcome of the case. The complainant's version of the visit was that she had gone over and had spoken to the accused's mother and told her about the intruder. The mother then asked her if it was her eldest son, Talite, and the complainant had replied, "no, it was Motesito." The mother then called the accused out of the house and the complainant said to him, "it's you."

[17] Quite properly, Mr Fifita put to the complainant the gist of the evidence he would be calling in relation to the visit and she promptly denied any proposition that conflicted with her version of events. One of the questions Mr Fifita put to the complainant related to what she told the accused's mother about her observations of the intruder's breath when he was bending over her. She denied having told the mother that he smelled of alcohol or drugs but she did admit telling the mother that the person who bent over her, "smelt nice".

[18] The accused's description of the complainant's visit to his home on the Saturday morning was quite different from that given by the complainant. What he told the court was confirmed completely by the evidence given by his older brother, Talite, his 27-year-old sister and his mother -- all of whom were impressive witnesses. What they told the court was that when the complainant came to their house on the Saturday morning, she did not "speak nicely" but she shouted out to the mother that her oldest son had entered her house during the night time. She said that he was drunk at the time. The mother then walked over and stood by the door and her eldest son, Talite, who had been lying on the couch went and stood beside her. The complainant then pointed directly at Talite and said that he was the person who had entered her home. She had then gone on to explain that the intruder had been naked and he was holding a cloth over his face and his clothes in his other hand and when he was bending over her she wasn't sure whether he wanted to kiss her or whether he was trying to identify who she was. She told the mother that his breath had smelt of alcohol or marijuana. The mother then told the complainant that her eldest son was a missionary for the Mormon Church and he did not drink or smoke but once again the complainant, who was standing only 2 or 3 meters away, pointed directly at Talite and identified him as the intruder.

[19] At that point the accused, who had been in the living room and had overheard the conversation between his mother and the complainant, walked out the front door to go somewhere and the complainant then turned around and pointed to him and said that he was the intruder. One of the points Mr Fifita made was that if the accused had, in fact, been the intruder then he would have either stayed hidden in the house or would have exited from one of the other two doors instead of walking out in front of the complainant. There is substance in that observation.

Conclusions

[20] As I have already indicated, I found the mother, the daughter and Talite particularly convincing witnesses and I accept their description of the events surrounding the Saturday morning visit. I reject the complainant's evidence on this aspect of the case.

[21] My conclusions on the evidence relating to the Saturday morning visit raise two fundamental issues. First, the issue of identification. The accused's older brother, Talite, who the complainant first identified when she visited the accused's home, bears no resemblance at all to the accused. The accused is a slightly built young man of medium height. Talite, who is now 25 years of age, is a tall, well built muscular man. He plays professional rugby in France and was returning to France the day after he gave evidence before me. There was no evidence of any significant changes to the physical appearances of either man in the period since the incident. The complainant's initial positive identification of Talite as the intruder, therefore, on the Saturday morning casts very real doubts on her alleged identification on the night of the incident of the accused as the intruder.

[22] The second issue that arises out of the evidence relating to the Saturday morning visit is simply one of credibility. There was a direct conflict between the complainant's evidence and that of the three witnesses called on behalf of the accused. I have rejected the complainant's evidence as to what took place during the visit. What she told the court was not the truth. If she was caught out on this aspect of the case, which is my finding, how can any reliance be placed on her uncorroborated evidence that she had been able to identify the intruder on the night in question as being the accused?

Order

[23] It was essentially for these reasons that I held at the end of the trial that the Crown had failed to establish the charge against the accused and he was acquitted accordingly.

Tukuafu v Latu anor

Court of Appeal, Nuku'alofa
Webster CJ, Burchett, Salmon, and Moore JJ
AC 5/2005

7 August 2006; 7 August 2006

Practice and procedure – final orders – ordered to deliver up possession of land

The substantial issues were decided in a judgment delivered a year ago (see [2005] Tonga LR 344 (CA)). The question was now what final orders should be made.

Held:

1. It was clear that a monetary order against the first respondent was unlikely to prove fruitful and therefore the appellant sought only an order that the first respondent deliver up possession of the land to the appellant on a date about three months hence.
2. The Court ordered that the first respondent deliver up possession of the land on or before Wednesday the 15th of November 2006.

Counsel for appellant	:	Mr Niu
Counsel for first respondent	:	Mr Tu'utafaiva
Counsel for second respondent	:	Ms Simiki

Judgment

[1] The substantial issues in this appeal were decided in a judgment delivered a year ago. The question now before this Court of Appeal is what final orders should be made.

[2] After some discussion, in which it became clear that a monetary order against the first respondent would be unlikely to prove fruitful, Mr Niu said that his client sought only an order that the first respondent deliver up possession of the land to the appellant on a date about three months hence. The Court orders that the first respondent do so on or before Wednesday the 15th of November 2006, Mr Tu'utafaiva and Ms Simiki having nothing to urge against this course in the light of the Court's previous decision.

[3] Costs orders in respect of the appeal up to and including the judgment handed down at the last sittings of the Court of Appeal have already been made. In the special circumstances of this case, and Mr Niu not seeking any order, we make no further order as to the costs of any party.

R v Mafi

Supreme Court, Nuku'alofa
Ford J
CR 88/2004

21, 22, 26 June 2006; 8 August 2006

Criminal law – attempted rape – elements proved to criminal standard – accused convicted

Vea Mafi, the accused was charged with one count of attempted rape of the 15 year old complainant contrary to section 120 of the Criminal Offences Act (Cap 18). The complainant lived with her parents and on the morning of Saturday 13 March 2004 she was carrying out washing, cooking and other household chores at the home of a friend of her parents who had gone to her father's funeral. The accused, a married man with six children but separated from his wife, was living with a de facto partner in a small house on the same allotment. After the complainant finished her work she went inside the living room to do some studying for an upcoming school examination when the accused approached her and took her to the main bedroom of the house where the attempted rape occurred. The defence was that the complainant's evidence was not credible based on certain inconsistencies in her evidence and the Crown had failed to prove beyond reasonable doubt that the series of acts had not been broken by a determination by the defendant not to proceed with the offence he allegedly attempted to commit. The defence also relied on the failure of the complainant to attempt to escape from the alleged attempted rape and to complain at the first opportunity. The Crown highlighted the complainant's young age and the fact that she would have been confused and emotionally upset after very nearly being raped.

Held:

1. To prove the crime of attempted rape the Crown must establish, to the criminal standard of proof which was beyond reasonable doubt, two essential elements. First, that the accused formed an intention to commit the crime of rape. Secondly, that the accused did some act for the purpose of actually carrying that intention into effect. Both factors are important but it was the second element that always required particular careful consideration. Acts that were part of just thinking about committing rape or preparation for making the attempt to commit rape were not sufficient.
2. The apparent inconsistencies in the complainant's evidence related to the issue of penetration and penetration was not an essential element in the crime of attempted rape.
3. The court did not find it surprising that the complainant had not attempted to escape or complain any earlier than she did. There was a need to take into account Tongan sensitivities in talking about rape and the embarrassment and humiliation the complainant would have experienced in having to describe to anyone the things that the accused did to her.
4. It was held that the Crown had proved beyond reasonable doubt all the essential elements of the charge of attempted rape and the accused was convicted accordingly.

Case considered:

R v Lasike [2006] Tonga LR 164

Statute considered:

Criminal Offences Act (Cap 18)

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

Judgment

Background

[1] The 46-year-old accused is charged with one count of attempted rape contrary to section 120 of the Criminal Offences Act (Cap 18). It is alleged that on Saturday 13 March 2004 he attempted to carnally know the complainant against her will. The complainant at the time was 15 years of age, having been born on 14 March 1988.

[2] The incident giving rise to the charge allegedly happened at the house of Vaikaloa Preston at Longolongo. 57-year-old Vaikaloa and the complainant's parents had been family friends for a number of years. The complainant, with her parent's permission, would often go and carry out washing, cooking and other household chores for Vaikaloa. She would not be paid for her work. It was all part of the close friendship between Vaikaloa and the complainant's parents. Sometimes, however, Vaikaloa would give her some money. Vaikaloa explained to the court that she trusted the young complainant completely and treated her as she would her own daughter.

[3] In January 2004 Vaikaloa's husband passed away and following his death she invited the accused to come and live in a small house on her allotment at Longolongo so that he could help her out. The accused is Vaikaloa's first cousin. Their mothers are sisters. Vaikaloa said that she and the accused grew up together in Vava'u. The accused is a married man with six children but at the time of the incident he was separated from his wife and was living with his de facto partner in the small house on Vaikaloa's allotment at Longolongo.

[4] The small house which the accused and his partner lived in was formerly Vaikaloa's kitchen. Vaikaloa had built an extension onto her own home, however, which served as her new kitchen leaving the small house for the accused and his partner.

[5] Vaikaloa has five children of her own including a 28-year-old daughter, Luseane, and a younger son, Viliami, both of whom figured in the case. At the time of the incident, Viliami lived at home with his mother and Luseane, who normally lived at home, was house-minding a property at Fatai.

[6] On Tuesday 9 March 2004, Vaikaloa suffered a second tragedy for the year. Her father passed away. His body was kept at the mortuary at Vaiola Hospital but over the following days family members and other mourners assembled at Vaikaloa' s brother's house at Tofoa (the "funeral house") to pay their last respects. The accused claimed that Vaikaloa's father was buried on Saturday 13th March but both Vaikaloa and Luseane said that the burial service was held on Wednesday 17 March.

The Crown case

[7] On the morning of Saturday 13th March 2004 the complainant was helping out with the washing at Vaikaloa's place while Vaikaloa had gone over to the funeral house to mix with mourners. After the complainant finished the washing, she went inside the living room to do some study for an upcoming school examination. While she was carrying out her study work, the accused approached her in the house and asked her for sex. She refused. He then offered her $20 and again she refused. He ended up taking her into the main bedroom where he forced her to take off her clothes and lie down on a mattress. He then attempted to penetrate her vagina with his penis. She cried and struggled and the accused then withdrew.

[8] Vaikaloa telephoned from Tofoa and the complainant complained to her about what the accused had done. The complainant was told to go by taxi to the funeral house at Tofoa. She did so and she stayed overnight with Vaikaloa's daughter, Luseane, at Fatai. The next morning, which was a Sunday, Luseane took the complainant back to the funeral house and they both went with Vaikaloa to her home at Longolongo. Vaikaloa then arranged to tell the complainant's mother what had happened the day before. The mother was very upset and she took the complainant to hospital for a medical examination. Following the visit to the hospital, the matter was reported to the police.

The evidence

[9] The complainant told the court that on March 2005 she was in the fifth form at Tupou High School and she was one of the top five students in her class. She explained how, on the day in question, Vaikaloa had invited her over to do the washing and sweeping and to look after the place generally while she went to Tofoa to prepare for her father's funeral. The complainant said in evidence that after completing the washing she went inside the house and began watching television. Vaikaloa's son, Viliami and his friend Sione arrived and came into the living room. The complainant said that Sione was drunk and there was obviously some interplay between them. The complainant said that Sione jokingly asked her to be his girlfriend and at one stage, while she was still sitting in her chair, he reached over the small table in front of her and took hold of her hands. The complainant shouted out to him to let go and she then told the boys to leave. They did so and she began studying.

[10] The complainant then told the court how, a short time after the boys had left, the accused entered the house taking off his shoes in the hallway. She said that he asked her why Viliami and his friend had been there and she told him for no reason. The accused then asked her had she ever been taken by a boy before and she answered, "no". The accused told her that she was lying and again she replied, "no". She said at that stage, while she was still sitting in her chair in the living room, the accused suddenly grabbed her hands and asked her what about going to the bedroom and having sex. He then started to pull her towards the main bedroom and she said, "I won't be able to do that." The witness was asked in evidence in chief what she meant by that remark and she explained that she was then into the second day of her monthly period. The complainant said that the accused then gave her a 20 pa'anga note and told her not to tell anyone. She initially refused to accept the money but when he gave it back to her she took the note and put it in her pocket. She was asked why she had taken the money and she replied, "because I was thinking that if anything happened that would be evidence."

[11] The complainant then described to the court how the accused pulled her into the bedroom. She said that she did not agree to go with him and she told him that she did not want to go with him but she did not attempt to run away because she was afraid that he might hurt her. At that point, the accused had a towel wrapped around him. It was not clear from the complainant's evidence in chief when the accused had removed his trousers but in cross examination it was put to her that at the preliminary inquiry in the Magistrates' Court she had said that when he had entered the hallway and taken off his shoes, he also took off his pants and grabbed a towel and wrapped it around him. The complainant agreed that that evidence had been correct.

[12] The complainant said that once they were inside the bedroom, the accused grabbed a mattress that was standing upright by some cases and laid it on the floor. He then told her to lie down on the mattress and take off her pants. She said that she refused but he insisted. When she lay down she again told the accused that she was having her monthly period and he asked her to remove her menstrual pad. She said that she removed the pad herself because she thought that otherwise he would forcibly remove it.

[13] The complainant proceeded to explain to the court how the accused then removed her trousers and pants and all she had on at that stage was a T-shirt. She said that by then the accused had removed the towel from around his waist and he lay on top of her naked. He asked her to spread her legs apart but she refused to open her legs. The complainant said that she kept objecting to what the accused was doing and at one stage he used his mouth to cover her mouth. She told how at another point the accused was holding onto his penis trying to insert it but, "maybe his penis would not reach my vagina." She said that he kept asking her to spread her legs and she refused. All the time she continued to struggle. She then looked up and saw the accused taking saliva from his mouth and he tried to rub it onto her vagina. She said that at that point she jumped and sat up and at the same time he stood up and covered himself again with the towel and left.

[14] After the accused left the house, the complainant said she replaced her pad and put her pants and trousers back on. She then went to the outside toilet and she noticed the accused sitting outside the door of his own house. He was wearing a T-shirt and trousers. The complainant said that when she was returning from the toilet, the accused said to her that he was still "horny" and he asked her to go back to the bathroom and clean herself up so that he could continue on. She told him that she was not able to do that.

[15] A short time later the complainant noticed that the accused's partner had returned and he was inside his house with her. The complainant was asked in evidence in chief why she did not go over and complain to the accused's partner about what had happened. She replied that it was because she was ashamed and shy.

[16] The complainant said that she then went to sweep up the leaves on the allotment by the road (a common sight in Tonga on a Saturday afternoon). As she was doing the sweeping she noticed the accused's partner leave the house to go somewhere else. She said that as soon as she saw the accused's partner leave the premises, she threw down the broom and ran back to get her shoes intending to go back to her home as quickly as possible. As she was reaching out towards her shoes, she heard the telephone ring. It was Vaikaloa. She did not say anything to Vaikaloa at first and Vaikaloa asked her what was going on. She then told Vaikaloa that the accused had been at the house and he had forced her. Vaikaloa was upset and told her to go home and get changed and then get a taxi over to the funeral house at Tofoa. The complainant did that.

[17] Later, in cross examination, the complainant was asked who was at her home when she called back to change her T-shirt before catching the taxi to Tofoa. She explained that both her mother and father were home but she did not speak to either of them about what the accused had done to her because she was afraid. She said that her father was outside the house and she was afraid to say anything because he was not happy with her going over to help at Vaikaloa's house at that time. She was asked by counsel why her father disagreed with her going to Vaikaloa's place and she explained that it was because he knew that there were boys or men in that area.

[18] The complainant said that after she went home to change her T-shirt, she caught a taxi over to the funeral house. Vaikaloa then asked her if she wanted to have a bath and she declined. Vaikaloa called her daughter, Luseane, and asked her to come over and take her back to the house that Luseane was minding at Fatai for the night. The complainant told the court how the following morning she went with Luseane and Vaikaloa back to Vaikaloa's house at Longolongo and how her mother then came over to Vaikaloa's house and was told what had happened the previous day. The complainant said that her mother took her home and later she was taken to hospital for a medical examination before the matter was reported to the police. She confirmed that she understood from what the doctor had said to her that she was still a virgin.

[19] The complainant was cross-examined at considerable length. She was closely questioned by Mr Tu'utafaiva over apparent inconsistencies between her evidence and what she had said shortly after the incident in an unsworn statement to the police. Counsel reminded her that she had apparently (the police statement was not produced in evidence) said to the police that the accused inserted his penis into her vagina and copulated inside. The following exchange then took place:

> "What I stated was, the first time he was inserting his penis in I knew it didn't reach my vagina and then when I looked up at him he took some saliva and he rubbed it on my vagina and when he started to copulate that's the point when I jumped and sat up.
>
> Q. Didn't you just say that Vea did insert his penis into your vagina?
> A. Yes.
>
> Q. Right through inside?
> A. No.
>
> Q. What happened?
> A. When he inserted his penis in I knew it did not go through because I was struggling and that's the point when I looked up and he was getting saliva and rubbing.
>
> Q. And so when you say Vea did insert his penis into your vagina was it clear to you that Vea was trying to have sex on you?
> A. Yes.
>
> Q. I put it to you if Vea was trying to insert his penis into your vagina you can see that he is a big man and you are a skinny girl and there is nothing else to stop him continuing on and having sex on you?
> A. Yes.

Q. So I put it to you nothing like this happened. Vea did not come into your house and he was sleeping in his house?
A. I am making my statement. It is true. This thing did happen."

[20] The complainant was also questioned in cross examination as to why she did not tell her parents what had happened when she went home to change her T-shirt. She replied that she wanted to tell them but she was worried about what her father would say and do and so she did not speak to them. She simply changed her top and T-shirt and caught a taxi to Tofoa.

[21] Vaikaloa was called as the second witness for the Crown. She told the court that on the day in question, the complainant arrived at her home between 10 a.m. and 10:30 a.m. and she explained to her that she was to look after the house for the day and do the washing and later the sweeping. She said she told the complainant that if she (Vaikaloa) was not back from Tofoa by the evening then she was to return home. Vaikaloa said that she then travelled to Tofoa with the accused in his vehicle along with two other people. When they arrived at the funeral house they were starting to prepare an umu for the mourners.

[22] Vaikaloa then related how, at approximately 12 to 12:30 p.m., she telephoned the complainant on the landline and the complainant told her that she had finished her work and she was studying for her first examination. Vaikaloa telephoned again at approximately 3 p.m.. In cross examination the witness was asked whether she had telephoned at 3 p.m. because she was suspicious of the accused. She explained that the reason she telephoned at 3 p.m. was because she had been looking around for the accused at Tofoa for him to do a job for her in his vehicle and she could not find him. She then learned that the accused had gone back to Longolongo with some of his friends to have a drink there. She knew that the complainant was in her house at Longolongo on her own and she was intending to talk to the accused and tell him to leave. She told the court that she did not want him and his friends drinking at her place.

[23] Vaikaloa said that when she telephoned the complainant on that second occasion, the complainant did not speak to her and Vaikaloa could tell that she was upset and crying on the other end of the phone. She asked why she was crying and the complainant answered that the accused had come over and forced her. Vaikaloa said that the only thing that came into her mind at that stage was that she had to get the complainant over to Tofoa. She explained that she needed time to sort out what she was going to tell the complainant's parents. She said that she felt responsible for everything that had happened to the girl because the complainant was not simply visiting her house but she (Vaikaloa) had invited her over.

[24] Vaikaloa explained how difficult it had been for her on the Sunday morning to have to tell the complainant's mother what had happened. She said that before she began her explanation she apologised to the mother for what had happened because the incident had occurred at her house and it was her "brother" as she put it, who had done the thing to her (in Tongan culture it is common to refer to first cousins as "brothers" or "sisters" as the case may be). Later on the Sunday morning, the witness said, she confronted the accused at Tofoa and asked him what had happened and she reminded him that the reason she had invited him to live at her place at Longolongo was to help her. She said that the accused simply responded that the little girl was lying.

[25] The Crown also called evidence from Vaikaloa's daughter, Luseane, the complainant's mother, Salote, Dr 'Aivi Puloka and the Police Investigating Officer. Luseane said that when her mother called her over to the house at Tofoa to pick up the complainant on the Saturday afternoon she entered the room where the complainant was lying on a bed crying and asked her what happened. The witness said that the complainant told her the accused had forced her at Vaikaloa's home. She said that when he entered the house he asked her if he could have intercourse and he took hold of her. The complainant was not able to run and the accused took her to Vaikaloa's bedroom and asked her to take off her clothes and he took off his and while they were struggling with each other the telephone rang and then the accused stood up and walked away and the complainant went to answer the telephone. The telephone call was from Vaikaloa.

[26] Luseane told the court that she took the complainant to the house she was minding at Fatai to spend the night. She said that she tried to question the complainant about the details of what had happened but she was visibly upset, not talking back and crying most of the time. Luseane said that about four hours later she could see that the complainant

was not able to sleep and so she asked her if she wanted anything. She said that the complainant then gave her a 20 pa'anga note and said that the accused had given it to her to keep quiet. She then took the girl to have a shower and after that she slept.

[27] Luseane also gave her account of what happened on the Sunday morning when the complainant's mother was informed. She said that when the mother arrived at Vaikaloa's house, the complainant was crying all the time and was unable to speak. Luseane said that she (Luseane) then started to tell the complainant's mother what had happened but Vaikaloa intervened and explained the situation. Luseane said that they then all cried and the complainant and her mother left.

[28] In cross examination Luseane was asked why she had not taken the complainant back to her parents on the Saturday night or to the police and it was put to her that she had been doing what was best for her mother, Vaikaloa, rather than the little girl. Luseane did not appear to totally disagree with that proposition. She explained to the court the difficult position her mother had been placed in. Vaikaloa had asked the complainant over to mind her house. Vaikaloa was suffering over her father's death and what had happened to the complainant and so she (Luseane) thought that she would do whatever her mother wanted. She said she never thought of going to the police because the accused was her uncle. Luseane said that she was, however, trying to do her best for the complainant who she regarded as a sister.

[29] The complainant's mother, 58-year-old Salote, told the court how she was called over to Vaikaloa's place on the Sunday morning and she recounted what then took place. She said that her daughter was sitting in a chair and crying. She confirmed taking her daughter to hospital for a medical examination and she said that afterwards the doctor told her that her daughter, "was okay." In cross examination, Salote was asked whether she recalled her daughter coming home to change some of her clothing on the Saturday afternoon. The witness replied that she did see her daughter but she did not speak to her. In re-examination she elaborated on why she had not spoken to her daughter. She told the court that she had heard her daughter open the door but her grandchild was crying at the time and when she went to see her daughter after attending to her grandchild, her daughter had already changed and left the house again.

[30] Dr 'Aivi Puloka gave evidence about her examination of the complainant on the Sunday. In her report she noted that the complainant, "was looking distressed and ashamed." The doctor's conclusion was that no sexual penetration had occurred. The complainant was still a virgin.

[31] The final witness for the Crown was the Police Investigating Officer who produced the "Record of Interview" and other documentation. In his unsworn statement to the police dated 20 March 2004, the accused denied all the allegations the complainant had made against him. He said that he had been at Tofoa on the Saturday morning and then Vaikaloa had told him to take a tin of food scraps back to her house at Longolongo to feed the pigs. He said that back at Longolongo he went into Vaikaloa's house to get some water to drink and he noted Viliami and Sione were drinking liquor and Sione was pulling the complainant around. He said that the two boys asked him if there was cooked food at Tofoa and when he replied, "yes", they then disappeared and he went back to his own house. The police officer asked the accused at that point whether the boys returned home again. He replied, "yes, they came back and entered the house. I did not know what happened inside the house but I heard (the complainant) saying release me." The accused said that he then went to sleep in his house.

[32] The accused elected to give evidence. He denied Vaikaloa's claim that he had slept at his own house on her allotment on the Friday night and had then driven her and others over to Tofoa on the Saturday morning. He said that he had been at the funeral house at Tofoa since Vaikaloa's father had died on the Tuesday and the only reason he went back to Longolongo on the Saturday was because Vaikaloa had asked him to take the food scraps back for the pigs. The accused told the court that when he entered Vaikaloa's house on the Saturday he saw Viliami, Sione and the complainant sitting in the living room. He noticed a liquor bottle and the asked the boys if they were drinking. He then went back to his house, took off all his clothes apart from his T-shirt and after putting a towel around him he lay down to sleep.

[33] The accused was asked in evidence in chief whether he knew what was going on in the main house. He said that the entrance door to his own home opened straight on to Vaikaloa's house and he could see down the hallway to the livingroom. He said:

> "I saw Sione. He was pulling (the complainant) towards a bedroom. When I saw this I did not care because to me, and this is the truth, the girl joined the drinks and therefore I didn't care. I go to sleep."

He was then asked whether there was any time that Sione and Viliami left Vaikaloa's house and he replied:

> "Yes, when I was lying down I was going to sleep. I hadn't slept at that time. I heard them saying goodbye, they were leaving. Approximately after five or 10 minutes later they returned back and they entered the house.
>
> Q. And was there any time they said goodbye to you after they left this time?
> A. No.
>
> Q. So what happened after they returned after they left the first time?
> A. When they returned, Viliami asked me whether they had some food at Tofoa and I said, "yes, we just prepared the umu" and he wanted to go and get some food from there and after that I went to sleep.
>
> Q. Could you explain to the court whether you heard (the complainant) say something or Sione or Viliami say something while they were inside the house?
> A. Yes, while I was in my little house lying down I heard (the complainant) telling Sione to let go of her hand.
>
> Q. You know if Sione and Viliami left the house after you told them that you had food at Tofoa?
> A. After Viliami asked me about the food in my house I then went to sleep and when they went out of my house I went to sleep and I didn't know the time that they left."

[34] The accused carried on and told the court that the next thing he knew was that his partner and his sister woke him up and asked him what was a reason for him sleeping like that. He responded that it was because he was tired. He then took a shower and he slept at his own home on the Saturday night. In other words, as I understand the sequence of events he described, the accused claims to have been asleep in his own house at the time the alleged offence was committed.

[35] Referring to the following morning, the accused said:

> "I woke up on Sunday morning, put on my clothes and then I went to Tofoa to the funeral
>
> Q. What happened when you arrived at Tofoa?
> A. When I arrived at Tofoa, I was collecting rocks for the umu and when Vaikaloa came over that was the first time for me to know about this. She asked me what I had done to (the complainant).
>
> Q. What did Vaikaloa ask you?
> A. The reason why I raped (the complainant).
>
> Q. What was your answer?
> A. I was surprised as that was the first time I learned about it. I said the girl is lying. I didn't do something like that to her."

The law

[36] It is a crime to attempt to commit a crime even if, for whatever reason, the attempt is unsuccessful. To prove the crime of attempted rape the Crown must establish, to the criminal standard of proof which is beyond reasonable doubt, two essential elements. First, that the accused formed an intention to commit the crime of rape. Secondly, that the accused did some act for the purpose of actually carrying that intention into effect. Both factors are, of course, important but it is the second element that always requires particular careful consideration. Acts that are part of just thinking about committing rape or preparation for making the attempt to commit rape are not sufficient.

[37] The learned authors of Blackstone's Criminal Practice (2006) state (83.12):

> "The mental element in attempted rape is the same as that required for the full offence, namely an intent to have sexual intercourse and the absence of reasonable belief in consent. It is not necessary to prove that the accused had gone so far as to attempt physical penetration of the vagina."

Submissions

[38] In his written submissions, Mr Tu'utafaiva examined all the evidence in his usual thorough and detailed manner. His principal submissions were accurately summarised by Mr Kefu in his response in these terms:

> "(a) The complainant's evidence was not credible based on certain inconsistencies; and
>
> (b) The Crown had failed to prove beyond reasonable doubt that the series of acts had not been broken by a determination by the defendant not to proceed with the offence he allegedly attempted to commit.

[39] Perhaps the most significant apparent inconsistency in the complainant's evidence highlighted by Mr Tu'utafaiva related to her description of what happened in the bedroom. As earlier noted, the complainant's statement to the police was not produced in evidence but she was closely cross-examined on that part of her unsworn statement in which she apparently said that the accused inserted his penis into her vagina and copulated three times and it was painful. Mr Tu'utafaiva placed considerable stress on the difference between that statement and her sworn evidence in court which appears at paragraphs [13] and [19]. Defence counsel also highlighted the doctor's evidence that there was no evidence of any penetration of the vagina.

[40] Mr Tu'utafaiva also stressed the fact that, according to Luseane, the complainant told her that while they were still struggling, the telephone rang and Vea stood up and walked away but in her sworn testimony the complainant said that when Vaikaloa telephoned on the second occasion the incident was over and she was outside in the act of putting on her shoes before running home.

[41] Mr Tu'utafaiva's other principal submission related to the failure of the complainant to attempt to escape from the alleged attempted rape or to run away after the incident. He also stressed the failure of the complainant to complain at the first opportunity either to the accused's partner when she returned home or to one of the neighbours or to her own parents when she later went home to change her T-shirt.

[42] In response Mr Kefu highlighted the complainant's young age and the fact that she would have been confused and emotionally upset after very nearly being raped. The prosecutor submitted:

> "It is unlikely the complainant appreciated the elements of rape. It is likely that at the time of the incident the complainant would equate being forced down half-naked on a mattress by a semi-naked man and rubbing his penis on her genitalia as rape.
>
> Moreover, the pain that she felt at the time of the incident would be the erect penis being put against her sensitive genitalia area that was in its first day of menstruation.
>
> What is important is her sworn evidence that is before the court. She clearly stated that the accused told her to tear her legs apart, but she did not do so, and they were struggling. He put his mouth over hers and he was trying to insert his penis in her vagina. It did not go in. He told her to spread her legs more. She said no. She looked up and Vea put saliva on his penis and also on her vagina. When he laid down she got up and sat up -- then the accused got up and went out with a towel."

[43] In relation to the failure of the complainant to run away or complain earlier, Mr Kefu referred to the complainant's evidence that she had locked the second door in the living room before she sat down to study and he submitted that after the incident the accused was no longer a threat because he had returned to his own home and his de facto partner had also returned. The prosecutor made the additional submission that, on the evidence,

Vaikaloa was clearly a second mother to the complainant and it was understandable in all the circumstances that she was the only person that the complainant wanted to talk to about what had happened.

Conclusions

[44] I say at once that I did not find the accused a credible witness and I reject his version of the events on the day of the incident. I accept that he took Vaikaloa to Tofoa on the Saturday morning in his vehicle and then around lunchtime he returned back to Vaikaloa' house at Longolongo in the knowledge that the complainant would have been home alone. I accept the complainant's sworn evidence about the events that then followed. I found her to be a careful, thoughtful witness who was doing her best to recount for the court the events as they had happened. As already noted, she was subjected to a painstaking, very lengthy cross-examination but her evidence on oath remained unshaken. I have no doubt that having to relive the sordid experience over again in a public setting and having to be cross-examined on the most intimate details of her attempted rape would have been a traumatic ordeal for the young complainant in every sense of the term. Against a skilled cross examiner, she handled herself with distinction.

[44] I have considered the apparent inconsistencies in the complainant's evidence referred to by defence counsel in his submissions but they relate to the issue of penetration and penetration is not an essential element in the crime of attempted rape. In the end, I was left in no doubt at all that the accused had attempted to rape the complainant in the manner alleged. I accept Crown counsel's submissions about the complainant's likely understanding of the concept of rape at the time of the offence. At one point during her cross-examination when defence counsel was criticising her because she had told Vaikaloa that she had been raped, the court asked the complainant about her understanding of the word "rape" at the time of the incident. She replied, "what I meant by that, I was referring to what he did to me."

[45] Precisely why the accused did not complete the act of rape is not clear from the record. Mr Tu'utafaiva highlighted the fact more than once that his client is a big well built man whereas the complainant is a slim teenager and if the accused had intended to rape her then he would easily have done so. Mr Kefu seemed to accept that there was some force in that proposition. He observed that why the accused did not complete the act is something only the accused can answer. The prosecutor's comment is, of course, correct. I suspect that the accused may have been put off completing the act by the complainant's continuing struggle and her ongoing emotional reaction to her ordeal. The fact that he eventually desisted from trying to insert his penis into the complainant's vagina, however, does not diminish in any way the crucial element in the offence of attempted rape, namely, that the accused intended to have sexual intercourse with the complainant in the knowledge that she did not consent and he did all the acts necessary for the purpose of carrying that intention into effect apart from physically penetrating her vagina.

[46] I do not accept that the attempted rape was disrupted by the phone call from Vaikaloa as Luseane claimed the complainant had told her. I accept the complainant's sworn evidence about the second phone call from Vaikaloa. I can only conclude that Luseane misunderstood what the complainant was trying to explain to her about the exact sequence of events.

[47] Finally, I do not find it surprising that the complainant did not attempt to escape or to complain any earlier than she did. As Mr Tu'utafaiva correctly observed, the accused is indeed a big, well built man. The complainant would have easily been subdued and most likely injured had she tried to escape his clutches while he was pulling her into the bedroom. In relation to the failure of the complainant to later complain to the accused's de facto partner or a neighbour or even to her own parents, again, I do not find her decision to wait for Vaikaloa at all suprising. I accept Crown Counsel's description of Vaikaloa as a second mother to the complainant. It was apparent from the evidence that the complainant would have been emotionally upset and totally bewildered over the horrific experience she had just endured and Vaikaloa was the only person she was prepared to complain to. Even then, as the evidence showed, the complainant had difficulty speaking to Vaikaloa about her ordeal.

[48] Although it is true that the complainant carried on sweeping the leaves outside Vaikaloa's home after the incident, she was aware at that stage that the accused's de facto partner had returned and was in the house with him. As soon as the accused's partner left

the house again, the complainant ran to put on her shoes intending to run to her home. It was at that precise point in time that Vaikaloa made her second telephone call.

[49] I accept the reason the complainant gave in court for her reluctance to tell her parents about what had happened when she went home to change her T-shirt. Quite simply, she feared her father's reaction and, in the circumstances, her fear was understandable.

[50] There is one other aspect of the case I should comment on in relation to defence counsel's criticism of the complainant's failure to complain to anyone other than Vaikaloa. It is a point referred to, albeit briefly, by the Chief Justice in the recent unreported decision of *R v Lasike* [2006] Tonga LR 164 where his Honour spoke of the need to take "into account Tongan sensibilities in talking about rape." I fully endorse that observation. I do not underestimate for a moment the embarrassment and humiliation the complainant would have experienced in having to describe to anyone the things that the accused did to her.

Order

[51] For the foregoing reasons which, regretfully, have taken longer to explain than I would otherwise have liked, I find that the Crown has proved beyond reasonable doubt all the essential elements of the charge of attempted rape and the accused is convicted accordingly.

Ongosia anors v Tongia anors

Land Court, Vava'u
Webster CJ and Land Assessor Tofu
L 17/2005

10 and 11 May 2006; 16 August 2006

Land law – boundary shifted due to erosion – claim for eviction dismissed

The plaintiff was the registered holder of a tax allotment at Hinakauea Beach, Pangaimotu, Vava'u. He sought an order evicting the first and third defendants from part of the foreshore in front of his allotment. The defendants claimed that they were granted a permit to use that part of the foreshore (a strip of grass about 20 -- 30 m wide adjacent to the sandy beach) by the then Minister of Lands in 1994. Prior to then the beach area referred to in the permit had been used for some 10 or 11 years by another occupier for a tourist business. The defendants also held a licence from the Tourism Council to run Tongan feasts on the beach area covered by the permit. A dispute arose because the sea had eroded soil in the area and the original 20 -- 30 m grass strip had became part of the foreshore in terms of Clause 109 of the Constitution which meant that the land used by the defendants for their tourism business overlapped part of the plaintiff's allotment. The defendants raised the issue of limitation under section 170 of the Land Act and the fact that the plaintiff's tax allotment exceeded the statutory size for tax allotments. The issue before the court was the question, as a result of the landward movement of the high watermark due to erosion over the years, who had the right to the area where the part of the foreshore to which the defendants had been given a permit overlapped the plaintiff's allotment.

Held:

1. The intention in clause 109 of the Constitution and in Parliament, as seen in section 113 of the Land Act, was that all beach frontage in Tonga 15.24 m or 50 feet above the high watermark belonged to the Crown, one reason for which was to give the public unrestricted movement and use of the beachfront area without interference from adjacent landholders.
2. At common law, as the medium, high and low water marks shifted, so the boundary of the land shifted also. The plaintiff's claim for eviction of the defendants from the land in question could not succeed and was dismissed.
3. The 10-year limitation period in section 170 of the Land Act was to be strictly applied when the limitation period had expired even where the grant of an allotment may at one time have been open to challenge. Whatever the status of the defendant's possession of the land, it could not be challenged by the plaintiff because the defendants had been in adverse possession for over 10 years.
4. Statutes should be interpreted so as to avoid manifest injustice or unreasonableness in a way which was consistent with the purpose of the statute and, accordingly, sections 7 and 49 of the Land Act prescribing the maximum areas for a tax allotment and a town allotment should be interpreted as rendering void only the area of a grant which exceeded the area permitted.

Cases considered:

A-G v Chambers (1859) 4 De G & J 55; [1843-60] All ER Rep 559 (CA)
Arkansas v Tennessee (1918) 246 US 158
Arkansas v Tennessee (1970) 397 US 88
Attorney-General v Chambers [1843-60] All ER Rep 559 (CA)
Attorney-General of Southern Nigeria v John Holt and Co (Liverpool) Ltd [1915] AC 599

Attorney-General (Southern Nigeria) v J Holt & Co (Liverpool) Ltd [1914-15] All ER Rep 444
Auty v Thompson (1903) 5 GLR 541
Baxendale v Instow Parish Council [1981] 2 All ER 620 (ChD)
Brighton & Hove General Gas Co v Hove Bungalows Ltd [1924] 1 Ch 372
District Land Registrar of Wellington v Snow (1909) 29 NZLR 865
Fifita v Minister of Lands & Fakafanua [1974-80] Tonga LR 1 (PC)
Government of the State of Penang v Beng Hong Oon [1972] AC 425; [1971] 3 All ER 1163 (PC)
Hazlett v Presnell [1981-2] 149 CLR 107 (HC)
Hull and Selby Rail Co, Re (1839) 5 M & W 327
Humphrey v Burrell [1951] NZLR 262 (SC & CA)
Lokotui v Fifita [1992] TLR 18 (CA) at 20
R v Joyce (1905) 25 NZLR 78
R v Lord Yarborough (1824) 3 B & C 91
Smart & Co v Suva Town Board [1893] AC 301 (PC)
Southern Theosophy v South Australia [1982] 1 All ER 283 (PC)
To'a v Veikune [1974-80] Tonga LR 107 (PC)
Vaka'uta v Vaka'uta & Minister of Lands [1974 - 1980] Tonga LR 26
Ward's Case (1980) 142 CLR 308

Statutes considered:
Constitution of Tonga Act (Cap 2)
Land Act (Cap 132)

Counsel for plaintiffs : Mr Vaipulu
Counsel for defendants : Mr Taufaeteau

Judgment

Preliminary

The 1st Plaintiff Mr Soane Ongosia is the registered holder of a tax allotment on the Royal Estates at Hinakauea Beach, Pangaimotu, Vava'u. He seeks the eviction of the 1st and 3rd Defendants Mr 'Afele Tongia and Mrs Lesila Tongia from part of the foreshore in front of the allotment, which is situated beside the beach. The 1st and 3rd Defendants claim that they were granted a permit to use that part of the foreshore by the then Minister of Lands in 1994.

As I understand it the 2nd Plaintiff is the father of the 1st Plaintiff and was said to have transferred the tax allotment to the 1st Plaintiff, though neither gave evidence and there was no evidence of that; and the 3rd Plaintiff leased part of the tax allotment from the 1st Plaintiff, though again no evidence of that was led at this hearing. The 2nd Defendant is the son of the 1st and 3rd Defendants.

By agreement of the parties, this hearing related only to the question of the status of the land in dispute, not to any issues of responsibility or compensation for the disputes between the parties in November–December 2005. As I understand it the 2nd and 3rd Plaintiffs and the 2nd Defendant are not involved in this part of this action about the status of the land and are only parties to it following the events of November-December 2005.

Evidence and submissions

The Plaintiffs led evidence from Mr Makafilia Taungatu'a Mafi, Land Registrar for Vava'u; Mr Paula Moa Lo'amanu, Government Surveyor for Vava'u; and Mrs Elisi Faleola, Acting Officer-in-Charge of Tourism, Vava'u. The Defendants led evidence from the 3rd Defendant, Mrs Lesila Tongia. Both parties also filed documents. After the evidence there was a site visit to the land in dispute at Hinakauea Beach, Pangaimotu. The following day submissions were made by Counsel in support of their cases; and also by Crown Counsel in the public interest

Further hearing

On 26 May, at the end of the Vava'u circuit, I held a further hearing with Counsel and told them of my provisional view (subject to reconsideration on studying further legal authorities on my return to Nuku'alofa) that Clause 109 of the Constitution relating to beach frontage had to be respected, and that the legal authorities indicated that the

boundary of the land shifted if the medium high and low water marks shifted, so that the Plaintiffs' claim was likely to be unsuccessful.

I also narrated what the Assessor had told me after the hearing, namely that he was formerly District Officer for Neiafu and that previously the beach extended out 50 feet from the edge of the grass (where the boundary of this allotment is), but became eroded by the removal of sand from it. People wanting to get to the beach had been unable to reach it because the Plaintiffs' family had told them they were trespassing, so the then Governor of Vava'u, Dr Ma'afu Tupou (who was also His Majesty The King's Representative for Royal Estates in Vava'u), had instructed that the road to the north of the land where the Defendants are was to be made (as a Government road) so that the public could get to the beach, with the result that the boundary of the 1st Plaintiff's allotment had been cut. I said that this appeared to tie in with the legal position, but I finished by allowing Counsel until 12 June to make further written submissions on the provisional views of the Court and these matters.

Plaintiffs' further submissions

As a result of that order, Counsel for the Plaintiffs submitted that the Land Assessor erred in saying that the road between the water and the adjacent land was a public road and it was paved because the Plaintiffs have stopped the people from using the beach. The Plaintiffs said that it was the Defendants stopping the people who were operating the other side of the beach for a similar purpose to theirs, and it was just paved for access. Furthermore it had never been mentioned in evidence that this road was a public road and according to the evidence of the Land Registrar there was no evidence of such road it was only the land belonging to the 1st Plaintiff. The evidence of the surveyor also never mentioned that the road was a public road and the Plaintiffs submitted that this road is within the boundaries of the 1st Plaintiff's land.

Counsel for the Plaintiffs also submitted that although the allotment is in excess of the statutory area the Land Registrar in evidence stated that with the King's Estate the landholders are to stay with the original subdivisions made, however section 91 of the Land Act provides that the Minister may give 21 days' notice to such person informing him that he intends to subdivide such land. The Landowner had approached the Palace Office for a subdivision, with 5 acres each to be given to him and his younger brother, but was told to stay as it is.

In relation to the beach frontage and Clause 109, Counsel for the Plaintiffs submitted that all beach frontage belongs to the Crown from 50 feet above high water mark and it is lawful for the Government to lease any portion of the beach frontage for erecting a store or wharf and the Minister of Lands with the consent of the Cabinet shall have power to grant such lease. Counsel submitted that the Plaintiffs' claim be allowed for the reasons (i) that there has been no evidence of such a lease and that no application for any lease have been submitted to the Minister of Lands as stated in Clause 109 of the Constitution; (ii) and the consent of Cabinet have never been granted; (iii) that there is still land in the beach frontage to be used by the public; (iv) and it is respectfully submitted that the allotment with its original boundaries be established and that the Government had not granted any lease.

Defendants' further submissions

Counsel for the Defendants submitted that there were 2 important matters: (1) that the tax allotment is greater than the statutory size under section 49 of the Land Act, which states that grant in excess is void. That had not been brought up in his main submissions, but in the Defendants' Statement of Defence in paragraph 1, it stated that 10A 1R 24P exceeds the area permitted by law for a tax allotment; (2) with reference to the limitation period of 10 years, to say that the Plaintiffs did not stop the Defendants because they thought it was Crown land is no defence, as barring of a claim within the time prescribed by statute is regardless of knowledge of claimants: *Vaka'uta v Vaka'uta & Minister of Lands* [1974 -1980] Tonga LR 26.

Under Clause 109 of the Constitution all beach frontage belongs to the Crown, so that there is no interference from adjacent landholders. In other words the right of the public over the foreshore follows the foreshore wherever it may be at any material time. Section 23 of the Land Act gives the Minister of Lands power to define boundaries. These all tie in with what the Assessor said about the Minister of Lands arriving at a decision to make a Government road north of the Defendants' land, thus cutting the boundaries. Under Clause 109 of the Constitution, the supreme law, together with the Minister's power under

the Land Act and the size of the tax allotment in excess gave the Minister of Lands authority to do what he had done.

Counsel for the Defendants also submitted that it is important to note that the area occupied by the Defendants in most part is approximately within 50 feet above high water mark. Therefore the Defendants contend that the Constitution is paramount and the land occupied is beach frontage, which belongs to the Crown.

Conclusion on further submissions

In view of these further submissions for the Plaintiffs I considered holding a further hearing so that I could hear evidence to resolve the factual difference between what the Assessor advised me and what is now said for the Plaintiffs. But, having considered the further legal authorities now available to me in Nuku'alofa (see Applicable law below), I came to the view that the case should be decided without any reference to the Assessor's factual account and I make no findings in fact in relation to that.

Primary facts

The 1st Plaintiff is the registered holder of a tax allotment on the Royal Estates at Hinakauea Beach, Pangaimotu, Vava'u. The tax allotment is situated beside the beach, being Block 213/157 Lot 31. There were some discrepancies in evidence about the area of the tax allotment: in the Statement of Claim it was said to be 10A 1R 24P, but in evidence the Land Registrar said that on the old plan after '10A' the writing was scratched out; while on the re-survey plan it is shown to have an area of 10A 0R 26.5P. In light of this decision the actual area is not crucial and I hold it to be that most recent measurement of 10A 0R 26.5P. The tax allotment was registered on 18 October 1935 in name of the 1st Plaintiff's grandfather Mosese Ongosia. It was transferred to the 1st Plaintiff on 25 November 1992. However the Land Registrar gave evidence that in the Land Register there is no record of any document or deed of grant, and only the Register Book has the 1st Plaintiff's name in it.

Beyond what is stated above, no evidence was given of any written description of the tax allotment in the Land Register. The Court was shown an old plan of the Royal Estates at Pangaimotu, showing the allotment on it, but the Plaintiff did not provide the Court with a copy of that. However the Court was given a copy of the plan resulting from a re-survey in the 1950s, which showed the boundaries marked by survey pegs. That plan is attached as an Appendix to this decision. The Government Surveyor Mr Paula Lo'amanu had searched for these survey pegs at the end of September 2005 when the controversy first arose between the parties and had found all but 4 of them (3 on the side next the road and 1 on the side next the beach). He was therefore able to show the Court during the site visit exactly where the boundaries of the allotment ran, particularly on the side adjacent to the beach.

On 22 July 1994 the Governor of Vava'u (as Minister of Lands) granted a permit to the 1st and 3rd Defendants, which stated:

> HINAKAUEA AT PANGAIMOTU, SIDE TO THE BEACH ON THE TAX ALLOTMENT THAT BELONGED TO MOSESE ONGOSIA, HIS MAJESTY'S ESTATE AT PANGAIMOTU
>
> This is the Government's beach that was permitted to Kelepi Piukala to operate a Tourist Business thereon, and he has abandoned this Government beach.
>
> I therefore grant permission to 'Afele Tongia and Lesila Tongia to care for and manage Hinakauea Beach commencing today 22nd July, 1994. To prepare for greeting tourists to the Vava'u District.
>
> (Sgd) Dr S Ma'afu Tupou
> Minister of Lands, Survey and Natural Resources

As stated in that permit, the beach or foreshore in front of the allotment had before that been used for a tourist business by Mr Kelepi Piukala for some 10 or 11 years. The 3rd Defendant gave evidence, which was not seriously challenged in cross-examination and which I accepted, that she and her husband the 1st Defendant had since 1994 used the foreshore – more accurately a strip of grass about 20-30 m wide adjacent to the sandy beach – for a tourist beach and had built several fales on that strip, although some had been partially destroyed by Cyclone Uaqa. They held barbecues there and had at one time had 2 residential fales for tourists.

The 3rd Defendant accepted in cross-examination that the permit did not include the 1st Plaintiff's tax allotment, but the extent of the tax allotment is of course the whole issue in this case. There was no evidence by or for the Plaintiffs to contradict the evidence from the 3rd Defendant of the occupation by her and her husband the 1st Defendant of the land under dispute, although the Plaintiffs' Counsel submitted that the Plaintiffs did not attempt to stop the 1st and 3rd Defendants' activities at the time because they thought they were being carried out on Government land on the foreshore.

Although there was evidence from Elisi Faleola that the tourist accommodation licence (which appeared to be different from the permit issued above) issued to the 1st and 3rd Defendants by the Tourism Council was currently on hold, she was equally clear that the licence issued to the 1st and 3rd Defendants to run Tongan feasts was still up-to-date and current. Therefore it cannot be said that the 1st and 3rd Defendants have stopped using the beach for greeting tourists, nor that the permit has lapsed.

It is important for an understanding of this case that in Tonga under Clause 109 of the Constitution and section 2 of the Land Act the term 'foreshore' includes a strip 15.24 m or 50' above the high-water mark, in addition to land between the high- and low-water marks.

This dispute and case has arisen because the land on which the 1st and 3rd Defendants operate their tourist business, which is undeniably now within the definition of the foreshore in terms of Clause 109 of the Constitution (as described fully below), overlaps part of the 1st Plaintiff's allotment according to the re-survey plan and pegs. The Government Surveyor Mr Paula Lo'amanu said that the sea had eroded the soil, and he had heard that people used to take sand from the beach (the Court was able to take that hearsay evidence into account in terms of Land Court practice: *To'a v Veikune* [1974-80] Tonga LR 107 (PC).

The Court accepted the evidence of Mr Lo'amanu, as amplified during the site visit, which showed that the 1st Plaintiff's allotment as marked by survey pegs did overlap onto the present foreshore (ie land now within 50 feet or 15.24 metres of the high water mark of ordinary tides). Some of the Defendants' buildings have therefore been built on ground which is part of the tax allotment as marked, but may be part of the present foreshore, and some may even be on the allotment beyond the present foreshore. The boundary of the tax allotment as surveyed actually goes through some of the Defendants' buildings, as shown on the plan in the Appendix. It was equally clear at the site visit that during the Plaintiffs recent work on the land they had trespassed onto part of the beach which was outwith even the surveyed boundaries of the allotment and on the Defendants' part of the beach, and the Plaintiffs had moved a pile of earth and rubble onto the Defendants' part of the beach.

Injunction

Prior to the main hearing of this case, on 25 November 2005 I had granted an injunction restraining the Defendants from obstructing construction works on the areas not occupied by them, and from threatening the Plaintiffs. The Plaintiffs then on 6 December applied for an order for committal of the Defendants for alleged breaches of that injunction. On 23 December I held a hearing of that application at Neiafu, and also visited the site at Hinakauea Beach. At the same time I considered the Defendants' application to vary the injunction of 25 November and their opposition to the application for committal; and I explained to the 2nd Plaintiff and all the Defendants personally the importance of obeying the injunction until a full hearing of the case could take place, and the likely penalty in the case of a failure to obey it. I then varied the injunction to the effect that:

a. Both sides accepted that the Plaintiffs are to keep to the ground to the north of the track (ie farthest away from the beach); and the Defendants are to keep to the ground to the south of the track (ie next to the beach) and are not to enter or obstruct the ground of the other side.
b. Both sides may use the track between the 2 pieces of ground, but in doing so are not to obstruct or prevent its use by the other side.

I ordered that the injunction as varied was to endure until the full hearing of the case, and adjourned sine die the application for committal; and at the conclusion of this hearing I continued that position until this decision may be issued.

Applicable law

Foreshore

The issue before the Court is therefore the question, as a result of the landward movement of the high water mark due to erosion over the years, as to who has right to the area where the part of the foreshore, to which the 1st and 3rd Defendants have been given a permit, overlaps the 1st Plaintiff's allotment.

Clause 109 of Constitution provides:

> Beach frontage
>
> 109. All the beach frontage of this Kingdom belongs to the Crown from 15.24 metres [*50 feet*] above high-water mark and it shall be lawful for the Government to lease any portion of the beach frontage for erecting a store jetty or wharf and the Minister of Lands with the consent of the Cabinet shall have power to grant such lease.
> (Amended Act 23 of 1990)

The Plaintiffs' Counsel accepted that the Constitution is the supreme law of Tonga and that the Court must respect it. That also means that the Court must respect the Crown land on the foreshore, which is also defined in section 2 of the Land Act (Cap 132):

> "foreshore" means the land adjacent to the sea alternately covered and left dry by the ordinary flow and ebb of the tides and all land adjoining thereunto lying within 15.24 metres of the high water mark of the ordinary tides;
> (Amended by Acts 11 of 1980 and 21 of 1984.)

As noted above, both Clause 109 and the definition in section 2 of the Land Act were amended in recent years to follow metrication, reinforcing the view that they are still regarded as active.

The position on the foreshore is repeated by section 113 of the Land Act , so emphasising that the foreshore is the property of the Crown:

> Foreshore the property of the Crown.
>
> 113. The foreshore is the property of the Crown and the Minister may with the consent of the Cabinet grant permits to erect stores or wharves or jetties thereon or to reside on any portion thereof or he may with the like consent grant a lease for any of the purposes aforesaid.

In other words the intention in the Constitution and in Parliament has been that all beach frontage must include 15.24 m or 50' above the high water mark, one reason for which is to give the public unrestricted movement and use of the beach front area without interference from adjacent landholders.

At common law, as the medium high and low water marks shift, so does the boundary of the land shift also. This position is narrated succinctly in Halsbury's Laws (4th Ed Reissue) Vol 4(1) (Boundaries) para 921 (Seashore or foreshore):

> The boundary of land abutting upon the seashore may vary from time to time, and in the case of a conveyance of land described as bounded by the seashore, then, as the medium high and low water marks shift, so does the boundary of the land shift also; for there may be a movable freehold. This rule applies whether or not the grant of the land adjoining the seashore is accompanied by a map showing the boundary or contains a parcels clause stating the area of the land and whether or not the original boundary can be identified, but a fixed boundary may result if clear words and an intention to do so are shown in the conveyance.

There are a number of authorities on this subject over the years. The first readily available is *Attorney-General v Chambers* [1843-60] All ER Rep 559 (CA), where it was stated by Lord Chelmsford LC:

> "The law is stated very succinctly by Blackstone, vol 2, p 261, in these words:
>
> > "And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth so as in time to make terra firma, or by dereliction, as when the sea

> shrinks back below the usual water-mark - in these cases the law is held to be that, if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimus non curat lex; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King, for the King is lord of the sea."

.....

As Lord Abinger said in *Re Hull and Selby Rail Co* (1839) 5 M & W 327:

> "The principle as to gradual accretion is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property."

It must always be borne in mind that the owner of land does not derive benefit alone, but may suffer loss from the operation of this rule, for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore."

It is clear from these statements noted in *Chambers*, both by Blackstone in relation to 'the breaking in of the sea', and by Lord Chancellor Chelmsford in relation to the sea gradually stealing upon the land, that if erosion occurs the land holder may lose his property to the proprietor of the seashore.

A Privy Council case from Fiji is referred to in Halsbury, *Smart & Co v Suva Town Board* [1893] AC 301 (PC), but it contains no reference to authorities and only the following passage of passing relevance:

> "Bearing in mind the almost universally variable character of such a boundary as that described, viz, by the sea-coast from a point on the coast at high-water mark to another point on the coast at high-water mark, (both points being themselves necessarily liable to obliteration, either by accretion or encroachment of the sea or other causes, and the intermediate line of coast being in its nature alterable from similar causes), it appears to their Lordships that it cannot have been the intention of the proclamation [*of the Suva town limits*] to create a boundary which should have the effect of requiring a fresh proclamation to bring within the town any land which from time to time might from any cause become within the continuous high-water line on the seaward side."

In *Attorney-General (Southern Nigeria) v J Holt & Co (Liverpool) Ltd* [1914-15] All ER Rep 444 (PC), at 449-451, which traced the law on accretions to and erosion of the foreshore back to the Roman Emperor Justinian, it was stated in the Privy Council in London by Lord Shaw of Dunfermline:

> "On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown that the foreshore upon the line of inroad had de facto been transferred to the Crown as owners of the sea and its bed within territorial limits, and of foreshore, even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles. Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel and the like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land, notwithstanding the measurement in square yards or feet which the title contained. The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that

> lands which, although of specific measurement in the title deeds, were de facto fronted and bounded by the sea, were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a stretch of land, it might be yards, feet, or inches, between, the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into hinterland, would be followed by grotesque and wellnigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage."
> (p 449-450)

The true reason for the principle of law in regard to foreshores is the same reason as the principle in regard to river banks, ie, that it is founded upon security and general convenience.

In *Re Hull and Selby Rail Co* (1839) 5 M & W 327 Lord Abinger CB, referring to *Lord Yarborough's Case* (1824) 3 B & C 91, said:

> "The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property."

Re Hull and Selby Rail Co is important not only for the opinions of Lord Abinger and Alderson B, but for the fact of its acceptance of this principle of. the law (settled as between subject and subject) to the relations between the subject and the Crown. Lord Abinger said (5 M & W at p 332):

> "In all cases of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added; and vice versa."

He repeats in different words his main proposition:

> "No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property."

Alderson B, dwelt specially upon the double-sided operation of the rule. He said (ibid, at pp 332, 333):

> "I think the question is precisely the same, whether the claim is made against the Crown or the Crown's grantee. Suppose the Crown, being the owner of the foreshore - that is, the space between high and low water-mark - grants the adjoining soil to an individual, and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible, in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question."

In *A-G v Chambers* (1859) 4 De G & J 55; [1843-60] All ER Rep 559 (CA), at 564, Lord Chelmsford refers to the double-sided operation of the rule in this way (4 De G & J at p 68) [*as quoted above*]:

> "It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore."

As to the nature of the accretion, it must be, as already mentioned, so gradual as in a practical sense to be imperceptible in its progress. In *R v Lord Yarborough*, Abbott CJ, said (3 B & C at p 107):

> "Considering the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as

> expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time."
>
> This statement of the principle – namely, that the accretion is to be something which is imperceptible in the sense of not being observed in its actual progress - -goes no further than the words of Justinian [*quoted at p 450*]."
> (p 451)

Then in *Brighton & Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch 372 Romer J found that the general law of accretion applies to a gradual and imperceptible accretion to land abutting upon the foreshore, brought about by the operations of nature, even though it has been unintentionally assisted by, or would not have taken place without, the erection of groynes for the purpose of protecting the shore from erosion (p 390) (applying *Chambers* and *Holt*); and that the general law of accretion also applies where the natural accretion, gradual and imperceptible, abuts on land of which the former boundary was well known and readily ascertainable. In the course of the decision Romer J stated:

> "The reason given by Blackstone for this rule of law is not generally accepted as being the true one. But the rule itself is settled beyond all question by numerous authorities, of which it is sufficient to mention *Rex v Lord Yarborough* and *Attorney-General v Chambers*, where Lord Chelmsford refers to it as the well known rule of law as to the right of land gained from the sea."
> (p 381-2)

In the New Zealand case of *Humphrey v Burrell* [1951] NZLR 262 (SC & CA), at 267, Glesson J, who was upheld on appeal, said in relation to accretions of land, for which the law is the same as for erosions, and which concerned a river, but the legal principles are the same:

> "The question is whether this considerable body of land, just under 11 acres in area, is an accretion - that is, whether it has accresced or accreted to defendant's holding. The application of the rule of law which adds to the ownership of riparian lands the property of the soil *ad medium filum is* not interfered with on account of a specific or scheduled measurement of the land, a delineation on a plan, which measurement, delineation, or colouring does not in fact include any part of the bed of the river: *Attorney-General of Southern Nigeria v John Holt and Co (Liverpool) Ltd* [1915] AC 599, at 612 and *R v Joyce* (1905) 25 NZLR 78. It applies to land under the Land Transfer Act, 1915: *Auty v Thompson* (1903) 5 GLR 541, at 543 and *District Land Registrar of Wellington v Snow* (1909) 29 NZLR 865.
>
> What constitutes an accretion has received judicial consideration in many cases, the effect of which may be summarized as being that accretion denotes the increase which land bordering on a river undergoes through the silting-up of soil, sand, or other substance, or the permanent retiral of the water. It is necessary that it should have been brought about by a process so slow and gradual as to be in a practical sense imperceptible, by which is meant that the addition cannot be observed in its actual progress from moment to moment or from hour to hour, although after a certain period it may be possible to observe that there has been a fresh addition to the bank or border of the stream. In *Attorney-General of Southern Nigeria v John Holt and Co (Liverpool) Ltd* [1915] AC 599, Lord Shaw of Dunfermline stated the essential condition of the operation of the rule to be "that the accretion should be natural, and should be slow and gradual - so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs" *(*ibid, 613). It is necessary, therefore, that the increase should have resulted from the action of the water in the ordinary course of the operation of nature, and not from some unusual or unnatural action by which a considerable quantity of soil is suddenly severed from the land of one man and deposited on, or next to, the land of another."

In another case in the Privy Council in London, *Government of the State of Penang v Beng Hong Oon* [1972] AC 425; [1971] 3 All ER 1163 (PC), more was said by Lord Cross in relation to how the boundary is described, and it was found that there was no sufficient ground for attributing to the words in the indenture 'bounded on the west by the 'sea beach' any meaning other than their prima facie meaning in a legal document, namely, 'bounded on the west by the line of medium high tide':

> "It is, of course, well settled that if the boundary of land conveyed is the line of medium high tide the mere fact that the acreage of the land conveyed is given and that the position of the line of the medium high tide at the date of the conveyance can be established - whether or not it is delineated on a plan - will not prevent land which subsequently becomes dry land through the gradual and imperceptible recession of the sea from being added to the land conveyed (see *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd*). But what the defendants say here is that the wording of the conveyance and the plan show that the western boundary was not a fluctuating boundary along the line of medium high tide but a fixed boundary along the line on the plan. If the boundary had been intended to be simply the line of medium high tide there would - it is argued - have been no need to draw any western boundary on the plan. ...
>
> ... and it is, their Lordships think, most unlikely that the Crown was intending to retain any land between the land conveyed and the foreshore."
> (p 1171)

In *Baxendale v Instow Parish Council* [1981] 2 All ER 620 (ChD) (referred to in *Southern Theosophy* below) the respected property lawyer Sir Robert Megarry V-C found that there was no rule of law that a grant of foreshore conveyed only a movable piece of land, namely the foreshore as it was from time to time, since a conveyance of foreshore was capable of conveying either the foreshore as it was from time to time or a fixed piece of land consisting of the foreshore as it was at the time of the conveyance; and although there might be a presumption that a conveyance of foreshore was intended to convey only the foreshore as it was from time to time, what was in fact conveyed by a particular grant depended on the true construction of that grant. In his judgment he said:

> "Another instance of movable freeholds, and one that is very much in point in this case, may arise on a grant of foreshore; for such a grant may convey an estate in the foreshore in whatever position it is from time to time. If the sea imperceptibly recedes, the foreshore recedes with it, and so the grantee's land moves too; if the sea encroaches, the foreshore that has been granted moves inland. This has to be considered in relation to the law of accretion and diluvion. Apart from any grant of the foreshore, if there is diluvion the movement of the foreshore appears to divest the frontager of some of his land; for what was his dry land becomes part of the new foreshore, and so belongs to the owner of the foreshore, usually the Crown: see *Re Hull and Selby Railway* (1839) 5 M & W 327,333, 151 ER 139,141. This is justified as being a form of rough justice for the frontager: he should not complain of losing land since he would have gained land if instead the sea had retreated."

In probably the major case in this field in recent years, in *Southern Theosophy v South Australia* [1982] 1 All ER 283 (PC) (another river case, but the legal principles remain the same) Lord Wilberforce said in the Privy Council in London:

> "Before examining the authorities, which are copious and in their result clear, their Lordships find it advisable to consider briefly the nature of the doctrine of accretion. This is a doctrine which gives recognition to the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water. Where these changes are gradual and imperceptible (a phrase considered further below), the law considers the title to the land as applicable to the land as it may be so changed from time to time. This may be said to be based on grounds of convenience and fairness.

> Except in cases where a substantial and recognisable change in boundary has suddenly taken place (to which the doctrine of accretion does not apply), it is manifestly convenient to continue to regard the boundary between land and water as being where it is from day to day or year to year. To do so is also fair. If part of an owner's land is taken from him by erosion, or diluvion (ie advance of the water) it would be most inconvenient to regard the boundary as extending into the water; the landowner is treated as losing a portion of his land. So, if an addition is made to the land from what was previously water, it is only fair that the landowner's title should extend to it. The doctrine of accretion, in other words, is one which arises from the nature of land ownership from, in fact, the long-term ownership of property inherently subject to gradual processes of change. When land is conveyed, it is conveyed subject to and with the benefit of such subtractions and additions (within the limits of the doctrine) as may be take place over the years. It may of course be excluded in any particular case, if such is the intention of the parties. But if a rule so firmly founded in justice and convenience is to be excluded, it is to be expected that the intention to do so should be plainly shown.
>
> The authorities have given recognition to this principle. They have firmly laid down that where land is granted with a water boundary, the title of the grantee extends to that land as added to or detracted from by accretion, or diluvion, and that this is so whether or not the grant is accompanied by a map showing the boundary, or contains a parcels clause stating the area of the land, and whether or not the original boundary can be identified."
> (p 287-8)
>
> "In *Government of the State of Penang v Beng Hong Oon* [1971] 3 All ER 163; [1972] AC 425 it was argued, as here, that the boundary was not a fluctuating boundary along the line of high tide but a fixed one along the line on the plan. But this argument was rejected: it was most unlikely, so their Lordships held, that the Crown was intending to retain any land between the land conveyed and the foreshore."
> (p 289)

Finally that decision was considered in the High Court of Australia in *Hazlett v Presnell* [1981-2] 149 CLR 107 (HC), where the Court drew attention to the international recognition of the law on this subject (albeit it was dealing with the line of a river, for which the principles are the same) and stated:

> "At common law, where land is bounded by a navigable river and the rule ad medium filum does not apply, the title to the land is applicable to the land as it may be from time to time changed by the gradual and imperceptible processes of erosion and accretion. This is so even if there be the means of identifying the original bounds of the property (see, generally, *Williams v Booth*; *Southern Centre of Theosephy Inc v South Australia*). This distinction between accretionary and avulsive changes has been recognized in international law (see Hyde, International Rivers, (1918) p 29; Bouchez, "The Fixing of Boundaries in International Boundary Rivers", International and Comparative Law Quarterly, vol 12 (1963), p 789, at pp 799 ff; Oppenheim's International Law (ed Lauterpacht), 8th ed (1955), vol 1, p 533; O'Connell, Inter-national Law, 2nd ed (1970), vol 1, pp 428-430) and accepted by the United States Supreme Court as applicable to the case where a river constitutes the boundary between two States of the Union. Thus in *Arkansas v Tennessee* ((1970) 397 US 88,89-90), a case concerned with avulsive changes to the Mississippi River where the state line was the thalweg (the middle of the main or commonly used navigable channel), the Supreme Court repeated the basic rule it had laid down in a previous case concerned with similar avulsive changes:
>
> > "This is a classic example of the situation referred to in an earlier case between these

> States, *Arkansas v Tennessee* (1918) 246 US 158 at 173 where we said, 'It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the bound-ary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel'".
>
> There is nothing in the subject matter or context of the provisions of the Imperial Acts of 1850 and 1855 fixing the New South Wales and Victorian boundary which would justify the conclusion that the ordinary principles of common law as to changes by erosion and accretion were not applicable so as to result in the boundary changing in accordance with such changes to the course or whole watercourse of the river or, more particularly, to the south bank. Nor is the application of those principles excluded by practical considerations. The requirement that erosion and accretion must be gradual and imperceptible (see *Southern Centre of Theosophy Case*) excludes, from those processes, sudden variations in the boundary or dramatic alterations in the status, rights or duties of individuals. Indeed, acceptance of the ordinary principles as to erosion and accretion is actually in the interests of certainty since the effects of gradual and imperceptible erosion and accretion along the banks of a great river will inevitably be incapable of precise determination. We respectfully agree with Stephen J (in *Ward's Case* (1980) 142 CLR 308) that, upon the proper construction of the statutory provisions, the ordinary common law principles of erosion and accretion are applicable. Different considerations and principles apply in respect of the more sudden and observable changes which result from avulsion."
> (p 116-7)

Although the foreshore as defined in Tonga includes an additional 15.24 m strip above the high-water mark (as distinct from the definition in English law of the land between high- and low-water marks), the principles to be derived from these cases must still be applicable in Tonga.

Limitation

Section 170 of the Land Act provides:

> Limitation of action.
> 170. No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.

There have been many cases over the years on the application of that section, which has been strictly applied when the limitation period has expired, and even where the grant of an allotment may at one time have been open to challenge, after the limitation period there is no right of action: *Lokotui v Fifita* [1992] TLR 18 (CA) at 20.

Even if a defendant's occupation of the land was unlawful, with no deeds or documents supported the occupancy, and the applicant holds registered title, that is all

irrelevant if the occupation of the land is adverse for over 10 years before it is challenged: *Tu'ifua v Tui & Ors* [1974-80] TLR 99 (PC) at 100.

Allotment exceeding statutory size

Under section 49 of the Land Act:

> Grant in excess of statutory size void.
> 49. Subject to the provision of sections 46 and 47 hereof it shall be unlawful to grant an allotment in excess of the areas specified in section 7 and any such grant made after the coming into force of this Act shall be null and void:
>
> Provided that to facilitate survey of the prescribed areas a tax allotment and a town allotment may be exceeded by areas of not more than 505.9 square metres and 12.6 square metres respectively.
> *(Added by Act 17 of 1930; Amended by Acts 12 of 1959, 11 of 1980 and 21 of 1984.)*

And under section 91 of the Land Act, referred to by the Plaintiffs' Counsel:

> Leases to occupiers of land in excess of statutory area.
> 91. (1) Whenever it is found that any person is holding land as a tax allotment which is of greater area than the statutory area, the Minister may give 21 days' notice in writing to such person informing him that he intends to subdivide such land and to grant from out of the same to such person a tax allotment of the statutory area.
>
> (2) In any such case it shall be lawful for the person holding land in excess of a tax allotment upon which improvements have been made over a greater area than the statutory area for allotments to receive a lease for all or any part of such improved portion.
> *(Substituted by Act 9 of 1929.)*

However in *Fifita v Minister of Lands & Fakafanua* [1974-80] Tonga LR 1 (PC) it was held that statutes should be interpreted so as to avoid manifest injustice or unreasonableness in a way which is consistent with the purpose of the statute; and accordingly section 49 should be interpreted as rendering void only the area of a grant which was in excess of the area permitted by section 7 of the Land Act, and not the entire grant.

Grounds of decision

Extent of foreshore

The basic decision in this case has to be made in terms of Clause 109 of the Constitution, the supreme law of Tonga, backed up by the long-standing and internationally recognised law on accretion and erosion by the sea. Under all that law it is clear, as demonstrated above, that the physical situation of the foreshore may vary from time to time if gradual or imperceptible accretion or erosion occurs on the foreshore.

The legal position is well explained by Lord Wilberforce in the *Southern Theosophy* case. The legal doctrine of accretion and erosion gives recognition to the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water. Where these changes are gradual and imperceptible, the law considers the title to the land as applicable to the land as it may be so changed from time to time, based on grounds of convenience and fairness. The doctrine thus arises from the nature of land ownership from the long-term ownership of property inherently subject to gradual processes of change. When land is conveyed, it is conveyed subject to and with the benefit of such subtractions and additions (within the limits of the doctrine) as may take place over the years. If part of an owner's land is taken from him by erosion, it would be most inconvenient to regard the boundary as extending into the water; the landowner is treated as losing a portion of his land.

In this case, from the 1950s when the re-survey of the 1st Plaintiff's tax allotment was done, to the 1990s when the Minister granted the foreshore permit to the 1st and 3rd Defendants, it was clear that there must have been gradual erosion of the beach. Although there was evidence that that may have been partially caused by people removing sand from the beach - ie the intervention of man rather than nature - there was no evidence at

all that the change in the foreshore was sudden or was done with the intention of the Defendants or the Government of gaining land from the 1st Plaintiff's tax allotment. Even if sand was taken from Hinakauea Beach over the years, the inference from the evidence of Mr Lo'amanu was that the process of erosion of the beach was slow, gradual and imperceptible; and there was no evidence that a considerable quantity was taken suddenly from the beach.

It cannot have been intended that Clause 109 of the Constitution was only meant to apply to beach frontages as they were at the time of the adoption of the Constitution in 1875. The only sensible interpretation of that clause - considered with the recognised law of property on accretion and erosion - is that it is to apply to the foreshore as it is from time to time.

Under that interpretation the foreshore today extends 15.24 m above the high water mark and so must take in part of the 1st Plaintiff's tax allotment.

Even though the boundary of the tax allotment was marked out with pegs at the time of the re-survey, that cannot take priority over the provision of the Constitution about beach frontage. While there is no description of the tax allotment in the Land Register other than by reference to the plan, it is de facto bounded by the beach, so it is clear on the authority of Halsbury, derived from *Holt*, *Humphrey* and *Southern Theosophy*, that a map or other identification of the original boundary does not stop the law of accretion and erosion operating. As in the *Penang* case, in this case it is most unlikely that when the tax allotment was being granted from the Royal Estate there was any intention to retain any land between the land conveyed and the foreshore. There is nothing special on the plan in the Appendix to indicate that the true construction of the grant of the tax allotment should be that there were clear words or an intention to create a fixed boundary in these particular circumstances (on which see *Baxendale* and *Southern Theosophy*).

Compensation for erosion

In submissions the Plaintiff's Counsel also raised the issue of compensation from the Crown under section 143 of the Land Act or Clause 18 of the Constitution if part of the 1st Plaintiff's allotment has become part of the foreshore. However the land in question would not appear to be land resumed by Crown under Part IX of Land Act (Land for public purposes) in terms of section 143, and section 138 does not appear to be applicable. In any event from the cases referred to above, in particular *Chambers*, *Holt* and *Southern Theosophy*, it would not appear that compensation would be payable as a result of the foreshore moving due to erosion. But if that issue is to be pursued, the Crown would have to be formally joined as a Defendant, or it can be dealt with in a separate action, and it is not appropriate for the Court to deal with it in this decision.

Limitation

The issue of limitation under section 170 of the Land Act was also raised for the Defendants. The evidence showed that the 1st and 3rd Defendants had been in adverse possession of the relevant parts of the land in question which are within the 1st Plaintiff's tax allotment since 1994, but the 1st Plaintiff had not challenged that until this action was raised on 17 November 2005, ie over 10 years after the adverse possession started. Even if that had been unlawful occupation of the land by the 1st and 3rd Defendants, with no deeds or documents supporting the occupancy, it was still an adverse possession and so the 1st Plaintiff cannot now challenge it. But in fact the 1st and 3rd Defendants possession was supported by a document, a permit from the Governor on behalf of the Government, the proprietors of the foreshore, giving the 1st and 3rd Defendants some legitimacy in their occupation of the land, albeit not as strong a title as if they held a formal lease. Even if the Governor's permit had lapsed, as claimed by the Plaintiffs, due to the tourist accommodation licence being put on hold, that would not matter, as they have been in adverse possession during the relevant period of 10 years.

It is quite clear that section 170 is not limited to claims eg by competing allotment holders, but prohibits any action outwith 10 years. Whatever the status of the 1st and 3rd Defendants possession of the land, it cannot now be challenged by the 1st Plaintiff because of the 1st and 3rd Defendants' adverse possession of that piece of his tax allotment for over 10 years. This action was not brought within 10 years of that date in 1994, and so is also barred by section 170 of the Land Act.

Section 170 is very clear that the date from which the limitation period starts to run is the date from which the right to bring the action first accrued, and does not depend on whether or not the 1st Plaintiff had actual knowledge of the adverse possession, although on the facts there was a clear inference that he and his family must have had such

knowledge: if, as submitted for the Plaintiffs, he did not attempt to stop the 1st and 3rd Defendants' activities at the time because he thought they were being carried out on Government land on the foreshore, that tends to support the Defendants' case, rather than contradict it.

Excess over statutory size

Although the 1st Plaintiff's tax allotment clearly exceeds the statutory size, it is not clear what the effect of the movement of the foreshore will be on it in terms of area, and whether the reduced allotment (after the southern boundary has been re-surveyed, as I order below) will still exceed the statutory size. As there are ample grounds, as referred to above, to enable me to decide this case, it is thus not necessary for me to deal with the submission for the Defendants that the grant of the allotment is void as to the excess, particularly as no particular area of excess has been identified for such reduction.

Equity

It is also not necessary for me to consider the submissions for the Defendant in relation to equity in order to decide this claim.

Conclusions

Therefore, for all these reasons, this claim by the 1st Plaintiff, in so far as it relates to the status of the land in question, and includes the claim for eviction of the Defendants from the land in question, cannot succeed and it is dismissed. The remainder of the Plaintiffs' claims, and the Defendants counter-claims if allowed out of time, all as relating to the events of November-December 2005, can be heard at a future Vava'u circuit.

To finalise the matter I shall order that within 3 months of this date (a) the Minister of Lands is to re-survey the 1st Plaintiff's allotment so that the southern boundary (next to the beach) follows the line of the foreshore (ie 15.24 metres above the high-water mark); and (b) in terms of section 149(1)(a) of the Land Act, the Minister is then to redefine the area and boundaries of the 1st Plaintiff's tax allotment at Hinakauea Beach and to amend the grant of that tax allotment accordingly in the Land Register.

Once that has been done, I order that within a further 3 months (c) the Plaintiffs are to remove, under the guidance of the Defendants, all the sand, soil, stones, bricks and rubble deposited by them on what is now the part of the foreshore occupied by the 1st and 3rd Defendants; and (d) the 1st and 3rd Defendants are to remove any buildings or structures remaining on the newly re-surveyed area of the 1st Plaintiff's tax allotment.

I cannot at this stage tell where the re-defined southern boundary will lie in relation to the road or track which is the boundary that both sides agreed to observe when I varied the injunction on 23 December 2005, but if problems arise they can be raised with the Court as follows:

> If any difficulties occur during those processes, any of the parties are free to return to the Court for further orders.
> To avoid any further problems between the parties, the terms of the injunction of 25 November 2005, as varied on 23 December 2005, will remain in force until all those processes are complete and ultimately may only be lifted by this Court, but may be modified on the application of any party, in particular if appropriate following the re-survey I have ordered above.

Costs

There is no reason why costs should not follow the event and I award the costs of this hearing as agreed or taxed to the 1st and 3rd Defendants against the 1st Plaintiff.

Appendix: Re-survey plan of 1st Plaintiff's tax allotment from 1950s.

Takataka anor v Hurrell anors

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 6/2005

8 August 2006; 16 August 2006

Car ownership – loan – respondent acted in good faith – appeal dismissed

The facts are set out in full at *Takataka anor v Hurrell anors* [2005] Tonga LR 359 (CA). The Supreme Court dismissed the claim and found that there was no valid cause of action against Hurrell and that none of the actions of the third or fourth respondents were unlawful. The Court held that the third respondent had acted at all times in good faith. It also held that there was no adequate proof of the value of the vehicle at any time after the agreement with Prema and that the appellants had not properly proved any of the damages claimed. The Court was concerned with the position of Taufalele and set aside the judgment against him. It ordered that Takataka was entitled to possession of the car. The appellants appealed.

Held:

1. The Court accepted that the third respondent acted in good faith. He was faced with competing claims to the vehicle. He did what he thought on reasonable grounds, was correct in the circumstances and could not be criticised for that. There was apparently some confusion caused by an incomplete record of changes to ownership but again there could be no duty to the appellant arising from this fact. In any case the appellants did not establish that any loss arose over the two week period when Taufalele regained possession of the car.
2. The evidence of loss produced by the appellant was inadequate. The only evidence of the value of the car at the time of the transaction between Hurrell and Taufalele was what was paid - $400. There was no evidence of its value at the time it was seized for the second time by the Police other than the appellants' estimate that it was then worth no more than $1,000.
3. In respect of the other heads of damage claimed, the court was not persuaded that the Judge was wrong in his conclusion that they were not proven. The loan to Prema could only be recovered from Prema.
4. There was one respect in which the Court concluded that the appellants were entitled to succeed. Counsel informed the Court that he was given no opportunity to present argument on the question of whether the judgment against Taufalele should be set aside. He should have had that opportunity and accordingly the Court restored that judgment. Therefore if the appellants wished to take the matter further they would have to comply with the directions in the order made by Ford J on 15th July 2004. The ultimate outcome may appear inevitable but that was a matter for the appellants and their counsel.
5. In all other respects the appeal was dismissed. The first, third and fourth respondents were entitled to costs to be taxed if not agreed.

Counsel for appellant : Mr Kengike
Counsel for first respondent : Mrs Vaihu
Counsel for third and fourth respondents : Mr Kefu
No appearance on behalf of second respondent

Judgment

[1] This is an appeal against a judgment of Thomas J dismissing a claim by the appellants for damages arising from the alleged actions of the respondents in relation to a Nissan motor vehicle owned by the second appellant (Lita).

[2] The vehicle was originally owned by one Ivan Prema who purchased it in 1999. In May 2000 Prema borrowed $2,000 from Lita to be repaid in 3 months. It was agreed that if the loan was not repaid the vehicle would become the property of Lita. To secure this arrangement the vehicle was transferred into Lita's name. The money was not repaid, however the appellants made no enquiries regarding the car until late in 2001.

[3] In the meantime Prema had rented a property from the first respondent (Hurrell). He vacated when he could not pay the rent leaving owing about $600. He left the vehicle, which was by this time in a damaged condition, in Hurrell's garage. It sat in the garage for about 6 months when Hurrell sold it to the second respondent (Taufalele) for $400.00. By this time Mr Prema had gone to Fiji. He had told Hurrell to sell parts of the car to recover the rent he owed. Instead, Hurrell sold the vehicle to Taufalele. There is no evidence of Mr Prema having ever returned to Tonga or taking any further interest in the vehicle.

[4] When he could not find the car the first appellant (Takataka) contacted the third respondent Superintendent Taulahi. Superintendent Taulahi was shown the change of ownership form and seized the car from Taufalele. A short time later Taufalele persuaded the Police to return the car to him. He had it for about two weeks during which time it seems he may have removed same parts he had added to the vehicle. Takataka persuaded the Police that he was entitled to the car and it was seized again. Takataka then inspected the car – it seems for the first time since his dealings with Mr Prema – and was so disappointed with its condition that he refused to take possession of it and commenced these proceedings.

[5] The statement of claim pleaded that the sale from Hurrell to Taufalele was unlawful, that the action of the third respondent in releasing the vehicle to Taufalele after it had been originally seized was unlawful and that the fourth respondent was vicariously liable for the actions of the third respondent. The appellants claimed losses totalling some $34,000 under the heads of loss of car, damages, loss of benefit and unlawful seizure of the car. They sought damages and an order for possession of the car.

[6] Taufalele took no step in the proceeding and judgment by default was entered against him. Judgment was not entered for any monetary sum, rather a directions hearing was set to provide a date for formal proof of damages. The appellants have taken no step in that regard.

[7] Justice Thomas dismissed the claim finding that there was no valid cause of action against Hurrell and that none of the actions of the third or fourth respondents were unlawful. He held that the third respondent had acted at all times in good faith. He also held that there was no adequate proof of the value of the vehicle at any time after the agreement with Prema and that the appellants had not properly proved any of the damages claimed. The judge expressed himself as concerned with the position of Taufalele and set aside the judgment against him. He ordered that Takataka was entitled to possession of the car.

[8] This appeal followed. The appellants also made an application to adduce further evidence. That application was heard by this Court last year and was dismissed.

[9] We have now heard full argument on the substantive appeal.

[10] Mr Kengike repeated the arguments made in the Supreme Court. Essentially his claim appears to be that Hurrell and Taufalele had a duty to the appellants to check on the ownership of the vehicle before selling it. We cannot accept that any such duty existed. There was no reason for Hurrell to suspect that Prema was not the owner of the car. Prema had obviously abandoned it and had told Hurrell that he could sell parts of it to meet the arrears of rent. Any obligation that either Hurrell or Taufalele had to register a change of ownership cannot translate into an obligation to the appellants.

[11] Assuming that Lita was entitled to immediate possession of the vehicle at the time of the transaction between Hurrell and Taufalele the question arises as to whether Hurrell has liability under the tort of conversion. He of course had no intention of denying Lita's right, he being unaware of it, but even if despite that, liability in conversion exists we consider, as appears below, that as no loss has been proved the issue is moot.

[12] As to the third and fourth respondents we accept, as did Justice Thomas, that the third respondent acted in good faith. He was faced with competing claims to the vehicle. He did what he thought on reasonable grounds, was correct in the circumstances and cannot be criticised for that. There was apparently some confusion caused by an incomplete record

of changes to ownership but again there can be no duty to the appellant arising from this fact. In any case the appellants did not establish that any loss arose over the two week period when Taufalele regained possession of the car.

[13] Additionally the evidence of loss produced by the appellant was inadequate. The only evidence of the value of the car at the time of the transaction between Hurrell and Taufalele was what was paid - $400. There is no evidence of its value at the time it was seized for the second time by the Police other than the appellants' estimate that it was then worth no more than $1,000.00.

[14] Subsequent to the judgment against him in the Supreme Court Takataka took possession of the vehicle. His counsel advised us from the bar that it was then worthless but there is no evidence of that and certainly that was not the evidence before the Supreme Court.

[15] In respect of the other heads of damage claimed we are not persuaded that Justice Thomas was wrong in his conclusion that they were not proven. We agree with him that the loan to Prema can only be recovered from Prema.

[16] There is one respect in which we have concluded that the appellants are entitled to succeed. Counsel informed the Court that he was given no opportunity to present argument on the question of whether the judgment against Taufalele should be set aside. He should have had that opportunity and accordingly we restore that judgment. This means that if the appellants wish to take the matter further they will have to comply with the directions in the order made by Ford J on 15th July 2004. The ultimate outcome may appear inevitable but that is a matter for the appellants and their counsel.

[17] In all other respects the appeal is dismissed. The first, third and fourth respondents are entitled to costs to be taxed if not agreed.

Tu'ivai v R

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 01/2006

9 and 10 August 2006; 16 August 2006

Criminal law – appeal against conviction and sentence – no grounds made out – appeal dismissed

The facts are set out in the Supreme Court decision at *R v Tu'ivai* [2006] Tonga LR 254. The Supreme Court convicted the appellant of an attempt to evade import duties in relation to 600 cartons of Bounty Rum. He was fined $20,000. He appealed against his conviction and sentence. The grounds of the appeal were: misdirection of the jury by the trial judge on questions of fact and law; misdirection against the weight of evidence; the introduction by the Crown of a new count in the indictment without re-arraignment of the appellant; and the fine imposed was excessive.

Held:

1. The proper test as to whether the jury was misdirected was not whether the Judge usurped the jury's function but whether he commented in such a way as to make the summing up fundamentally unbalanced; if he did, repetition of the standard direction that the facts were for the jury and that an expression of opinion by the judge was to be ignored if the jury disagree with it, would not remedy the unfairness.
2. The Court was satisfied that, given the strength of the evidence against the appellant, the Judge was entitled to sum up as he did. Overall the summing up was balanced and in particular the appellant's defence was properly put to the jury. The Court was satisfied that the summing up did not deprive the appellant of a fair trial.
3. The appellant did not make out any of the grounds of his appeal against conviction.
4. As to the appeal against sentence, the Court found that the Judge's approach was entirely appropriate. The appeal against sentence was dismissed.

Cases considered:
Ibrahim v R [1914] AC 599
Mears v R (1993) 97 Cr. App.R. 239 PC
R v Cohen and Bateman 2 Cr.App.R. 197,208

Statutes considered:
Criminal Offences Act (Cap 18)
Customs and Excise Act (Cap 67)

Appellant in person
Counsel for the Crown : Ms Simiki

Judgment

[1] In January of this year the appellant was convicted of an attempt to evade import duties in relation to 600 cartons of Bounty Rum. He was later fined $20,000. He appeals against his conviction and sentence.

[2] The grounds of Mr Tu'ivai's appeal may be summarized as follows:

(1) Misdirection of the jury by the trial judge on questions of fact and law.

(2) Misdirection against the weight of evidence.
(3) The introduction by the Crown of a new count in the indictment without re-arraignment of the appellant.
(4) The fine imposed was excessive.

The Indictment

[3] Mr Tu'ivai's principal submissions related to the indictment in respect of which he was brought to trial. He was arraigned in 2005 on an indictment which contained two counts under *The Criminal Offences Act* - knowingly dealing with forged documents and conspiracy to commit bribery of a government servant.

[4] We accept as correct a chronology of events prepared by Ms Simiki for the Crown as to changes later made to the indictment. In early January 2006 Ms Simiki contacted Mr Clive Edwards who represented Mr Tu'ivai at trial to advise him that the Crown would be making an application to amend the indictment to include two counts of conspiracy to bribe a government servant and one count of attempt to evade customs laws. Mr Edwards consented to this proposal.

[5] On the 13th January the Crown filed an amended indictment. Again this was done with the consent of defence counsel. The trial commenced on the 16th January. Prior to its commencement counsel for the appellant and two co-accused together with counsel for the Crown met the Chief Justice in chambers. The Crown applied to amend the indictment, defence counsel consented and the application was granted.

[6] On the 23rd January, Counsel for the Crown applied to the Court to dismiss the counts of conspiracy to commit bribery against the appellant on grounds of insufficient evidence. That application was granted. The Chief Justice summed up to the jury on the 24th January. At that stage the charges remaining were a charge of attempt to evade customs laws against Mr Tu'ivai and a similar charge together with a bribery charge against the Hon. Veikune. Charges against a third accused had been dismissed.

[7] Ultimately the appellant and Hon. Veikune were found guilty of the charges they faced.

[8] Mr Tu'ivai maintained that he did not become aware of the change to the indictment until just before the close of the Crown case. He told us that he discussed the change with Mr Edwards who told him not to be concerned because they had a good defence. We accept that the revised charges were read to the jury in the presence of Mr Tu'ivai. He does not dispute this but says he did not appreciate that changes had been made. We asked him what he would have done differently had he known of the changes earlier. He was unable to think of anything. This is perhaps not surprising because 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 eventually convicted.

The Constitution

[9] Mr Tu'ivai submitted that by virtue of Clause 11 of the Constitution of Tonga he was entitled personally to receive a copy of the amended indictment before the trial commenced.

Clause 11 so far as it is relevant provides:

> *"No one shall be tried or summoned to appear before any court or punished for failing to appear unless he have first received a written indictment (except in cases of impeachment or for small offences within the jurisdiction of the magistrate or for contempt of court while the court is sitting). Such written indictment shall clearly state the offence charged against him and the grounds for the charge ..."*

[10] He also relied upon Clause 13 of the Constitution and s 3 of *The Criminal Offences Act*. We are satisfied that these last two provisions are not relevant in the circumstances. Clause 13 prohibits (subject to certain exceptions) a person bring tried on any charge other than that in the indictment. In this case as will become clear, we are satisfied that Mr Tu'ivai was tried on the charge in the indictment. Section 3 refers to the case where a

person is found guilty of an offence other than that charged. That did not happen in the present case.

[11] We are satisfied too that there has been no breach of clause 11. The clauses of the Constitution (as indeed with all legislation) must be read in context. Clause 11 and those which follow it are designed to ensure that people are tried according to proper procedures which ensure that they have an adequate opportunity to mount a defence to any charge laid against them. This of course requires adequate notice of the nature of that charge. We consider that these requirements are met in a case where an amended indictment is provided to the counsel for an accused. Counsel is much more likely to appreciate the consequences of an amended indictment than an accused person thus ensuring that the purpose of the clause is met. Counsel is of course the agent of the accused.

[12] In this case Mr Edwards had ample notice of the change. He did not think it necessary to seek an adjournment. He obviously considered that the briefing he had had from Mr Tu'ivai was adequate to meet the amended charge. Mr Tu'ivai did not give evidence so no further discussion was needed for that purpose.

The letter from the Collector of Customs

[13] The other major concern of Mr Tu'ivai related to evidence which was called in his defence. That evidence was of a letter written by the Collector of Customs in October 2003 recording an agreement that the rum, the subject of the charge, should be sold to a duty free shop. The submission appeared to be that because the rum was to go to a duty free shop no duty was payable on it and there could be no attempt to evade. It is clear however that the proposal to sell to the duty free shop arose after the events which formed the basis of the charge. Indeed it seems that the letter was an ex post facto attempt to avoid the consequences of the earlier actions.

[14] A further submission put by Mr Tu'ivai was that the Chief Justice was wrong to order the forfeiture of the 600 cartons of rum the subject of the charge. It is correct that he did order forfeiture. However it was unnecessary for him to do so. Forfeiture is an automatic consequence of conviction under s 210(1)(e) of *The Customs and Excise Act*.

The Summing-up

[15] Although not directly raised in his grounds of Appeal Mr Tu'ivai in his written submissions claimed that the Chief Justice had influenced the jury to find him guilty rather than letting them decide freely. We take this to be a complaint concerning the Judge's summing up to the jury.

[16] We have carefully read the summing up. The Judge has fairly reminded the jury of the evidence called by the Crown. He told them that if they accepted that evidence they could infer that Mr Tu'ivai had fraudulently attempted to avoid duty. Although a strong statement we do not consider that it was inappropriate. There are other portions of the summing up where the judge has advised the jury of inferences which can be drawn from the facts. Towards the end of his discussion of the Crown evidence he expressed the belief that the evidence was sufficient for the jury to reach a decision against Mr Tu'ivai. This is a firm opinion but we have concluded it does not go too far.

[17] The proper test is not whether the Judge usurped the jury's function but whether he commented in such a way as to make the summing up fundamentally unbalanced; if he did, repetition of the standard direction that the facts are for the jury and that an expression of opinion by the judge is to be ignored if the jury disagree with it, would not remedy the unfairness – see Archbold 2005 para 7 – 67. As Channell J said in *R v Cohen and Bateman* 2 Cr.App.R. 197,208:

> *"In our view, a judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law. Of course, questions of fact are for the jury and not for the judge, yet the judge has experience on the bearing of evidence, and in dealing with the relevancy of questions of fact, and it is therefore right that the jury should have the assistance of the judge. It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely*

> *confident opinions. The mere finding, therefore, of very confident expressions in the summing up does not show that it is an improper one."*

Cohen and Bateman was decided in 1902. We have considered more recent authority. There are cases where the judge has abandoned the role of judge for that of advocate. We are satisfied that this is not one of those cases. In *Mears v R* (1993) 97 Cr. App.R. 239 PC Lord Lane at p.244 described the task of the Appellate court as being "... to take the summing-up as a whole... and then ask themselves in the words of Lord Sumner in *Ibrahim v R* [1914] AC 599, 615, whether there was:

> *'Something which...deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future. ' "*

We are satisfied that, given the strength of the evidence against Mr Tu'ivai, the Judge was entitled to sum up as he did. Overall we consider the summing up to be balanced and in particular we consider that the appellant's defence was properly put to the jury. We are satisfied that the summing up did not deprive the appellant of a fair trial.

[18] We conclude that the appellant has not made out any of the grounds of his appeal against conviction. We should however comment on some concerns we have had about the wording of the indictment.

[19] The charge against Mr Tu'ivai was brought under s 210(1)(e) of *The Customs and Excise Act* which provides:

> *"(1) Every person who –*
>
> *(e) is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws, and restrictions, of the customs relating to the importation, warehousing, delivery, removal, loading and exportation of goods;*
>
> *shall be guilty of an offence and for each such offence incur a penalty of treble the value of the goods or $200 whichever is greater; and all goods in respect of which any such offence shall be committed shall be forfeited."*

[20] The indictment was (as is customary) in two parts – a statement of offence and particulars of offence.

[21] The statement of offence provided:

> *"Attempt to evade customs laws, contrary to section 210(e) of the Customs and Excise Act"*

[22] The particulars provided:

> *"'Amini Tu'ivai on or about 2003 you knowingly attempted to evade import duties of customs relating to the importation of 600 cartons of Bounty Rum in container TRLU No. 3530660."*

[23] In our view, following the wording of clause (e) the statement of offence should have been worded: "Being knowingly concerned in a fraudulent attempt at evasion of import duties".

[24] When our concerns were raised with Ms Simiki she referred us to para 7-78 of Archbold. She submitted that the test to apply is one of fairness. In this case she submitted that the offence charged is sufficiently spelled out in the combination of the statement and particulars. We accept that submission. We consider that the reference to clause (e) together with the particulars gave sufficient notice to the appellant of the charge against him. He of course made no complaint on this issue himself.

[25] It is correct that the indictment does not include the word "concerned" which was used by the Judge in his description of the offence in summing up. The use of that word potentially broadens the class of person caught by the section. However on the basis of the facts referred to in the summing up we are satisfied that even without the addition of that

word the facts provide an ample basis for Mr Tu'ivai's conviction. The facts all pointed to his direct involvement in the attempt at evasion. We conclude therefore that no unfairness to the appellant has resulted from the wording of the indictment.

[26] For all the above reasons the appeal against conviction is dismissed.

Sentence

[27] The appellant submits that his sentence was excessive. He says that it was unfair when compared with that of his co-offender Hon. Veikune. Hon. Veikune was fined $20,000 on the bribery charge in respect of which he was found guilty but execution was stayed on the customs duty charge. Mr Tu'ivai submits that he should be treated in the same way as Hon. Veikune on that charge. His submission reflects a misunderstanding of the purpose behind the Judges sentencing decisions.

[28] The Chief Justice concluded that Mr Tu'ivai's role in the importing of and the attempt to evade payment of duty on the 600 cartons of Bounty rum was the lead one and that Hon. Veikune played a lesser role. He approached the sentence imposed on Hon. Veikune by considering the totality of his offending and concluded that the $20,000 fine on the bribery charge was sufficient punishment for the whole of his offending. This is an entirely appropriate approach to take. On this basis there can be no question of any lack of parity between the sentences imposed on the two men.

[29] The appeal against sentence is dismissed.

Li v R

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 02/2006

10 and 11 August 2006; 16 August 2006

Criminal law – appeal against conviction and sentence – no grounds made out – appeal dismissed

The facts are set out in the Supreme Court decision at *R v Li* [2006] Tonga LR 90. The appellant was convicted on 17 March 2006 of four counts of attempting to have carnal knowledge of a girl under the age of 12 years. The appellant was sentenced on 7 April 2006 to six years imprisonment on each count of attempting to have carnal knowledge of the girl and four years imprisonment on each count of indecent assault on a child but the Court ordered that all sentences were concurrent and were to be backdated to 17 March 2006. The appellant appealed against conviction and sentence.

Held:

1. When an accused was charged with an offence constituted by certain conduct, it was open to a judge or jury to convict a person of attempting to commit the offence where complete commission of the offence charged was not proved.
2. The role of the appellate Court was to consider whether an error was made on the part of the trial Judge. Only if error was demonstrated would the Court consider what was an appropriate sentence. The appellant did not demonstrate error on the part of the trial Judge. The sentences imposed in the Supreme Court were not excessive and all relevant considerations were taken into account.
3. The appellant did not establish any ground of appeal. The appeal was dismissed.

Cases considered:

Holland v R (1993) 117 ALR 193
Subramaniam v Public Prosecutor [1956] 1 WLR 965

Statutes considered:

Constitution of Tonga Act (Cap 2)
Criminal Offences Act *(*Cap 18)
Evidence Act (Cap 15)
Interpretation Act (Cap 1)
Laws Consolidation Act 1988
Magistrate Courts Act (Cap 11)

Rules considered:

Court of Appeal Rules 1990

Counsel for appellant : Mr Veikoso
Counsel for respondent : Ms Simiki

Judgment

Introduction

[1] This is an appeal by Kaluseti Li against conviction and sentence. The appellant was convicted on 17 March 2006 of four counts of attempting to have carnal knowledge of a girl under the age of 12 years (s 121 of *The Criminal Offences Act* (Cap 18)) and four

counts of indecent assault on a child under the age of 12 years (s 125(1) of *The Criminal Offences Act*). These convictions arose from a trial conducted by a judge alone: see s 12 of *The Magistrate Courts Act* (Cap 11). The trial was conducted by Chief Justice Webster who sentenced the appellant on 7 April 2006 to six years imprisonment on each count of attempting to have carnal knowledge of the girl and four years imprisonment on each count of indecent assault on a child but ordered that all sentences were concurrent and were to be backdated to 17 March 2006.

[2] At the trial, ten prosecution witnesses gave evidence. They included the complainant (then aged 13). The appellant called three witnesses and gave evidence himself. A record of interview was admitted into evidence though its tender was challenged and was the subject of a voir dire.

[3] The essential facts found by the trial judge (resulting from his acceptance of the complainant's account of events and having regard to other evidence) were that on Friday 3, Monday 6, Tuesday 7 and Wednesday 8 September 2004, the complainant, then aged 11, was in the appellant's house. There he took off her clothes, kissed her, draped her legs over his shoulders, licked her vagina and "put his thing to her thing" and that sometimes a white liquid came out of the appellant's penis and the appellant used the bedsheet and wiped his penis. In the context of considering whether carnal knowledge or attempted carnal knowledge had been established, his Honour said:

> *[carnal knowledge] requires proof of penetration (which means penetration however slight) and while both the complainant in her evidence and the [appellant] in his interviews said that he inserted his penis to her vagina, that is not fully supported by the medical evidence. So while I consider that something like that may have happened between the two, albeit incompletely, there is a reasonable doubt raised by the absence of medical evidence of penetration..... I thus find that the charges of carnal knowledge were not proved.*
>
> *But I believe the evidence of the complainant and the defendant's statements to the Police, taken with the medical evidence, do establish beyond reasonable doubt that the defendant put his penis to the complainant's vagina and so attempted to have carnal knowledge of her. .....*
>
> *..... I find that it was established beyond reasonable doubt from the complainant's evidence of the [appellant's] actions and his own answers to the Police that he intended to have sexual intercourse with the complainant and that in putting his penis to her vagina he did something which was more than mere preparation.*

[4] At the beginning of the hearing of the appeal, counsel for the appellant applied for bail. Bail was sought so the appellant could work to earn enough to be able to obtain a transcript of the trial proceedings. It was an unusual application. Ordinarily, bail is not granted to a person appealing against conviction for a serious offence. In the usual course, an application should be made for transcript in accordance with the *Court of Appeal Rules 1990*: see Order 8 rule 2. There may be cases where it would be in the interests of justice for the Court to provide a transcript to an impecunious appellant without charge. However, in this appeal, it is not apparent to us that the appellant is prejudiced by not having the transcript. Accordingly the appeal has been heard without the transcript and no question of granting bail remains for consideration.

The grounds of appeal

[5] In this appeal, various grounds were raised which put in issue the reception of certain evidence and the evaluation of other evidence. The sentence was also challenged. The notice of appeal was structured in a way that did not clearly separately identify the grounds. In addition, some of the grounds appeared to be repetitive. However reading the notice of appeal as a whole, the following are the issues that have been raised.

Issue 1 - The appellant's confession was obtained involuntarily, the admission of the appellant's record of interview was contrary to ss 20, 21

and 22 of The Evidence Act (Cap 15) and the trial judge misconstrued ss 21 and 22.

[6] The appellant was taken into custody on 20 September 2004. He was interviewed by police on 21 and 22 September 2004 and a formal record of interview was taken on 23 September 2004. During the course of the trial objection was taken to the tender of the record of interview, answers to charges and confession statements of 23 September 2004. A voir dire was conducted. The appellant did not give evidence in the voir dire though his counsel now relies on evidence given by the appellant later in the trial to demonstrate that the record of interview should not have been admitted.

[7] The trial Judge made a ruling on 9 March 2006, admitting into evidence the documents to which objection had been taken. The appellant's counsel submitted to the trial judge that the appellant had been interviewed on 21 and 22 September 2004 and had denied the charges but these interviews were not recorded in a proper manner. They were only recorded in a police "diary of action". A submission made to the trial judge and repeated in this appeal, was that the appellant wished to be released from custody to look after his daughter and her child who were sick. It was in those circumstances, he made the confession. Evidence apparently given by the appellant during the trial, but importantly, not given during the voir dire, was that the appellant was told, in effect, that he would be detained in custody unless he confessed. It was submitted in this appeal that the record of interview should not have been admitted because of the appellant's evidence.

[8] This ground faces several difficulties. The first is that the appellant did not give evidence during the voir dire. No explanation has been given in this appeal as to why he did not. The voir dire was conducted for the purpose of enabling the trial judge to determine whether the record of interview should be admitted into evidence. His Honour was entitled to act on whatever evidence was adduced by both parties. The appellant cannot now point to evidence given later in the trial (not given for the purpose of resisting the admission of the record of interview) to establish that the trial judge erred in admitting it.

[9] The second difficulty confronting the appellant is that the evidence that was given during the voir dire by a police officer and accepted by the trial judge, was that the officer and the appellant had gone with the appellant to his home and nothing untoward was evident concerning the daughter and her child. This was done to give effect to a direction of the Magistrate who had made an order permitting the appellant to continue to be remanded in custody.

[10] Section 21 of *The Evidence Act* (Cap 15) prevents evidence being given in any criminal proceeding of any confession if it appears to the Court to have been caused by any inducement, threat or promise of a specified character. The trial judge considered the section and it is quite clear he did not misunderstand its effect. It did not operate in the appellant's favour because the trial judge concluded beyond reasonable doubt that there was no inducement, threat or promise. On the evidence before the trial judge, that conclusion was plainly open.

[11] Section 22 facilitates the admission into evidence of a confession but with the proviso that the Court has a discretion to refuse to admit the evidence if the confession was made to a police officer when the accused was in custody. The trial judge rejected a submission of the appellant's counsel that the proviso mandated that the Court refuse to admit a confession made by an accused in custody. The submission was based on the Tongan text of the proviso. First, the trial Judge accepted that the Tongan text was permissive and did not require the confession to be rejected. We have no reason to doubt this conclusion. Secondly, the English text plainly confers a discretion to admit a confession obtained from someone in custody, and that text prevails: see s 11(2) of *The Laws Consolidation Act 1988*.

[12] This ground is not made out.

Issue 2 - The trial Judge gave no, or insufficient, weight to the appellant's evidence on oath that he did not insert his penis into the complainant's vagina or indecently assault her.

[13] As noted earlier, the trial was conducted by Chief Justice Webster without a jury. His Honour was the trier of fact and had the benefit of observing all witnesses including the

complainant and the appellant. In his lengthy and detailed reasons for judgment, his Honour noted that the appellant denied in evidence at the trial, the matters he had confessed to the police in the record of interview conducted on 23 September 2004. That is, his Honour noted the appellant's denial that he had tried to have sex with the complainant but his Honour went on to say he did not believe the appellant's denial. There was ample evidence justifying the rejection of the appellant's denial. It is unnecessary to repeat all the evidence referred to by the trial judge. It is sufficient to note that the appellant did not deny making the statements to the police confessing to the substance of the offences charged, but sought to explain the confession on the basis that he gave the answers so he could be released from custody to look after his daughter and her son who were ill. His Honour was entitled to reject this explanation on the basis of evidence from the police that at about the time the confession was made, the appellant's daughter and her child were observed to be in good health.

[14] This ground is not made out.

Issue 3 - The trial Judge gave no, or insufficient, weight to the complainant's statement on oath that she made a false complaint against the appellant and to the fact that the complainant's evidence that she spoke to Mrs Lesili Mu'a about the incidents, was denied by Mrs Lesili Mu'a.

[15] An assertion was made by the appellant's counsel in the appeal that the complainant gave evidence at the trial that she made a false complaint against the appellant. Counsel for the Crown denied that the complainant gave such evidence. The trial Judge did not record in his reasons that the complainant gave this evidence, which would have been significant evidence. It is extremely unlikely that the evidence was given and not noted by his Honour in his reasons. It would be inappropriate for us to proceed on the basis that such evidence had been given by the complainant in the absence of the appellant establishing it had been. We note that the appellant's counsel did not maintain his assertion in reply.

[16] As to the evidence concerning Lesili Mu'a, the complainant did say that she told Lesili Mu'a at her house that the appellant had put her on his bicycle but, as noted in the trial judge's reasons, the complainant did not give evidence that she told Lesili Mu'a the other things that the appellant had done to her. Apparently a submission was made at trial by counsel for the appellant, which is repeated in this appeal, that the complainant's evidence was that she had told Lesili Mu'a about all the things the appellant had done to her and Lesili Mu'a had denied at the trial the complainant told her about these things. The trial judge noted in his reasons that the submission, when made at trial, was not supported by the evidence. That is, the complainant did not give evidence she told Lesili Mu'a about all the things the appellant had done to her (other than putting her on her bicycle). It would be inappropriate for us to proceed on the basis that the complainant gave more extensive evidence (about telling Lesili Mu'a about all the things the appellant had done) in the light of the trial judge's finding to the contrary and in the absence of material establishing she had.

[17] This ground is not made out.

Issue 4 - The trial judge relied on evidence from the complainant about dealings with her uncle though he did not give evidence, contrary to s 88 of The Evidence Act.

[18] The trial judge accepted that the complainant had said in December 2005 or January 2006 in front of two witnesses called by the accused at the trial, Vika Lolohea and Siu Tukia, that the stories about the appellant taking her were not true as the kids had made her tell the story. While the complainant admitted saying these things to those two women, she explained that her uncle had told her not to tell anyone else that it (the events involving the accused) had happened. The trial judge accepted the complainant's explanation. He was entitled to do so. It was a credible explanation to be assessed in the face of the other evidence corroborative of the complainant's account pointing to the appellant's guilt.

[19] Section 88 of *The Evidenced Act* (Cap 15) provides that when it is sought to prove any fact by evidence of an oral or written statement made by the person not called as a witness, such evidence is called hearsay evidence. Section 89 requires that hearsay

evidence not be admitted subject to certain exceptions. However ss 88 and 89 are not directed to all evidence a witness might give about something said by another person who was not called as a witness. They are directed to evidence of a particular type, namely hearsay evidence. What is hearsay evidence and what is not, was described by the Privy Council in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 969:

> *Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact it was made.*

[20] In the present case, the complainant's evidence about what she was told by her uncle, simply proved that the statement was made. That is, it was evidence that certain things had been said to the complainant by her uncle. It was evidence she had direct knowledge of because the statement was made to her. It was not evidence to prove that something the uncle had said was true. It is not hearsay evidence and falls within the second type of evidence discussed by the Privy Council in *Subramaniam v Public Prosecutor*. Sections 88 and 89 did not apply to the complainant's evidence about what she was told by her uncle and the Crown was not obliged to call the uncle.

[21] This ground is not made out.

Issue 5 - The trial judge erred in concluding that attempted carnal knowledge was proved beyond reasonable doubt given that he was not satisfied carnal knowledge was proved beyond reasonable doubt

[22] In his confession, the appellant admitted to inserting his penis into the complainant's vagina on at least one occasion. The complainant gave evidence that afterwards her vagina hurt and she was in pain. It is not clear whether this evidence related to one or a number of occasions. However the trial judge was not satisfied beyond reasonable doubt that the appellant was guilty of carnal knowledge (involving penetration of the vagina however slight) because the medical evidence (arising from a medical examination two weeks after the incidents) was neutral on whether there had been penetration. However the complainant also gave evidence that the appellant had put "his thing to her thing" (meaning his penis to her vagina) on each of the occasions when there had been a sexual encounter (as alleged in the charges). In his confession the appellant accepted that he had tried to have sexual intercourse with the complainant. It was open to the trial judge to conclude, as he did, that something like that which the appellant confessed to and the complainant gave evidence about, had happened between the two, albeit incompletely. It was open to his Honour to conclude that the appellant had attempted to penetrate the complainant's vagina on each of the occasions there had been a sexual encounter and he had done so by putting his penis to her vagina.

[23] When an accused is charged with an offence constituted by certain conduct, it is open to a judge or jury to convict a person of attempting to commit the offence where complete commission of the offence charged is not proved: see s 13(a) of *The Constitution* (Cap 2) and s 6 of *The Criminal Offences Act*. In the present matter, the trial Judge said, correctly, that the case before him was not dissimilar to a case considered by the High Court of Australia: *Holland v R* (1993) 117 ALR 193. In that matter the accused had been charged with having sexual intercourse with a girl aged 13. Four of the charges concerning sexual intercourse, involved allegations of digital penetration of the child's vagina. The accused was convicted of attempt by the jury. The complainant gave evidence of having seen and felt the accused place his fingers in her vagina but the medical evidence raised doubts about whether the finger could have penetrated the vagina. The High Court concluded that it had been open to the jury to find that all the ingredients, including intent, of each of the offences involving digital penetration had been made out. Their Honours went on to say that it was an obvious possibility that the jury might conclude that, while they were satisfied that all the other ingredients had been established, they entertained a reasonable doubt about whether, when resistance was encountered at the vaginal entry, the appellant applied sufficient pressure to effect penetration of the vagina itself. The High Court concluded that the jury was entitled to find the appellant guilty of the alternative offences of attempt. In the present matter, the trial Judge correctly observed that *Holland v R* was not dissimilar.

[24] This ground is not made out.

Issue 6 - Because of s 30 of the Interpretation Act (Cap 1), the appellant could not be prosecuted and punished for an act which constituted an offence under two or more Acts.

[25] There is a short answer to this ground. Section 30 of *The Interpretation Act* (Cap 1) concerns offences under two or more Acts. The appellant has been prosecuted and punished for acts constituting offences under the one Act, namely *The Criminal Offences Act*, and not offences under two or more Acts. The section has no operation. Even if it might operate in relation to charges brought under ss 121 and 125(1) of *The Criminal Offences Act*, it is clear that the charge under the first section (carnal knowledge proved as attempted carnal knowledge) concerned the specific act of the appellant of attempting to penetrate the complainant's vagina while the charge under the second section (indecent assault) concerned other acts of the applicant including licking the complainant's vagina. The two charges do not concern the same act for the purposes of s 30.

[26] This ground is not made out.

Issue 7 - The penalty was excessive

[27] The appellant was convicted of four counts of attempted carnal knowledge of a girl. The maximum punishment was ten years. The trial Judge sentenced the appellant to six years on each count. The appellant was also convicted on four counts of indecent assault on a child. The maximum punishment was seven years. The trial Judge sentenced the appellant to four years on each count. All sentences were to be served concurrently. As the trial judge noted, they were serious offences committed by a man of mature years, the complainant was very young, the offences involved (to an extent) an abuse of trust and the appellant had pleaded not guilty. His Honour took into account factors in mitigation including that the appellant had no prior convictions for sexual offences. It was open to the trial Judge to impose the sentences he did. Some submissions were made in this appeal as if this Court were considering afresh what was an appropriate sentence. Our role is to consider whether an error was made on the part of the trial Judge. Only if error was demonstrated would we consider what was an appropriate sentence. In the present case, the appellant has not demonstrated error on the part of the trial Judge. The sentences his Honour imposed were not excessive and all relevant considerations were taken into account.

[28] This ground is not made out.

Conclusion

[29] The appellant has not established any ground of appeal. The appeal should be dismissed.

Fonua v Tonga Communications Corporation Ltd

Court of Appeal, Nuku'alofa
Webster CJ, Burchett, Salmon, and Moore JJ
AC 11A/2004

7 August 2006; 16 August 2006

Practice and procedure – appeal out of time – special circumstances – time extended
Employment law – question of whether resignation was voluntary – not voluntary – unjustified dismissal

The facts of the judgment are set out at *Fonua v Tonga Communications Corporation Ltd* [2003] Tonga LR 351. The Court effectively dismissed the claim by the applicant that alleged that he had been wrongfully dismissed in July 1999 by his employer The Tonga Telecommunications Commission ("the Commission"), now the Tonga Communications Corporation Ltd ("the Corporation"). However, the Chief Justice ruled that notwithstanding the adverse finding in relation to the wrongful dismissal claim, the applicant was entitled to the pension. On 21 July 2005, the Court of Appeal upheld the Corporation's appeal and concluded that the construction of the pension scheme provisions adopted by the Chief Justice was erroneous. The effect of the Court of Appeal's judgment was to deprive the applicant of the benefit of a favourable ruling by the trial judge concerning his pension even though his Honour had effectively dismissed his application for wrongful dismissal. On or about 14 September 2005, the applicant filed a notice of appeal purporting to appeal against the judgment of the Chief Justice of 11 December 2003 putting in issue the conclusion of the Chief Justice that the applicant had not been wrongfully dismissed but had voluntarily resigned. That appeal was plainly out of time. It was necessary for the applicant to obtain an extension of time to prosecute an appeal. However the hearing was conducted on the basis that the parties would address both the question of whether time should be extended and also the merits of the appeal so the appeal could be determined in the event that time was extended.

Held:

1. The application to extend time was filed almost two and a half years after the Chief Justice's judgment. The power to extend time was a discretionary power. In exercising the discretion, time should be extended only if it was necessary to do justice between the parties. It was necessary to have regard to the history of the matter, the conduct of both parties, the nature of the litigation and the consequences for the parties of the grant or refusal of the extension. A relevant consideration was the prospect of the applicant succeeding in the appeal. Also, the failure of a legal adviser to take proper steps could be regarded as establishing sufficient cause to extend time. The candid and proper concession of counsel as to why there was the delay, was a factor supporting the extension of time.
2. It was in the interests of justice to extend time.
3. The court found that the Commission dismissed the applicant by requiring him to resign in circumstances in which he knew that if he did not, he would be dismissed. That occurred in circumstances where the Commission could only dismiss the applicant if it was established, by proper process, that he was guilty of gross misconduct. That was never established and the applicant's dismissal was not lawful. The Chief Justice erred in reaching the contrary conclusion.
4. Time should be extended and the appeal should be allowed.
5. The court made the following orders: time was extended until 14 September 2005 to file the notice of appeal; the appeal should be allowed. The court declared that on or about 29 July 1999 the applicant was wrongly dismissed. The matter was remitted to the Supreme Court to assess damages for the wrongful dismissal. Costs should be ordered as discussed.

Cases considered:
Blyth Chemicals Ltd v Bushnell (1933) 49 CLR 66
Brown, Kali & Minister of Lands v Tali 'Ofa [1990] Tonga LR 136
Cabal v United Mexican States (2001) 108 FCR 311
Commodities Board v Christine 'Uta'atu [1990] Tonga LR 92 (PC)
Commonwealth, Re; ex parte Marks (2000) 177 ALR 491
Scott v Jess (1986) 12 FCR 187

Statutes considered:
Pensions Act (Cap 8)
Tonga Communications Corporation Act 2000

Rules considered:
Court of Appeal Rules 1990

Counsel for appellant : Mr Niu
Counsel for respondent : Mr Tu'utafaiva

Judgment

Introduction

[1] This is an application for an extension of time to appeal against a judgment given by Chief Justice Ward on 11 December 2003 (see [2003] Tonga LR 351). His Honour effectively dismissed a claim by the applicant, Siosaia H Fonua, alleging that he had been wrongfully dismissed in July 1999 by his employer The Tonga Telecommunications Commission ("the Commission"), now the Tonga Communications Corporation Ltd ("the Corporation"). It is necessary for the applicant to obtain an extension of time to prosecute an appeal. However the hearing was conducted, as such matters often are, on the basis that the parties would address both the question of whether time should be extended and also the merits of the appeal so the appeal could be determined in the event that time was extended.

[2] In the proceedings resulting in the judgment of 11 December 2003, an issue arose about whether the applicant was entitled to a pension under a pension scheme modelled on the scheme embodied in the Pensions Act (Cap 8). The learned Chief Justice indicated in his judgment that he would hear further submissions from the parties on that issue. In the result, on 28 June 2004, his Honour made a ruling that the applicant was entitled to be paid a pension when he reached his 50th birthday. That occurred on 8 August 2000. The ruling of 28 June 2004 was the subject of an appeal by the Corporation.

[3] On 21 July 2005, the Court of Appeal upheld the Corporation's appeal and concluded that the construction of the pension scheme provisions adopted by the Chief Justice that had led him to conclude that the applicant was entitled to a pension, was erroneous. The effect of the Court of Appeal's judgment was to deprive the applicant of the benefit of a favourable ruling by the trial judge concerning his pension even though his Honour had effectively dismissed his application for wrongful dismissal.

[4] On or about 14 September 2005, the applicant filed a notice of appeal purporting to appeal against the judgment of the Chief Justice of 11 December 2003 putting in issue the conclusion of the Chief Justice that the applicant had not been wrongfully dismissed but had voluntarily resigned. That appeal was plainly out of time: see Order 5 Rule 2 of the Court of Appeal Rules 1990. On or about 26 May 2006, the applicant filed an application for leave to appeal out of time. That application was accompanied by an affidavit of his counsel in which he candidly and properly deposed to having given his client inappropriate advice about when and on what basis an appeal should be brought.

The judgment below

[5] Before considering the application for extension of time, it is convenient to summarise the reasoning of the Chief Justice in concluding that the applicant had not been wrongfully dismissed. There was no real issue before his Honour about the primary facts. The applicant led evidence and gave evidence himself. The Corporation led no evidence. In July 1999, the applicant was the Chief Engineer of the predecessor of the Corporation, the Commission. The Commission became the Corporation by operation of the Tonga

Communications Corporation Act 2000. Both the Commission and later the Corporation had their origins in the Telegraph and Telephone Department of the Government. The applicant commenced working in the Department in 1971. He worked continuously for the Department and the Commission until July 1999. As the trial judge noted, at that time the applicant was a very highly qualified and experienced telecommunications engineer and he fully expected to continue working for the Commission until he reached retirement. His Honour also noted that following a number of incidents, the applicant was told to resign and did so.

[6] In summary, his Honour's findings concerning the events leading to the applicant tendering a letter of resignation were that in 1996 issues arose about the standard of telephone services provided by the Commission and, in particular, what was revealed by the ASR (Answer Seizure Ratio) which was a means of measuring the number and types of unanswered calls both incoming to and outgoing from Tonga. The applicant, who headed the Engineering division of the Commission, believed the cause of the problem lay elsewhere in the organisation. In the result, the relationship between the applicant and the General Manager had, by 1999, deteriorated. In June 1999, the applicant sent a memorandum to the General Manager, in which he expressed an opinion about the losses the Commission had suffered and advocated the dismissal of the Chief Commercial Officer. That memorandum was later produced in the Legislative Assembly. His Honour noted that it was clear from the evidence that the General Manager and some of the applicant's senior colleagues suspected it had been passed on by the applicant. His Honour also noted that this was denied by the applicant and there was no evidence to support the allegation.

[7] On 6 July 1999, the General Manager submitted a report to the Commission's Monitoring Committee answering the applicant's memorandum concluding that "the ASR conclusions of [the applicant] is therefore unacceptable and wrong". That committee heard from the applicant about his memorandum, but it did not accept his assertions. The Monitoring Committee adjourned to allow it to see if there was any "further and accurate information" available. It met again on 8 July 1999 and again concluded that the applicant's conclusions concerning the ASR were incorrect and erroneous. The Monitoring Committee met again on 12 July 1999. As his Honour recorded, the committee noted seven matters which it considered constituted serious misconduct on the part of the applicant. Having regard to his Honour's findings, it appeared not to be in issue that at that meeting the applicant was told to resign. In any event, that became apparent in a letter to him from the General Manager dated 13 July 1999 which noted the meetings of the Monitoring Committee on 6, 8 and 12 July 1999 and then said:

> .....It is now up to a point that someone has to move out in order for the services of [the Commission] to be executed smoothly and effectively.
>
> You well recount all the issues considered at the above meetings and that the blames fall at your side. It was therefore advised to you that for the good of the Tonga Telecommunications Commission and your own good, it is advisable for you to attend your resignation from the services of [the Commission] and to submit your letter by Tuesday 20th July 1999.

[8] Later, the General Manager prepared a briefing paper for a meeting of the Monitoring Committee scheduled for 20 July 1999. In that paper, the General Manger discussed procedures for charging the applicant.

[9] The applicant, after receiving the General Manager's letter of 13 July 1999, wrote a resignation letter and as the trial judge noted, "he knew the consequences if he did not resign". The applicant tendered the letter on 20 July 1999 giving three months notice. In his letter he expressed sincere regret for the "damages and inconvenience" caused to the Chairman of the Board, members of the Board, the Commission and its staff. The applicant continued to attend his workplace. However he received a letter from the General Manager dated 29 July 1999 informing him that the Board had, that day, accepted his resignation, that the resignation was effective immediately and that the requirement for three months notice had been waived. He was also told that he would be paid a gratuity equivalent to three months salary. Receipt of that payment was acknowledged by the applicant in a letter dated 9 August 1999 though it was expressed to be received under protest.

[10] After recounting these primary facts, the Chief Justice noted that the main thrust of the applicant's case was that he was effectively dismissed. His resignation had been forced on him. He had offered to resign because he was told to and was sure that if he did not he would be dismissed because the decision had already been made. There were proper procedures for dismissal which had not been followed.

[11] The Chief Justice dealt with this contention in the following passage:

> ..... The [applicant] has not persuaded me on the balance of probabilities that he was forced to resign. It is all too clear that the point had been reached where the General Manager was going to recommend disciplinary action against the [applicant]. The Monitoring Committee had accepted there were grounds for such action and, in order no doubt to offer the [applicant] an alternative, suggested he should resign.
>
> There is no doubt that, in deciding whether to accept that advice, the plaintiff considered the alternative and the risk of dismissal. Resignation, as he agreed with Counsel for the defence, will allow him to seek further employment in that field. Dismissal would be a serious bar to any hope of future employment in a position of responsibility in the communications industry.
>
> I am satisfied he considered it the better option and made a free decision. The note prepared by the General Manager for the meeting of 20 July 1999 when he thought the plaintiff had not decided to accept that course, shows that the intention was to charge the plaintiff and to put the matter through the proper channels. If successful, he would have retained his position but he decided not to take that more risky option.
>
> He has devoted considerable time in the witness box to maintaining that he was correct in all he did. He was a man of considerable experience with [the Commission]. I have no doubt that, had he thought he could have succeeded, he would have taken the option of fighting it through the Commission procedures. He complains that the proper procedures were not followed but I am satisfied that no decision had been made to dismiss him by the time he was offered the option to resign. The decision was to charge him and he accepted that he would be better to offer his resignation.

[12] It was for these reasons that the Chief Justice concluded that the applicant had not been wrongfully dismissed. He had resigned voluntarily.

Application for extension of time

[13] The purported notice of appeal was filed a little less than two years after the judgment in which the Chief Justice concluded that there had been no wrongful dismissal though it was only less than two months after the Court of Appeal determined that the applicant was not entitled to a pension. The application to extend time was filed almost two and a half years after the Chief Justice's judgment. The power to extend time is a discretionary power. In exercising the discretion, time should be extended only if it is necessary to do justice between the parties. It is necessary to have regard to the history of the matter, the conduct of both parties, the nature of the litigation and the consequences for the parties of the grant or refusal of the extension. A relevant consideration is the prospect of the applicant succeeding in the appeal: see generally the observations of McHugh J in *Re Commonwealth; ex parte Marks* (2000) 177 ALR 491 at 495. The following are some particular matters relevant to the exercise of the discretionary power.

[14] The explanation given by counsel for the applicant for the delay was, as noted earlier, erroneous advice given to the applicant about when and on what basis an appeal should be brought. It appears that the applicant and his counsel took comfort from the ruling of the Chief Justice that notwithstanding the adverse finding in relation to the wrongful dismissal claim, the applicant was entitled to the pension. However the applicant's counsel now accepts that the prudent and appropriate course was for the applicant to have cross-appealed (or perhaps filed a notice of contention) from what in effect were the combined rulings and judgment of the Chief Justice that the applicant had not been wrongfully

dismissed but was entitled to the pension. Had that course been followed, the Court of Appeal would have been able to consider in the one appeal proceeding, both of the Chief Justice's conclusions. However the failure of a legal adviser to take proper steps can be regarded as establishing sufficient cause to extend time: see *Scott v Jess* (1986) 12 FCR 187 at 190. In the present case the candid and proper concession of counsel as to why there was the delay, is a factor supporting the extension of time.

[15] There is an obvious theoretical prejudice to the Corporation if time is extended. Legal issues which it thought had been settled in its favour, are reopened. But counsel for the Corporation did not submit there was any actual prejudice. However, against that can be balanced the prejudice to the applicant, if he is entitled to a remedy and is unable to obtain it because of the combined effect of error on the part of the trial Judge (if this is established) and misjudgement on the part of his legal adviser.

[16] It will shortly be apparent from our discussion of the merits of the appeal, that the applicant has a strong case. Indeed, he should succeed in the appeal.

[17] In all the circumstances, we are satisfied that it is in the interests of justice to extend time. The case is an unusual one. The judgment against which the applicant wishes to appeal (involving the determination that he had not been wrongfully dismissed) was an innocuous one from his perspective at least from the time the ruling in his favour was made by the Chief Justice concerning the pension until, many months later, that ruling was reversed on appeal by the Court of Appeal. We should emphasise that our ruling in this matter should not be taken as a licence for aggrieved litigants to delay bringing appeals. It is generally in the interests of the administration of justice, for judgments of the Supreme Court and other courts to be treated as final after the period for bringing an appeal has expired. Any other approach introduces unacceptable uncertainty into the Tongan legal system.

The appeal

[18] The gist of the applicant's case in the appeal was that the Chief Justice erred in concluding that the applicant had resigned voluntarily and had not been dismissed. The Corporation's case was that the conclusion that the applicant had resigned voluntarily was a conclusion of fact which should not be interfered with by an appeal court: see *Brown, Kali & Minister of Lands v Tali 'Ofa* [1990] Tonga LR 136 at 137 and 138.

[19] A convenient starting point is considering the role of an appeal court in relation to findings of fact. It cannot be doubted that a trial judge is in a special position when hearing evidence and any invitation to review findings of fact should be approached with caution for the reasons explained in *Brown, Kali & Minister of Lands v Tali 'Ofa.* Particular caution is necessary if findings of fact may depend on the assessment by the trial judge of witnesses who have given evidence. However this is not such a case. First, the evidence of the applicant was not challenged by evidence from the Corporation. Indeed, somewhat curiously, the Corporation called no evidence in the proceedings before the Chief Justice. Secondly, the primary facts appear not to have been disputed.

[20] What was in issue before the Chief Justice, and is in issue in this appeal, is what inferences can be drawn from those primary facts. The critical inference is whether the applicant resigned voluntarily or whether the applicant effectively had no choice but to resign. In circumstances where there is an appeal by way of rehearing from a judge sitting without a jury, the appellate court is in just as good a position as the trial judge to decide on the proper inference to be drawn from facts which are not disputed. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge. However once having reached its own conclusion it will not shrink from giving effect to it: see *Cabal v United Mexican States* (2001) 108 FCR 311 at 362.

[21] In the present case, the Chief Justice inferred that the applicant resigned voluntarily. From one perspective, this is true. The applicant was asked to resign and some days later, wrote a letter of resignation and tendered it to the Commission. The writing and tendering of the letter were voluntary acts in the sense that they were conscious acts of the applicant. He was not, in relation to the physical steps of preparing and providing the letter, acting involuntarily. They were his acts. However those voluntary physical acts occurred in a context where he had no effective choice but to resign.

[22] It may be accepted, as the Chief Justice noted in the passage quoted earlier, no decision had been made to dismiss the applicant. However, with respect, that conclusion focuses on form rather than substance. The Monitoring Committee was comprised of most of the Board of the Commission, its ultimate decision making body. The committee had expressed the firm view on 12 July 1999, that the applicant had been guilty of serious misconduct in seven ways particularised in a summary of its conclusions. The misconduct included wrongly alleging loss by the Commission, providing erroneous and misleading information, wrongly blaming other staff, insubordination and incompetence. The later conduct of the General Manager directed to formulating charges appears to us to have been an attempt to regularise, as a matter of process only, what were clearly predetermined views about the guilt of the applicant.

[23] The unambiguous request that the applicant resign was effectively made on behalf of those within the Commission with power to make decisions after they had made clear their view that the applicant was guilty of gross misconduct. The high probability, if not certainty, was that if the applicant had not resigned, their predetermined views would have been confirmed in any process designed to consider charges and the applicant would have been dismissed for gross misconduct. Our conclusion in this regard is fortified by the forensic decision made by the Corporation to defend the applicant's claim in the Supreme Court only on the basis that he had resigned voluntarily. It did not raise a defence that the applicant had been guilty of gross misconduct. That forensic decision relieved the Corporation of the burden of proving the misconduct: see *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66.

[24] Counsel for the Corporation conceded in the appeal, that having regard to the Commission's staff regulations promulgated in January 1998, the applicant could only be dismissed for gross misconduct and then, it appears, only after the procedures of charging the applicant had been followed: see generally reg 4.1 of section 12.5 of those regulations. The position appears to be analogous to that considered by the Privy Council in *Commodities Board v Christine 'Uta'atu* [1990] Tonga LR 92.

[25] In our opinion, the Commission dismissed the applicant by requiring him to resign in circumstances in which he knew that if he did not, he would be dismissed. That occurred in circumstances where the Commission could only dismiss the applicant if it was established, by proper process, that he was guilty of gross misconduct. That was never established and the applicant's dismissal was not lawful. The Chief Justice erred, with respect, in reaching the contrary conclusion. Time should be extended and the appeal should be allowed. Counsel for both the applicant and the Corporation ultimately accepted that if we reached this conclusion it would be appropriate that the matter be remitted to a judge of the Supreme Court to assess the damages payable to the applicant. However we would urge the parties to investigate, in the meantime, whether the matter could be settled and, in particular, whether a pension (or compensation for loss of the pension) might be paid to the applicant.

Originally, the applicant received half his costs of the trial before the Chief Justice. That order was set aside by the Court of Appeal in its judgment of 21 July 2005 though no order was made as to the costs of the appeal. The applicant should have his costs of the trial and two-thirds of his costs in this appeal. While the applicant has succeeded in the appeal, the hearing was unnecessary in the sense that the issue decided in the applicant's favour could have been raised in the hearing which resulted in the Court of Appeal's judgment of 21 July 2005. For this reason, the applicant should not have all his costs of this appeal.

[26] The appropriate orders are as follows. Time should be extended until 14 September 2005 to file the notice of appeal. The appeal should be allowed. We would declare that on or about 29 July 1999 the applicant was wrongly dismissed. The matter should be remitted to a judge of the Supreme Court to assess damages for the wrongful dismissal. Costs should be ordered as discussed in the preceding paragraph.

Tafa v Viau anors

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 3/2006

11 August 2006; 16 August 2006

Land law – deed of grant – land lawfully occupied therefore unavailable – mistake – appeal dismissed

For the facts and the decision of the Land Court, see *Tafa v Viau anors* [2006] Tonga LR 114. The Land Court found that the Minister of Lands had been required by law to have regard to whether or not the land was available for grant before making a grant; that in fact it was not so available because Sione Finau and his family were in lawful occupation of it and had built a house on it; and that by exercising his discretion upon the mistaken assumption "that the land in question was vacant" the Minister had made a mistake on an essential issue, or, at any rate, had failed to take into account a material fact, namely, that the land was lawfully occupied by others who had built a house on it. Therefore orders were made cancelling the registration of the deed of grant and dismissing the appellant's claim for an order evicting the respondents. The appellants appealed to the Court of Appeal.

Held:

1. Two aspects of the Minister's functions and duties combine to require him to take steps, which must be reasonable in the particular circumstances, to ascertain whether the land was in fact not subject to some other claim that might be an impediment to a grant or make it unavailable. In the first place, he could not properly sign a declaration on behalf of the Crown that there was no impediment if the truth was that he simply did not know because he made no sufficient inquiry. In the second place, the administrative decision to make the particular grant could not properly be made in the absence of the same inquiry in any case where the Minister did not actually know whether the land was available, or whether any competing claim had been appropriately resolved. The Minister did not have to make inquiries personally. He may rely on his officers, but if he did so, and they failed to perform the task properly, a person affected may have a remedy for that failure as if it were a failure of the Minister.
2. The Court concluded that reasonable steps were not taken by or on behalf of the Minister to acquaint him 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 appeal must therefore be dismissed and the respondents (other than the Minister) must have their costs against the appellant. The orders made below, while upheld, should be varied to the extent indicated.
3. The dismissal of the appeal left the ultimate decision upon the question of the issue of a grant to the Minster.

Cases considered:

Daganayasi v Minister of Immigration [1980] 2 NZLR 130
Devries v Australian National Railways Commission (1993) 177 CLR 472
Fowler & Roderique v Attorney-General [1987] 2 NZLR 56
Hakeai v Minister of Lands [1996] Tonga LR 142
Jones v Dunkel (1959) 101 CLR 298
Kioa v West (1985) 159 CLR 550
Powell v Streatham Manor Nursing Home [1935] AC 243

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014
Vai v 'Uliafu [1989] Tonga LR 56
Watt or Thomas v Thomas [1947] AC 484

Statutes considered:
Land Act (Cap 132)
Laws Consolidation Act 1988

Counsel for appellant	:	Mr Fakahua
Counsel for first and second defendants	:	Mr Niu
Counsel for third respondent	:	Mr Sisifa

Judgment

[1] Important questions with respect to grants of allotments upon applications under s.43 of *The Land Act* (c.132), in particular in the case of Crown land, lie at the heart of this appeal. Those questions concern the consequences of a prior occupancy which is either known to an applicant to involve a competing claim, or in the light of facts he knew would reasonably be expected to do so, whereas the Minister of Lands is without either knowledge or notice of the situation, although inquiries, if made, would have revealed it, when he issues a grant upon the application.

[2] The facts raising these questions may be recounted quite briefly. At the time of an application made by the appellant for the grant of an allotment of land forming part of the Crown estates, the first and second respondents (whom we shall call "the respondents", referring to the third respondent as "the Minister") were in lawful occupation of that land and residing in a substantial house they had built on the land. The land had been in the occupation of the grandmother and father of the second respondent and then of the father together with the respondents, who are husband and wife, for a period of twenty years. That occupation had begun when the then grantee of the tax allotment of which the present allotment forms part, one Tevita 'One'one Kamea (who will be referred to as 'One'one) invited the second respondent's grandmother, Hevaha, with her son, the second respondent's father Sione Finau, to a meeting with himself and his son and heir, one Mosese, to choose a piece of land from his allotment which he was going to subdivide. She did select an allotment, and it was marked out with boundary sticks. That was in 1985, and in the same year Sione Finau cleared the bush and began building a Tongan fale on the land, replaced in 1990 by a second house, made of plywood, and then, in 1992, by the present house.

[3] 'One'one was referred to as Sione Finau's grandfather pursuant to what the Assessor below explained as a Tongan custom applicable to some indefinite relationships. Pursuant to this customary relationship, Sione Finau and his older sister used regularly to take food from their house to 'One'one. The relationship and their recognition of its obligations in this way explain 'One'one's decision to provide the allotment for Sione Finau's family, but we reject as without foundation the appellant's submission that 'One'one's actions demonstrated the existence of an unlawful "*agreement* for profit or benefit relating to the use or occupation" of part of his holding within s.13 of *The Land Act.* No bargain was suggested by the evidence.

[4] 'One'one died in 1990, but between 1985 and his death both he and his heir Mosese assured Sione Finau that Mosese would have all the work done to have the allotment transferred to him, and Mosese referred to the allotment as belonging to Sione Finau. Sione Finau's family continued to live on the allotment in the successive houses he or they built there, with the approval of both 'One'one (during his lifetime) and Mosese, and the first sign of any problem came on 5 June 2004 when he received a letter from a solicitor (although that solicitor was not writing on behalf of the appellant) making a claim to the land. Sione Finau took the matter up with Mosese, who told him to go back and stay on the allotment because Mosese would go to the Lands and Survey Office and deal with it.

[5] It was early in January 2005 that Sione Finau was confronted by the appellant, who had obtained on 29 November 2004 a registered deed of grant from the Minister of Lands pursuant to an application under s.43 of *The Land Act*. The respondents had had no notice of that application, although the appellant admitted in evidence that he knew early in 2004

of the occupation of the allotment and of Sione Finau's claim that it was his. That was before the appellant made his application later in the year.

[6] Neither side called Mosese to give evidence. For the respondents, evidence was given that they could not find him before and at the time of the trial. The evidence on which the trial judge principally relied for the findings we have summarized was that of Sione Finau, whom his Honour expressly accepted "on all these matters", describing him as "a thoughtful and conscientious witness." The judge having seen and heard him, and believed him, very strong grounds would be required for us to reject his evidence without seeing or hearing him. An appellate court, as Lord Atkin pointed out in *Powell v Streatham Manor Nursing Home* [1935] AC 243 at 255 "must recognize the onus upon the appellant to satisfy it that the decision below is wrong; it must recognize the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the judge who saw and believed." Using similar language, Lord Simonds in *Watt or Thomas v Thomas* [1947] AC 484 at 492 said:

> "I am satisfied that an appellate court having none of those advantages which the trial judge enjoyed of hearing and observing the witnesses, was not justified in concluding that he was so clearly wrong that their judgment of fact should be substituted for his."

See also Devries v Australian National Railways Commission (1993) 177 CLR 472.

[7] But counsel for the appellant urged the respondent's failure to call Mosese to confirm Sione Finau's evidence was a strong ground of appeal; and also asserted that the evidence of 'One'one's and Mosese's assurances to Sione Finau was hearsay. As to the failure to call Mosese, it seems to us the respondents' case necessarily involves the proposition that Mosese had deceived them. He had confirmed the promises of his father 'One'one and made similar promises himself, while at the same time surrendering the allotment he had received from his father (of which that occupied by the respondents was a part), not for the purpose of fulfilling those promises, but for the purpose of enabling others to obtain interests, and in particular with the consequence that the appellant was enabled to apply for a grant. These actions might fairly be described as surreptitious, being concealed from Sione Finau and the respondents. They were found as facts by the judge on clear evidence. In that situation, the respondents could not have been expected to call Mosese as a witness to confirm his own deception. Rather it was for the appellant to call Mosese, from whose actions he had benefited, if he wished to controvert the evidence of Sione Finau. The well known rule stated by the High Court of Australia in *Jones v Dunkel* (1959) 101 CLR 298 applies against a party only where the witness not called is a witness that party would have been expected to call. In any case, the judge accepted that the respondents were unable to find Mosese prior to the trial. As for the hearsay point, the evidence of the assurances was not hearsay; it was direct evidence of the basis on which the respondents came to be, and to continue, in occupation of the land.

[8] On these facts, the trial judge found that the Minister of Lands had been required by law to have regard to whether or not the land was available for grant (see s.50 of *The Land Act*) before making a grant; that in fact it was not so available because Sione Finau and his family were in lawful occupation of it and had built a house on it (see *Vai v 'Uliafu* [1989] Tonga LR 56 at 63-64 where Webster J (as he then was) held land "was not available..... because a house had been built on the land"); and that by exercising his discretion upon the mistaken assumption, as his counsel admitted he had done, " that the land in question was vacant" (of which, we note, he had no evidence) the Minister had made a mistake on an essential issue, or, at any rate, had failed to take into account a material fact, namely, that the land was lawfully occupied by others who had built a house on it. Therefore orders were made cancelling the registration of the deed of grant (it would seem also to follow that the grant itself must be declared invalid as Webster J held the grant was in *Vai v 'Uliafu* at 64) and dismissing the appellant's claim for an order evicting the respondents.

[9] To the extent that the trial judge's reasoning relies on a mistake of fact by the Minister as a ground for setting aside his decision, it receives support from *Vai v 'Uliafu* where (at 64) this very ground was accepted in analogous circumstances as one of the grounds of the decision. His Honour also cited New Zealand and English authority, including an obiter dictum of Casey J (in a judgment with which Cooke P expressed "general agreement") in *Fowler & Roderique v Attorney-General* [1987] 2 NZLR 56 at 77. Casey J considered that a decision taken "on mistaken or inadequate advice" might be declared invalid. His

Honour's approach also receives some support from *Wade & Forsyth on Administrative Law* (7 ed, 1994) at 316-318 and *de Smith, Woolf & Jowell, Judicial Review of Administrative Action* (5 ed, 1995) at 5-094. In the latter text, in the section cited, it is stated:

> "The taking into account of a mistaken fact can ... be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration."

Both texts cite Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, where Lord Wilberforce said (at 1047):

> "If [an administrative] judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account."

In *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 145 et seq., Cooke J (as he then was) held that an administrative decision was "invalid on the ground of mistake", but Richmond P and Richardson J left this question open. In Australia, of course, a limited ground may be available in cases of mistake of fact under the *Administrative Decisions (Judicial Review) Act*, 1977 (Cth).

[10] In the circumstances of this matter, we think the judgment under appeal was, in any case, clearly right on a ground that really depends upon the true construction of *The Land Act*. One of the foundations of that Act is the provision in clause 113 of the *Constitution*:

> "Every taxpayer shall have the right to hold an hereditary tax and town allotment upon and subject to such conditions as to the area thereof and the rent to be paid therefor as may be determined from time to time by the Legislature."

s.7 of *The Land Act* then provides:

> "Every male Tongan 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. " (Emphasis added.)

[11] The general rights stated in s.7 to be "subject to the provisions of this Act" are given more detailed effect by later sections including s.43 and s 50, which provide:

> "43. (1) Every male Tongan subject by birth of 16 years of age not being in possession of a tax or town allotment shall be entitled to the grant of a tax or town allotment or if in possession of neither to the grant of a tax and town allotment.
>
> (2) The grant shall be subject to the provisions of this Act and shall be made in accordance with the following rules–
>
> (a) the applicant shall make an application on the prescribed form to the Minister;
> (b) the applicant shall produce for the inspection of the Minister his birth certificate or some other proof of the date of his birth;
> (c) the applicant shall pay the prescribed fees.
>
> 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;
(b) where there is no land available in the estate in which the applicant is resident, then the allotment shall be taken out of some other estate held by the noble or matapule in one of whose estates the applicant is resident;
(c) if no land is available in any hereditary estate held by the noble or matapule in one of whose estates the applicant is resident then the allotment shall be taken out of the hereditary estate of any other noble who is willing to provide such allotment;
(d) if no land is available under rule (c) then the applicant may have his allotment from Crown Land;
(e) an applicant for an allotment to be granted out of Crown Land shall have his tax and town allotments from such particular portion of Crown Land as the Minister may decide:

Provided that an applicant already resident on Crown Land shall where possible be granted the allotments from the particular area of Crown Land in which the applicant is resident."

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 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 the signature of the Minister who is, by s.19, "the representative of the Crown in all matters concerning the land of the Kingdom", and who makes the grant. So when he signs the form he does so on behalf of the King. The form itself, as a prescribed form, like other subsidiary legislation set out in the "Red Statutes", is given the force of law by an Act entitled *The Laws Consolidation Act 1988* which is printed at the beginning of vol.1 of those statutes (see s.8 and the definitions in s.2).

[12] Two aspects of the Minister's functions and duties, in a case such as this, combine to require him to take steps, which must be reasonable in the particular circumstances, to ascertain whether the land is in fact not subject to some other claim that might be an impediment to a grant or make it unavailable. In the first place, he cannot properly sign a declaration on behalf of the Crown that there is no impediment if the truth is that he simply does not know because he has made no sufficient inquiry. In the second place, the administrative decision to make the particular grant cannot properly be made in the absence of the same inquiry in any case where the Minister does not actually know whether the land is available, or whether any competing claim has been appropriately resolved. Of course, in both respects, the Minister does not have to make inquiries personally. He may rely on his officers, but if he does so, and they fail to perform the task properly, a person affected may have a remedy for that failure as if it were a failure of the Minister.

[13] The duty to take reasonable steps to ascertain the facts to which we have referred has been held to apply by very high authorities. In *Secretary of State v Tameside MBC* at 1065, Lord Diplock said:

> "[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

And in the High Court of Australia, Brennan J, in *Kioa v West* (1985) 159 CLR 550 at
290 627, the issue being related to the obligation to accord natural justice to a party, said:

> "The repository of a power has to adopt a reasonable and fair procedure before he exercises the power ..."

On that basis, his Honour considered an administrator could be held to account for a failure to have regard to "circumstances which, had he acted reasonably and fairly, he would then have known." Where that knowledge would have imposed a duty to accord natural justice to some person (as clearly, here, knowledge of the respondents' occupation would have done: *Hakeai v Minister of Lands* [1996] Tonga LR 142), Brennan J held (ubi supra) "the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair".

300 [14] We conclude that, in the circumstances of this case, reasonable steps were not taken by or on behalf of the Minister to acquaint him 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 appeal must therefore be dismissed and the respondents (other than the Minister) must have their costs against the appellant. The orders made below, while upheld, should be varied to the extent we have indicated.

[15] Before parting with the matter, we record that the Minister, although he had opposed the respondents' case below, supported it in this Court. His counsel acknowledged the Minister had an obligation, having received the appellant's application, to make inquiry. It
310 should be added that we understand the Minister's practice was to make inquiries, and it may be that in this instance the normal application of that practice was diverted from its course by some procedural lapse in his Department.

[16] Finally, we note that our dismissal of the appeal leaves the ultimate decision upon the question of the issue of a grant to the Minster.

Fischer v Fung Shing Development Co Ltd

Supreme Court, Nuku'alofa
Ford J
CV 242/2002

18 and 19 April, 29 June and 5 July 2006; 4 September 2006

Tort – negligence – res ipsa loquitur – defendant negligent – liable
Damages – mitigation of loss – plaintiff should have repaired earlier – damages adjusted

On the night of 28 February 2002 a collision occurred at Fua wharf, Nuku'alofa, between a fishing vessel "M V Fung Shing 2" owned by the defendant and the plaintiff's much smaller pleasure launch called the "Topaz". The plaintiff brought a damages claim against the defendant alleging that the accident was caused by the negligence of the defendant. The defendant contended that the accident did not result from any negligence on its part but from cable and nylon rope becoming entangled in the propeller of the Fung Shing causing the master to lose control of the steering. At the time of the accident the Topaz was stationary, moored against another vessel three out from the wharf. The Fung Shing was carrying out certain manoeuvers at the wharf and as the ship was asterning the captain was unable to stop and reverse the propeller thus resulting in its collision with the Topaz. The plaintiff claimed damages totalling $181,910. The defendant challenged the damages claim on the grounds that the plaintiff was negligent in not having his vessel insured; that the repair estimates were not reasonable and that the plaintiff had failed to take appropriate steps to mitigate his loss.

Held:

1. The maxim *res ipsa loquitur* applies to an accident which would not, in the normal course of things, have occurred without the lack of reasonable care on the defendant's part.
2. Although the defendant did not have to explain the precise cause of the collision in order to dislodge the inference of negligence, it was still required to produce credible evidence which explained how the collision may have occurred without negligence on its part.
3. The defendant had failed to produce such evidence and the plaintiff succeeded, therefore, in establishing its cause of action in negligence.
4. The challenge to the damages claim on the basis of the vessel not being insured and the repair estimates not being reasonable were dismissed but the claim that the plaintiff had failed to mitigate his loss was upheld on the basis that the repair work should have been carried out within a reasonable period which was assessed at nine months. The plaintiff was awarded damages totalling $46,348.00 together with costs.

Cases considered:

Esso Petroleum Company Ltd v Southport Corporation [1955] 3 All ER
F C Nichol v Simiki [2006] TOSC 31
Llanover, The (79 Lloyd's Rep 163)
Merchant Prince, The [1892] P 9
Scott v London Dock Company (3 H&C 601)
Southport Corporation v Esso Petroleum Company Ltd [1954] 2 All ER 561
Tukutau v Masoe [2001] Tonga LR 116

Counsel for plaintiff : Mr Mangisi
Counsel for defendant : Mr Niu

Judgment

Background

[1] During the night of 28 February 2002 a collision occurred between two vessels at Fua Wharf, Nuku'alofa. The fishing vessel "M V Fung Shing 2" collided with a much smaller pleasure launch called the "Topaz". The Topaz, which was moored at the time, is owned by the plaintiff. The Fung Shing 2 is owned by the defendant company.

[2] In this proceeding the plaintiff seeks damages from the defendant claiming that the accident resulted from the negligence of the defendant in one or more of the various respects particularized in the statement of claim. The defendant contends that the accident did not result from any negligence on its part but from cable and nylon rope becoming entangled in the propeller causing the master of the Fung Shing 2 to lose control of the steering.

[3] The writ was issued on 9 May 2002 and the statement of defence was filed on 12 June 2002. It is fair to say that since then, however, the case has only meandered its way to trial. Both parties changed solicitors at different points in time and that no doubt would explain some of the delays but it cannot be claimed that the proceeding has proceeded to trial as expeditiously as it should. The delays in turn seem to have had a consequential adverse effect on the availability of potential witnesses and this has been another unsatisfactory feature of the proceeding.

The plaintiff's case

[4] The plaintiff told the court that he emigrated from Germany in 1990. He had been a chef all of his working life and the intention was that he would be running a restaurant in a local guesthouse. It is not entirely clear from the evidence, however, what exactly he did for a living up until 1999 when he purchased the Topaz.

[5] The plaintiff described the Topaz as an 8 m fibreglass game fishing boat which he used for charter work. He said that he had purchased the vessel for $50,000 cash and at that stage it had just undergone a complete refit. A colour photograph of the boat was produced as an exhibit along with a business brochure. The vessel appears to have been an attractive, modern game fishing boat with all the necessary accessories.

[6] The brochure is headed "Game and Sport Fishing. Top M V Topaz Charters. Topaz is 8 m And boat with flybridge powered by 205hp. Equipped with Chart-plotter, GPS, fish fineler (sic), down rigger, quality fishing equipment. After giving contact telephone numbers and an e-mail address, the brochure goes on to state:

> "We take charters 2 or 3 anglers and fish for Marlin, Sailfish, Yellowfin tuna, Wahoo, Mahimahi (El Dorado) operating from Tongatapu. Prices: from T.$600 per day. Minimum: 10 hours."

[7] The plaintiff said that in addition to charter work he would take people out for half day fishing trips at a cost of $400 and whale watching during the season. The boat was also available for hire for barbecues and other functions. The plaintiff acknowledged that the demand for the Topaz varied and there could be periods of up to two weeks at a time when he would have no business.

[8] The vessel has still not been repaired. The plaintiff said that he had been unable to afford to meet the repair costs. He was asked in evidence to estimate his losses and in response he told the court that his earnings would have averaged $3500 per month but he was claiming only $2500 per month for the period between the date of the accident and the date of trial. He also seeks storage costs of $3 per day which he said he has had to pay the Ports Authority while the Topaz remains on Authority land.

[9] At the time of the accident the Topaz was moored against another vessel three out from the wharf. It was a mooring position specifically allocated to it by the Ports Authority. The plaintiff paid an annual rental to the authority for the berth. He told the court that the Topaz had always used that berth without any incident.

[10] The plaintiff said in evidence that he understood the collision had occurred around 3 a.m.. His statement of claim showed the date of the incident as, "the night of 5 -- 6 March 2002" but during the hearing that date was amended by consent to 28 February

2006. The plaintiff told the court that he first learned of the collision from a taxi driver in the early hours of the morning. He drove down to the wharf and inspected the damage to the Topaz. He described what he saw to the court. He said that he also met up with a Mr Martin Ke who told him that he was in charge of the Fung Shing. Martin Ke gave the plaintiff his business card and, according to the plaintiff, admitted liability for the damage caused to the Topaz and agreed to pay for the damage.

[11] The plaintiff admitted in evidence that at the time of the collision, the Topaz was insured only against third-party risk. He explained that originally the vessel had been fully insured but because of some problem he had encountered over a claim the previous year, the full cover had not been renewed. The plaintiff said that immediately after the accident he proceeded to obtain a quotation for repairing the Topaz to a seaworthy state. The quotation he obtained from KW International Marine Ltd, a company specialising in marine fibreglass work, amounted to T.$32,038.00. The quotation dated 5 March 2002 was signed off by the General Manager of KW International Marine, Stephen Leeson, and concluded with the observation:

> "We look forward to your quick response as the sooner we have the boat under cover from the elements the better repair..."

[12] The court was told that the Topaz in its damaged state has remained exposed to the elements and vandalism since the accident. The estimated repair costs today are approximately $55,000. The expert witness called to give evidence from KW International Marine, Laka Vaifo'ou, agreed with the proposition put to him by the court that rather than try and repair the Topaz to a seaworthy condition, it would be more realistic these days to treat the vessel as a complete write-off.

[13] The plaintiff also called evidence from Uaisele Pau'u, who in 2002 was the captain of a vessel belonging to the Deep Blue Diving Company. He was also a diver for the company. He told the court how one day after the collision he and another diver working for Deep Blue, who he knew only as Paula, were required to carry out a dive to inspect the shaft and propeller of the Fung Shing 2. He said that the defendant company had approached Deep Blue and had made a specific request for the underwater inspection to be carried out.

[14] Uaisele said in evidence that Paula was under water for approximately 20 minutes. He took with him a 12 inch bread knife which he used to cut a length of nylon rope about the diameter of an electric cord and 5 m in length from around the propeller. On his second dive, he surfaced with some cloth and plastic bags. The witness remained on the surface and marked the spot where Paula had dived. He said that afterwards all the material was given to a Korean man who was present representing the Fung Shing. He (the Korean man) took the length of nylon rope with him but the other material was thrown back into the sea. Uaisele could not recall the exact date of Paula's dives but he estimated that it was at least two weeks after the collision.

The defence

[15] The defendant denied any negligence on its part. It pleaded:

> "The collision was due to a big heavy rope and wire which had been discarded on the bottom of the harbour and which, because of the low tide at the time, became entangled in the propeller of the defendant's vessel, causing the propeller not to turn when required nor to turn in reverse for the vessel to go forward when required, so that the vessel could not stop the momentum of its backward movement or turn its stern away from the plaintiff's boat."

The defendant also denied that the man who had made the admission of liability to the plaintiff, Martin Ke, was a representative of the defendant and it challenged all aspects of the damages claim alleging that the amounts sought were excessive.

[16] The first witness called for the defence was Raymond Yu, Managing Director of the defendant company. He had no first-hand knowledge of the collision but he had been told about it by Martin Ke who he referred to as the manager of the Fung Shing. Mr Yu said that Martin Ke had returned to China in 2004 and the captain of the Fung Shing, captain Zhang, had left the company, "over a year ago." Mr Yu described the Fung Shing 2 as a

26.5 m long line fishing vessel. At the time of the trial it was said to be in Fiji undergoing maintenance work.

[17] Mr Yu produced a letter which Martin Ke had written to the Ministry of Marine and Ports on 11 March 2002, some 11 days after the collision. The letter was written on a Fung Shing Fishing Company Ltd letterhead. I set the contents out in full:

> " Re: Marine Incident Report
>
> Dear Sir or Madam,
>
> I regret to report to you one incident which happened at Faua Wharf on February 28. Because MV "Fangafa" would come from Ha'apai and moor in the berth where " Fung Shing 2" (outside) and "Fung Shing 3" (inside) already alongside, so " Fung Shing 2"'s captain Mr Zhang Jinbiao shift the boat to Seastar's wharf with the chief engineer and the crew.
>
> After "Fangafa" and "Fung Shing 3" finished mooring, " Fung Shing 2" return back and wanted (sic) alongside "Fung Shing 3". While asterning, Mr Zhang already saw MV "Topaz" in the back, and immediately turned the key to stop the propeller and wanted to ahead, but the propeller no answer and still astern, so the captain has no way and informed the engineer to stop the main engine immediately. But it was still too late and the incident happened, the back of "Fung Shing 2" hit the starboard bow of MV Topaz at about 2:30 a.m. on Feb 28, 2002.
>
> Because of the propeller's problem, the captain decided to anchor the boat and moored one rope from the back to one pole in the wharf.
>
> After finishing anchoring, I asked the captain and the Chief Engineer, they thought the incident came from the problem of the adjustable propeller.
>
> And we are looking to your department for assistance in this matter.
>
> Sincerely yours,
>
> Martin Ke"

No objection was taken to the production of Mr Ke's letter.

[18] Mr Yu told the court that between four to seven days of the collision the company, through Martin Ke, arranged for a diver, who he only knew as "Tevita" to dive and remove rope tangled in the propeller. Mr Yu was asked in cross-examination whether his company contacted the Deep Blue Diving Co to inspect the propeller of the Fung Shing. He replied: "Any problems we always call Tevita." Earlier, in examination-in-chief the witness had been asked whether any of the company's vessels had ever had "a problem like this before" or since? The witness answered, "no, I don't think so."

[19] Mr Yu was also asked in cross-examination and by the court about the plaintiff's claim that Martin Ke, on behalf for the defendant, admitted liability for the damage caused to the Topaz and agreed to pay for the repairs. Mr Yu appeared to concede in the end that Martin Ke did have a authority to make such a commitment on behalf for the defendant but he claimed that the quotation of $32,038 for the repair work was too high and Martin Ke was unaware of that figure when he made his representation. Mr Yu admitted that the defendant did not obtain a quotation of its own and he knew of no other local company that could carry out repair work to fibreglass vessels. He told the court that an acceptable figure for the repair work, in his view, would have been $5,000.

[20] The defence also called evidence from 39-year-old Tevita Raass who described himself as a mechanic and a diver. He said that he had been diving for 10 years. Tevita told the court that he carried out diving work for the Port Authority, inspecting the keels of vessels, and he also carried out diving work inspecting boats for fishing companies. He was very familiar with the two Fung Shing vessels. He said that he recalled the collision between the Fung Shing 2 and the Topaz. At that time he was working for himself. Previously he had been working for the Deep Blue Diving Company Ltd.

[21] Tevita estimated that within five to seven days of the collision he had been required by "a Chinese man", on behalf for the defendant company, to dive and check the propeller of the Fung Shing 2 which had become entangled. He duly dived and reported that a length of rope and cable had tied itself around the propeller. He was then asked to remove it and he did so using bolt cutters, a hacksaw and a knife. He said that the job took him three hours and he used three tanks of oxygen. No one else assisted him. He said that when he removed the rope, the propeller free flowed and he was able to turn it by hand. Mr Raass explained that in high tide the distance between the keel of a fishing vessel the size of the Fung Shing 2 and the bottom of the harbour was only about 1 1/2 metres and in the low tide the vessel would sit on the mud.

[22] Continuing in examination-in-chief, the following exchange then took place between the witness and Mr Niu:

"Q. Did you see the boat again after you did your dive that day -- the Fung Shing boat?
A. They asked me about a month later working again -- the same thing -- they always have (indecipherable).

Q. They asked you again?
A. Yes.

Q. How long after?
A. About a month.

Q. After a month?
A. Yes.

Q. They asked you to do what?
A. To dive again and take the ropes off the propeller.

Q. And did you dive?
A. Yes.

Q. And what did you find?
A. The same thing, ropes and tyres.

Q. The same boat?
A. The same boat.

Q. What about before this dive when it damaged the Topaz, did you ever dive before that?
A. Yes, every time a big vessel like that moves around the wharf, when they're ready to move I have to dive and check that everything is clear to go out (indecipherable).

Court: I'm sorry, I'm having trouble, just keep your voice up -- you were asked did you ever dive before, now tell me again what was your answer?
A. The same problem -- all these ropes and stuff.

Court: So that happened before the accident with the Topaz?
A. Yes.

Court: The same problem?
A. The same problem.

Court: Yes Mr Niu.

Q. And where, can you remember, where was the Fung Shing vessel when you did the dive before? Before this accident with the Topaz you did dive before?
A. Everywhere at the wharf. They come in parking this side and parking that side.

Q. Was there any accident before?
A. All the boats are like that. All these fishing boats at the wharf. They have -- when they get any movement, the propeller sucks in the tyres and those big ropes and when they hit the propellers they stop the engine.

> Q. And did this boat hit another boat before?
> A. Yes, (indecipherable) move closer to another boat. They did not damage but they drive closer. It depends on how strong the vessel.
>
> Q. How many times do you think you have dived to clear the propeller of the Fung Shing vessels -- let's say the Fung Shing 2 and the Fung Shing 3?
> A. Every month, every month like that. These boats go out for three months, two months (indecipherable) but when they arrive, every month."

[23] This line of questioning was pursued further by Ms Mangisi in cross-examination:

> "Q. When did you inspect the Fung Shing's propeller, before they leave the wharf or after they arrived at the wharf?
> A. Before they leave and sometimes after. It depends on when they asked me to dive. Sometimes they asked me to check when they arrive or when they are ready to leave they asked me or sometimes when they moved out from the wharf to get out (indecipherable).
>
> Q. When was the last time you inspected the Fung Shing 2 before the accident?
> A. Three weeks before the accident."

[24] Mr Raass was also asked questions in cross-examination about the nature of the resulting damage when a vessel like the Fung Shing 2 collided during manoeuvers in the harbour. He indicated that if the other vessel was a steel hulled vessel the damage would be superficial but he then volunteered the statement: "I don't know why the Ports Authority lets them come into the wharf. They are too big for the wharf."

Submissions

[25] Mr Niu submitted that the plaintiff had not established that the defendant was negligent. The following were his principal submissions under this head:

> " 3. The collision of the defendant's vessel and the plaintiff's vessel was due to ropes and wire being sucked up by the propeller of the defendant's vessel from the bottom of the harbour and entangling and stopping the propeller of the vessel from turning.
>
> 4. The captain of the defendant's vessel turned the "key " which controlled the propeller, so that the propeller would stop spinning in reverse and to spin forward instead, so that the vessel would go forward and avoid colliding with the plaintiff 's vessel. But the propeller did not respond because it had already been entangled too tightly with the ropes, wires and nylon.
>
> 5. The captain even had the engine of the vessel stopped but the vessel was still, no doubt because of its momentum, moving backwards and collided with the plaintiff's vessel, which was moored and stationary, and then stopped.
>
> 6. It is clear that the captain was unaware at that time of the entangling of the ropes, wires and nylon on the propeller."

[26] The thrust of Ms Mangisi's submissions in response was that, given the evidence of the defendant's own witness, the diver Tevita Raass, of previous accidents involving the Fung Shing caused by its size and its propeller having been entangled by rope and cable, the defendant had a duty of care to ensure that the propeller was free of obstruction before the vessel was moved and the defendant had breached that duty on this occasion.

The law

[27] The written submissions received were of a rather summary nature. Neither counsel referred to any authorities or legal principles. The maxim *res ipsa loquitur* applies to an accident which would not, in the normal course of things, have occurred without the lack of reasonable care on the defendant's part. On the face of it, therefore, the

occurrence of the collision between the Fung Shing 2 and the stationary Topaz would constitute prima facie evidence of negligence on the part of the defendant.

[28] The legal maxim applies, however, only in the absence of some explanation. The classic test is that laid down by Erle CJ in *Scott v London Dock Company* (3 H&C 601):

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

[29] Balkin and Davis in Law of Torts second edition, p.289, state that the *res ipsa loquitur* rule:

> "is dependent on the absence of explanation. This merely means that if the court finds on the evidence adduced how and why the occurrence took place, then there is no room for inference. The occurrence at this point ceases to speak for itself and the question becomes whether, having regard to the now known cause, the defendant is negligent."

[30] In *Southport Corporation v Esso Petroleum Company Ltd* [1954] 2 All ER 561, a tanker developed a steering fault and stranded on a revetment wall in the Ribble estuary. The plaintiff company which owned the foreshore brought an action in trespass and negligence for damages arising from a subsequent oil discharge. They alleged that the master was guilty of negligent navigation in entering the channel when the steering was erratic. The defendants denied negligence and alleged that the accident had been caused by the steering gear being out of control because the propeller had twice struck some object. Devlin J. dismissed the action holding that the plaintiffs had not proved the negligence pleaded. In allowing the appeal, the majority of the Court of Appeal held that the defendants were liable for negligence because the stranding of the vessel was an accident which did not happen in the ordinary course of things and the onus, therefore, was on the defendant to give an explanation of its occurrence which they failed to do. The case then went to the House of Lords -- *Esso Petroleum Company Ltd v Southport Corporation* [1955] 3 All ER where the decision of the Court of Appeal was reversed in part on the grounds that the negligent acts or default relied upon had not been pleaded. The House of Lords did not, however, appear to take issue with any of the statements of principle relied upon by the Court of Appeal.

[31] In the Court of Appeal Singleton LJ quoted with approval the following passage from Bucknill LJ in *The Llanover* (79 Lloyd's Rep 163):

> "On the undisputed evidence as to the circumstances leading up to the collision, it seems to me that a prima facie case of negligence is made out against the Llanover which she has failed to rebut. Her rebuttal rests on her evidence that her steering gear jammed, which made it impossible for her to keep out of the way. It is not sufficient for a ship to say: "My steering gear has jammed and therefore I can do nothing." I think that the burden is cast on her showing that the jamming could not have been avoided by the exercise of reasonable care and skill on her part, or at least that she used all reasonable care and skill to prevent the jamming of the gear, and that it might reasonably have jammed for a cause which they could not have prevented by the exercise of reasonable care and skill."

[32] Another relevant decision referred to in both the Court of Appeal and the House of Lords in the *Esso Petroleum* case was *The Merchant Prince* [1892] P 9, 179. In that case a ship under way in broad daylight and normal weather conditions collided with a ship at anchor in the Mersey. The court held that in those circumstances, the onus lay on the colliding ship to negate the charge of negligent navigation that had been made against it and to discharge that onus the defendant had to show that the accident was inevitable. The defendant claimed that the collision had occurred because the steering gear had jammed through no-fault on its part. The question before the court was whether the steering gear had jammed through some negligence on the part of the defendant's servants. The Court of Appeal concluded that, on the evidence, the jamming of the steering gear was a danger

which ought to have been foreseen. Consequently, the defendant had failed to discharge the onus of showing that the accident was inevitable and judgment was entered for the plaintiffs.

[33] Morris LJ in the Court of Appeal in the *Esso Petroleum* case, in reference to *The Merchant Prince* said at p.579:

> "It seems to be both good sense and good law that if a ship runs into another ship which is at anchor . . . it is not enough for the colliding ship merely to say that its steering became defective. It is necessary to go on and explain how and why the steering became defective and to negative negligence."

[34] In the House of Lords, after referring to *The Merchant Prince*, Lord Morton of Henryton said at p.672:

> " . . . assuming that the event was itself prima facie evidence of negligence, and that the respondents had so framed their case . . . the appellants would not have displaced that evidence by merely showing that their failure in navigation was due to a failure in the steering apparatus of the ship. They would have had to go further and show that they had not omitted any reasonable precaution to ensure that failures did not occur in their steering apparatus or in their control of the steering."

Findings

[35] In the present case, as I understand it, the defendant contends that the steering apparatus or control of the steering had became defective because the propeller had become entangled with the rope and cable Tevita Raass described in evidence, not through negligence on the part of its servants. The defendant's case has not been helped, however, by the absence of any witness who could give first-hand evidence of the events leading up to the collision. The court has not had the advantage of hearing from the captain of the Fung Shing 2 or from the vessel's engineer or even from its shore based manager, Martin Ke. In his submissions cited under paragraph [25] above, defence counsel speaks about the entanglement "stopping the propeller from turning" whereas in the very next paragraph he speaks about the captain turning the "key so that the propeller would stop spinning in reverse and to spin forward instead." Without hearing direct evidence on these matters, it is difficult to reconcile these seemingly contradictory submissions.

[36] More significantly, however, I am not satisfied on the evidence that the defendant did, in fact, take all reasonable precautions to prevent the accident occurring. It is clear that the problem of propellers of large fishing vessels like the Fung Shing 2 becoming entangled with ropes and other obstacles within the area of Faua Wharf is generally recognised as a commonplace hazard. I accept the evidence of both the divers I heard from. Despite Mr Yu's denial of any knowledge of the diver Paula and his assertion that only Tevita carried out diving for the defendant company, I am satisfied that Paula was in fact retained, most likely by Martin Ke, to check the propeller of the vessel as the witness Uaisele Pau'u described. I also accept Tevita Raass's evidence that both before and after the accident, he was regularly called upon to dive and check the propeller of both Fung Shing vessels to ensure that they were free from entanglement. I also accept his evidence that there had been previous collisions between the Fung Shing 2 and other vessels while manoeuvring within the confines of the wharf but because the other vessels had steel hulls, no serious damage had resulted. In the present case, of course, the Topaz was a fibreglass vessel and the consequential damage was significant.

[37] There was no evidence as to when the Fung Shing 2 had arrived at the wharf or when precisely its propeller had last been inspected for entanglement prior to the collision. There was no direct evidence as to why the manoeuvres the Fung Shing 2 was carrying out within Faua Wharf at the time of the collision had to be carried out at 2:30 a.m. or as to how much prior notice the captain had been given of the requirement for such a manoeuvre. What was clear from the evidence, however, was that prior to carrying out any manoeuvres within the confines of the wharf area, prudent servants of the vessel's owner should have taken the reasonable precaution of having the propeller checked for entanglement. In the Court of Appeal in the *Esso Petroleum* case Singleton LJ at 569 was critical of the fact that:

> "The defendants were content to rely on the fact that the master noticed nothing wrong with the steering until after the heavy seas were shipped. There is no evidence of any inspection, routine or other, beforehand."

On this occasion likewise, for whatever reason, the precautionary step of having the propeller checked for any type of obstruction at some appropriate time between the vessel's arrival at the wharf (whenever that was) and its carrying out of the manoeuvring in question was not taken.

[38] Mr Niu submitted: " It is clear that the captain was unaware at that time of the entangling of the ropes, wires and nylon on the propeller." The only entanglement the diver Tevita Raass spoke about on his inspection after the accident was of the rope and cable that he described. I am satisfied that the entanglement the other diver, Paula subsequently encountered involving nylon and other obstacles related to a separate entanglement altogether. When Tevita Raass finished his work, which he estimated took three hours, the propeller was free of all obstruction and he was able to revolve it by hand. But that apart, Mr Niu's submission as to what the captain might or might not have been aware of is pure conjecture. The captain did not give evidence and there is no knowing what he thought at the time. He may, for example, have noticed some earlier problem with the ship's movements -- particularly if the rope had been picked up some time earlier and was slowly tightening itself around the propeller. If an appropriate inspection had been made at any time between the Fung Shing's arrival at its berth and the commencement of its manoeuvres on this particular night and it had revealed that the propeller was free of any obstacle then, of course, there would be substance in Mr Niu's submissions but without hearing direct evidence on these matters, I am not prepared to simply assume that the vessel was completely free from rope entanglement before it commenced the manoeuvres leading to the collision. In this regard, I respectfully adopt the following passage from the recent judgment of Chief Justice Webster in *F C Nichol v Simiki* [2006] TOSC 31:

> "Plaintiffs and their counsel must understand that at a trial, even according to the lesser standards required under the civil law, the facts necessary to prove their case must be established in court by hard evidence. If that is not the case, then a plaintiff will not be able to succeed."

The same principle applies, of course, to a defendant in a case where that party is trying to establish a question of fact.

[39] Another puzzling feature of the case which called for direct evidence was the defendant's explanation of the accident in its official report to the Ministry of Marine and Ports (see para [17] above). No mention was made in that report of rope entanglement. The report, written 11 days after the collision and after the diver, Tevita Raass, had carried out his inspection of the propeller, states that the captain and Chief Engineer of the Fung Shing 2, "thought the incident came from the problem of the adjustable propeller." What was meant by that statement is not something that was explored in evidence before me. The term "adjustable propeller" was not mentioned at any stage during the trial. Commenting on the Martin Ke letter of 11 March 2002, Mr Niu in a supplementary submission said:

> " 12 So that when Martin Ke wrote his letter of 11 March 2002, that is, only 11 days after the collision, Tevita Raass may have already carried out his dive but had not freed the propeller from the entanglements, because the vessel (Fung Shing 2) could still not move, and Martin Ke, writing his letter, thought that the problem was the adjustable propeller. But another dive was carried out subsequently, by Paula, subsequent to which, according to Uaisele Pau'u, the vessel, Fung Shing 2, was able to leave the point A he marked and carried out its longline fishing again, about two weeks after Paula did his dive.
>
> 13 The defendant therefore respectfully submits that no inference can properly be drawn from the letter of Martin Ke that the adjustable propeller did have a problem, because evidence had been given by witnesses of both the plaintiff and the defendant that the propeller was found to be entangled with ropes, nylon ropes, etc which had to be cut and cleared to free the propeller. Tevita Raass says that the propeller

> was stuck fast and he had to use bolt cutter and hacksaw to (get) the entanglements off."

[40] With respect to counsel, I do not consider that these submissions adequately explain the terminology used in Martin Ke's letter. If the sole cause of the problem had been rope and cable entanglement in the propeller then surely it would have been very easy for Martin Ke to have stated exactly that. At the time he wrote his letter, Tevita Raass had carried out his dives (over a three hour period) and had freed the propeller from the rope and cable obstruction. He told the court that after he removed the obstructions he was able to turn the propeller by hand. Mr Niu submits in submission 12, set out in the previous paragraph, that the vessel "could still not move" but the defendant called no evidence to that effect. In any event, if the vessel was still unable to move after the rope and cable had been untangled by Tevita Raass, it could only mean that there must have been some other problem which the court did not hear any evidence about. Ms Mangisi submitted that the Martin Ke Letter indicates that there may have been some recurring problem with the Fung Shing 2 which the defendant had failed to remedy. She may well be correct. Although the defendant does not have to explain the precise cause of the collision in order to dislodge the inference of negligence, it is still required to produce credible evidence which explains how the collision may have occurred without negligence on its part. For the reasons set out above, my finding is that the defendant has failed to satisfy that criteria in the present case and the plaintiff has succeeded, therefore, in establishing its cause of action in negligence.

Quantum

[41] Under the prayer for relief in his statement of claim, the plaintiff seeks:

> "Damage to the vessel amounting to TOP 32, 038.
>
> And loss of income while the vessel is repaired.
>
> Lifting charges.
>
> Storage charges at TOP 3 per day.
>
> Legal costs."

At the trial those claims were quantified as follows:

> "(a) costs of repairs, which initially was $32,038 in 2002 and which subsequently at the trial in 2006 was $55,000.
>
> (b) loss of income of $122,500 which (the plaintiff) averaged at $2,500 net profit per month from 2002 to 2006, and
>
> (c) storage costs of $4,410 which is $3 per day for 1470 days,
>
> making a total claim of $181,910.

[42] One of the submissions made by Mr Niu in relation to the damages claim is that the plaintiff was negligent in not having his vessel insured because an insurance company would have had the repairs carried out immediately with minimal consequential loss. However, no authority was cited for that proposition and the defendant did not plead contributory negligence. Another submission made by defence counsel in relation to quantum was that neither the original 2002 estimate of repair costs provided by KW International nor the company's updated 2005 estimate disclosed KW International's profit percentage figure. He submitted that that "left the court guessing as to whether or not KW International's profit margin is reasonable or not." Having listened to the representative from KW International who gave evidence, and having considered the written quotations from the company, I am prepared to accept that the company is reputable and that its repair estimates were genuine and reasonable. If either estimate was to be seriously challenged then it was always open to the defendant to obtain its own quotation from some other company but it did not do so.

[43] Mr Niu is on much stronger ground, however, when he criticises the plaintiff in his submissions for failing to take appropriate steps to mitigate his loss. From the plaintiff's own evidence, it seems that he has not worked in any other employment since the accident to the Topaz. He now claims loss of income for the four years between 2002 and 2006 in the total sum of $122,500. It also appears that he has made no real efforts to try to borrow

funds to have the repair work carried out. The vessel has remained on Port Authority land in its damaged state exposed to the elements and vandalism. It is now effectively a write-off.

[44] In *Tukutau v Masoe* [2001] Tonga LR 116, this Court affirmed the obligation on a plaintiff to mitigate his loss. In that case the court cited the following extract from Charlesworth & Percy on Negligence, 8th ed, para 4.83:

> "Consequential loss does not include any extra damage, occasioned by the impecunious position of the injured party, whereby the lost chattel could not be replaced within a reasonable time."

[45] I am prepared to accept from the evidence that it may have taken up to nine months to have the repair work carried out to a satisfactory standard. I am, therefore, prepared to allow consequential losses for such period of time. The claim of $2,500 net profit per month, however, was completely unsupported by any documentary evidence and for that reason I am not prepared to allow any more than $1,500 per month under this head -- making $13,500 in total. The storage charge of $3 per day seems reasonable and is allowed but only for a period of nine months -- $810 in total. On the same basis and having regard to the plaintiff's duty to mitigate his loss, I am not prepared to allow the repair costs claim at the updated figure of $55,000. In any event, no application was made by plaintiff's counsel to amend the figure in the statement of claim under this head of loss which still stands at the original repair quotation figure of $32,038.00. I accept that item of claim in full.

Conclusions

[46] The end result is that the plaintiff has succeeded in his claim and is entitled to recover damages made up as follows:

(a) repair costs $32,038.00
(b) loss of income $13,500.00
(c) storage costs $810.00

580 making a total figure of $46,348.00. No interest is claimed.

[47] The plaintiff is also entitled to costs at a figure to be agreed or taxed.

R v Tu'ivai

Supreme Court, Nuku'alofa
Ford J
CR 182/2005

28-30 August 2006; 4 September 2006

Criminal law – bribery of government servant – intention of accused essential ingredient – not proved so acquitted

The accused was charged with one count of bribery of a government servant contrary to section 51 of the Criminal Offences Act (Cap 18). It was alleged that on 27 May 2005 he gave a cheque to a senior Crown counsel with the Crown Law Office in order for him to adjourn sine die a high profile Customs case where the accused, a licensed lawyer, and his two co-accused, one of whom was a Noble of the Realm and Speaker of the Legislative Assembly, were being prosecuted for attempting to bribe Customs in order to avoid paying duty on the importation of 600 cartons of Bounty Rum from Fiji. The accused contended that the payment was made as a mark of appreciation for Crown counsel's cooperation in settling a civil case out of court.

Held:

1. Before an accused can be found guilty of bribery of a government servant under section 51 of the Criminal Offences Act, the court needed to be satisfied beyond reasonable doubt that the accused's purpose in making the payment or offer was in order to incline or dispose the government servant to act contrary to his duty or, in other words, to act contrary to the accepted rules of honesty and integrity as a government servant. It was not essential for the Crown to show that the government servant did so act or even that he ever intended to do so.
2. The essential feature in the offence was the intention of the accused; the intention with which he made the offer or payment. This involved an inquiry into the state of mind of the accused at the relevant time and that, in turn, involved a consideration of all the facts that had been established in evidence in order to ascertain whether those facts demonstrated that the accused's intention at the time he made the payment or offer was the intention attributed to him in the indictment.
3. It was inconceivable that any law practitioner could seriously believe that Crown counsel could somehow just make a case go away. The court accepted the accused's contention that the payment was made as a mark of appreciation "albeit a misguided mark of appreciation" for Crown counsel's cooperation in settling the civil case and the accused was acquitted accordingly.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown : Mr Kefu
The accused in person

Judgment

The background

[1] The accused, a licensed lawyer, is facing one charge of bribery of a government servant contrary to section 51 of the Criminal Offences Act (Cap 18). It is alleged that on 27 May 2005 he gave a cheque to the value of $400 to 'Ofa Pouono, a Senior Crown Counsel with the Crown Law Office in order to induce him to abstain from executing his

duty by adjourning *sine die* a criminal trial in which the accused was one of the three named defendants.

[2] For his part, the accused admits giving the cash cheque for $400 to Mr Pouono on the morning of 27 May 2005 but he contends that it was given to him as a shout or gift in appreciation for his role in a civil case that had recently been settled out of court.

[3] In the civil case the plaintiff, a Mr 'Elone Matakaiongo, had issued proceedings claiming damages against the Kingdom of Tonga arising out of a motor vehicle accident. The plaintiff's van had been hit from the rear by a Ministry of Work's truck. The accused was acting for Mr Matakaiongo in that proceeding and Mr Pouono was acting for the Crown.

The evidence for the Crown

[4] Returning to the present case, 31-year-old Mr Pouono told the court that he holds an LLB degree from the University of the South Pacific (1997) and an LLM from the University of Queensland (2004). He worked for the Crown Law Office in between the degrees and he resumed his employment with Crown Law as a Senior Crown Counsel in early 2005 following his return to Tonga. As a result of the factual matters giving rise to this prosecution, Mr Pouono lost his job at the Crown Law Office and recently he began working for a private law firm.

[5] In his examination-in-chief, Mr Pouono first canvassed his involvement with the accused in connection with the civil case. He said that the file was given to him to handle upon his return to Crown Law. He could not recall the amount of damages claimed by Mr Matakaiongo but he recalled that after he reviewed the file he considered it appropriate to try and settle the case out of court. He approached the accused on the subject and both counsel agreed on a settlement figure of $2000 which was eventually approved by the Solicitor General.

[6] Mr Pouono said that after the settlement was negotiated the accused told him that he was going to give him some money. He was asked about this conversation in his examination-in-chief:

> "Q. After the case with Mr Matakaiongo settled did you talk to the accused about giving you some money?
> A. Yes, counsel (the accused) told me that he's going to give me some money.
>
> Q. When did he tell you this?
> A. We talked on this after the settlement of that case.
>
> Court: He told you what?
> A. He told me he was going to give me some money after the settlement of the case.
>
> Q. Do you recall the words Tu'ivai used when he said he was going to give you some money?
> A. All he said was, "I'm going to shout you."
>
> Court: He would shout you?
> A. Yes.
>
> Q. And were you thinking of anything when he said that to you?
> A. No."

[7] Referring to the other criminal case the accused was involved in ("the Customs case"), Mr Pouono told the court that he also took over handling the prosecution of that case on behalf of the Crown after his return from Australia. There were three defendants in the case, Mr Tu'ivai, Hon Veikune and 'Aisea Toa. It is unnecessary for me to go into any of the details regarding that prosecution but in general terms, as I understand it, it was alleged that the three defendants had attempted to bribe Customs in order to avoid paying duty on the importation from Fiji of 600 cartons of Bounty Rum.

[8] Mr Tu'ivai was representing himself, Hon Veikune had Mr Tu'utafaiva acting as his counsel and Mr Toa was represented by Mr Teisina Fifita. Honourable Veikune was Speaker of the Legislative Assembly at the time and his counsel was anxious to have the case heard, if possible, before the opening of Parliament for the year in late May 2005.

The trial, therefore, had been scheduled to take place before Mr Justice Thomas on Tuesday 17 May 2005.

[9] The trial date of 17 May 2005 had been fixed by myself at a Directions Hearing on 11 May 2005 but as Mr Pouono had been in Fiji at the time, another counsel from Crown Law had appeared at the Chambers hearing on his behalf. Mr Pouono explained in evidence that he was duly informed of the trial date but because he did not return from Fiji until 14 May, he was not in a position to proceed with the trial when the case was called before Mr Justice Thomas on 17 May. He proposed, therefore, to ask the judge for an adjournment.

[10] Mr Pouono told the court about an incident that occurred in the courtroom immediately before the judge entered. He said that other counsel were in court but he was standing with his back to them. He then heard Mr Tu'ivai say to him words to the effect, "don't you know that the person you are prosecuting (Honourable Veikune) is a member of His Majesty's Privy Council and he would be able to have you appointed as the next Solicitor General." Mr Pouono said that Hon Veikune was not in the courtroom when the remark was made but later evidence contradicted that and I am satisfied that Mr Pouono was mistaken in this regard. The witness was asked by Mr Kefu how the others responded to the remark. He replied that they paid no attention and he smiled thinking that Mr Tu'ivai was simply joking.

[11] When Justice Thomas entered the courtroom, Mr Pouono explained his situation and formally applied for the trial to be adjourned. Justice Thomas in response told counsel that, as he would be returning shortly to New Zealand, what he proposed to do was list the case for another Directions Hearing in Chambers before Chief Justice Webster and the Chief Justice could then allocate a new trial date. The date scheduled for the Directions Hearing before the Chief Justice was 27 May 2005 at 9 a.m.

[12] Mr Pouono then recounted what happened immediately prior to and after the Directions Hearing on Friday 27 May. He said that before going into Chambers he was sitting on a seat under the verandah outside the Chief Justice's Chambers and the accused handed him something -- it was folded. He opened it up and saw that it was a cheque for $400 made out to cash. He continued in evidence:

> "I said to the accused, "what is this?" He said, "it's lunch money." He said that he wants to play fair. He also said that it's okay about the staff at Crown Law, he will come around some time and give them some and then I took the cheque and put it in my shirt pocket.
>
> Q. When Tu'ivai gave you the cheque what were you thinking at the time?
> A. The first thing that came into my mind was that the money was for lunch.
>
> Q. Were you thinking of anything else?
> A. No, I wasn't thinking of anything else.
>
> Q. After you put the cheque into your pocket what happened then after the other counsel came out of the Chief Justice's Chambers?
> A. When they came out they stood in front of me. We were about to enter Chambers and then 'Amini Tu'ivai said to them, " 'Ofa's good because he's a religious man and he will adjourn the case *sine die,"* and then we were called into the Judge's Chambers."

[13] In Chambers, after discussing the fixture position with all counsel, the Chief Justice fixed a date in January 2006 as the new trial date. Mr Pouono said that he then returned to his office and carried on with other work. After lunch that same day he remembered the cheque and he took it out of his shirt pocket and looked at it. In his words:

> "I was in my room and when I took out the cheque from my shirt pocket I looked at it. And then I thought about the cheque and to me this might not be for lunch only it might be for something else and that thing -- I didn't know what that thing might be. Then I thought about the words the accused said to me on the 17th of May when we were about to proceed with the case and to me it was likely that the accused, this counsel, was trying to pay something to me or bribe me. To bribe me so that I would not be able to fully complete or carry out my task

> as a prosecutor for this case. It was the thought that came to my mind or enlightened my mind and I came to the conclusion that this counsel tried to bribe me in regards to this case."

[14] Mr Pouono said that later that same afternoon he contacted the President of the Tonga Law Society, Mr Laki Niu, and informed him of his suspicions about the accused. After work that same Friday he made a formal complaint to the police. On the next working day, Monday 30 May 2005, Mr Pouono reported the matter to his superior at Crown Law, who at the time was the Acting Solicitor General. He was asked to make a written statement. By the time he presented his written statement the Solicitor General had returned. She immediately had the matter reported to the Public Service Commission and Mr Pouono was suspended from duty pending an investigation. Following the investigation, he was discharged from the Public Service for breaching a regulation which prohibits public servants from receiving money and gifts. Mr Pouono said that he subsequently successfully appealed his dismissal to Cabinet and in February 2006 Cabinet quashed the order made by the Public Service Commission and he was reinstated as a public servant as from June 2005 with back pay to that date on the basis that he formally resigned his position as from February 2006, which he duly did.

[15] Towards the end of his examination-in-chief, Mr Pouono was asked by the prosecutor to formally produce the $400 cheque as an exhibit. At the same time he was asked the reason why he thought the accused had given him the $400. He replied:

> "My understanding was to strike out the case
>
> Q. Were you able to do that?
> A. No."

[16] In cross-examination the accused asked:

> "Mr Pouono, since you are accusing me of bribing you to adjourn this trial for ever, the adjournment of the trial on the 17th of May, did I have any part in asking that favour?
> A. No
>
> .Q. So not at any time did I ask you to adjourn the case?
> A. Not directly, no.
>
> Q. Just your thoughts, that maybe $400 was given to you so you could adjourn the case?
> A. Yes."

[17] The Crown also called evidence from Siosaia Halatanu, a former Inspector of Police who had retired earlier this year after 32 years with the police force. Inspector Halatanu had been the investigating officer in the present case. He told the court that the accused had denied trying to bribe Mr Pouono. In his written statement to the police, which was produced as an exhibit, the accused said that when he settled the civil case for $2000 he told his client, 'Elone Matakaiongo, that he would give him $1000 and that he and Mr Pouono would have $500 each of the remaining $1000. He said that it was in his nature to do something like that.

The defence case

[18] The accused arranged for the Court file relating to the civil case to be produced. It showed that on 6 April 2005 a formal settlement memorandum was signed by Mr Tu'ivai on behalf of the plaintiff, Mr 'Elone Matakaiongo, and Mr Pouono on behalf of the defendant, the Kingdom of Tonga. The memorandum provided that the defendant would pay the plaintiff $2000 without any admission of liability and that it would repair the damage inflicted on the plaintiff's vehicle. The court was duly informed of the settlement at a chambers hearing on 13 April 2005. No order was made as to costs.

[19] In his evidence, the 46 year-old accused said that he obtained a Diploma in Legal Studies from the University of the South Pacific in 1992 and over the last 14 years he has practised law in Tonga appearing in the Magistrates' Court, Supreme Court and Court of Appeal. He explained that he is also a farmer and he runs a handicraft business. He has been suspended from practising law since he was charged in connection with the present case back in June 2005. He said that he and his wife were divorced in 2002 but they later

got back together but finally separated around the time of the events giving rise to this prosecution. He has a young foster son.

[20] The accused explained to the court in some detail how it was that he came to give the $400 cheque to Mr Pouono. He said that after he had settled the civil case for $2000 in April 2005 he had a talk to his client in front of Mr Pouono while they were standing under the verandah outside the Chief Justice's Chambers. He said that he explained to Mr Matakaiongo that the case had settled and they would not have to go to trial. He told his client that $2000 would be paid to him (the accused) of which $1000 would be given to him (the client) and the other $1000 would be for himself and he would share half of it with Mr Pouono.

[21] The accused said that nothing further then happened regarding the settlement until the morning of 17 May 2005 when he appeared, along with the others, before Mr Justice Thomas for what was going to be the first day of the trial in the Customs case. The accused said that after the Crown obtained the adjournment that day Mr Pouono took him aside and told him that the voucher for the $2000 settlement in the civil case had been issued and was back at his office ready to be collected. He said that he then walked back to the Crown Law Office with Mr Pouono and he waited while the clerk obtained the voucher for him. He related how, while they were waiting, Mr Pouono was called into the Solicitor General's office and when he returned he told the accused that she was upset at him for not having gone ahead with the trial that day. The accused said that they continued to talk in Mr Pouono's office until the clerk eventually returned and asked him to come and sign the delivery book so that he could uplift the voucher. When those various propositions had earlier been put to Mr Pouono in cross-examination, he had denied them. He said that he had not invited the accused back to his office on the 17th of May to pick up the voucher.

[22] The accused said that before he left the Crown Law Office that morning he told the girls at the office that he would shout them lunch. He said that he then walked back to his car which he had left parked at the court and drove over to Treasury to exchange the voucher for cash. He was not able to collect the cash, however, until later in the day. The accused produced as an exhibit the voucher in question. It was dated 17 May 2005 and his bank statement, which he also produced, showed that the money had been paid into his account also on that same day.

[23] After he uplifted the money from Treasury on 17 May, the accused said that he drove over to his client's house at Houmakilikao and gave him a cheque for $750 because he had decided to deduct a further $250 to cover court filing fees and other expenses. He said that his client then asked him to drive him into town so that he could cash the cheque and the accused did so. His client then refused to take the $750. He said that all he was really interested in was in having his vehicle repaired. The accused's three-year-old foster son was in the car at the time and the client threw him $150 in cash and he would not take it back. In the end, the accused was able to persuade him to take $50 back leaving the client with $650 which he was obviously very happy with.

[24] The accused told the court that he had not forgotten the promise he had made to Mr Pouono to give him half but he was busy with his other non-legal activities at the time and, as he knew he would be seeing Mr Pouono again at the Chambers hearing scheduled for the 27th of May, he decided that he would give him the money then. Referring to what happened outside the Chief Justice 's Chambers on the morning of the 27th of May, the accused said that while he was sitting on the seat with Mr Pouono he took out his cheque book, wrote out the cheque for $400 made out to cash and gave it to Mr Pouono. He said that when he gave it to him he simply told him that he had cashed the voucher and this was the lunch money he had promised. He told him he just wanted to be fair with him because he had promised him the money. He said Mr Pouono looked at it, said "thanks" and then put the cheque in his shirt pocket. The accused told the court that he really appreciated what Mr Pouono had done in agreeing to settle the civil case out of court because the only clients who came to him were those who had no money and they saw him as the last lawyer who could help them.

[25] The accused also said that he told 'Ofa Pouono at the same time that he would later give the girls from his office $100 for their lunch. He said that sometime after that when he was driving his van in town one day he met two of the girls from the Crown Law Office and they stopped him and asked him where the lunch money was that he had promised them. He said that one of the girls, who he named as "Tu'itavuki", told him that

she needed some money because she was making a polo (a food parcel wrapped in coconut leaves) for the Free Wesleyan Church conference in Ha'apai and she asked him if he could make a donation. The accused agreed and instead of writing out the one cheque for $100 he made out two cheques for $50 each and he told her that one cheque was his donation to the polo and the other was for her to buy lunch for the girls back at the office. He said that when he gave the cheque to Tuitavuki for the church food he made the facetious comment, "make sure that I'm the one who's going to get the blessings, not you."

[26] The accused was closely cross-examined by Mr Kefu over this evidence. He was asked where he got the name "Tuitavuki" from and he replied that he had asked the driver from Crown Law Office after the trial had commenced when he was proposing to issue a subpoena. It was then put to him that he was making all this part of his evidence up and he had not given any money to the girls. The accused stuck to his story. I will need to return to this evidence.

[27] For completeness I should record that the accused also called evidence from a senior law practitioner, Mr Tu'utafaiva, and from 'Elone Matakaiongo, his client in the civil case. Mr Tu'utafaiva confirmed that he acted for Hon Veikune in the Customs case. Ironically, Mr Pouono is now employed by Mr Tu'utafaiva. The accused asked Mr Tu'utafaiva about the two conversations that had figured so prominently in this trial, the first on 17 May while waiting in court for Mr Justice Thomas and, the second, outside Chief Justice Webster's Chambers on 27 May. In response, Mr Tu'utafaiva said that he recalled both conversations clearly and he went on to add, "to me personally, they were just jokes. They were not serious conversations."

[28] Mr 'Elone Matakaiongo made it clear to the court that he had never really been interested in obtaining damages in his claim arising out of the motor vehicle accident. His concern was to have his vehicle repaired as quickly as possible so that he could use it again for his farming work. In relation to the settlement of his civil claim, he told the court that he recalled having a conversation with the accused outside the Judge's Chambers on the day that he learned of the settlement. He said that another man was with them who he was able to identify in court as 'Ofa Pouono but he had not known at the time that Mr Pouono was the lawyer for the other side. He said that in the conversation Mr Tu'ivai told him that he would give him (Mr Matakaiongo) $1000 and the other party would repair his vehicle and the money that he (Mr Tu'ivai) would get, he would give some of it "to this guy" (meaning Mr Pouono). Mr Matakaiongo said that Mr Pouono would have overheard that conversation.

The law

[29] The allegation is that the accused paid $400 to 'Ofa Pouono, a person in the service of the government, as an inducement to abstain from executing his duty by adjourning *sine die* the trial of the Customs case. There is no dispute that the accused paid Mr Pouono $400 and that Mr Pouono was a person in the service of the government at the time.

[30] Before an accused can be found guilty of bribery of a government servant under section 51 of the Criminal Offences Act, the court needs to be satisfied beyond reasonable doubt that the accused's purpose in making the payment or offer was in order to incline or dispose the government servant to act contrary to his duty or, in other words, to act contrary to the accepted rules of honesty and integrity as a government servant. It is not essential for the Crown to show that the government servant did so act or even that he ever intended to do so. The essential feature in the offence is the intention of the accused; the intention with which he made the offer or payment. This involves an inquiry into the state of mind of the accused at the relevant time and that, in turn, involves a consideration of all the facts that have been established in evidence in order to ascertain whether those facts demonstrate that the accused's intention at the time he made the payment or offer was the intention attributed to him in the indictment.

Findings

[31] Towards the end of the evidence, there was an interesting development regarding the two girls from the Crown Law Office which gained some prominence as the case drew to its conclusion. Initially, the prosecutor was quite scathing of the accused in cross-examination about his contention that on the day he picked up his voucher in the civil case he had promised lunch to the girls at Crown Law. Mr Kefu was equally dismissive of the accused's claim that he had later given one of the two girls two cheques in the sum of $50

each -- one as a donation towards the food for her church conference, the other as a shout for the girls back at the office. Mr Kefu put it to the accused that these things simply did not happen and he was making the evidence up. Mr Kefu indicated that he would be calling evidence from the girls in question.

[32] The significance of this evidence, of course, is that if it was true then it would add support to the accused's story that the payment of $400 to Mr Pouono was simply a gratuitous payment from the proceeds of settlement of the civil claim in the same way that his payment to buy lunch for the girls at Crown Law was nothing more than a gratuitous gesture.. There is no way that a payment to the girls at Crown Law for lunch could be related to the Customs case and the prosecutor did not suggest otherwise.

[33] The accused produced in evidence his cheque-book which showed two butts for $50 cash each and his bank statement which showed that the two cheques had been presented on 22 and 24 June 2005 respectively. Prior to the luncheon adjournment on the final day of the trial, the accused obtained an order from the court requiring an officer from Westpac to appear and produce the two cheques in question in order to try and ascertain who had cashed them.

[34] When the hearing then resumed at 2 p.m. a witness from Westpac produced both of the cheques and told the court that they had been cashed by someone called "Tuiniua" as that name appeared on the reverse side of each. Tuiniua, as it turned out, was Keleni 'Itene Tuiniua, one of the girls from the Crown Law Office who the accused had spoken to in the street. The name "Tu'itavuki" which had been given to the accused by the Crown Law driver was Mele Tu'itavuki, the other girl who had been with Keleni at the time.

[35] Mr Kefu then called evidence in rebuttal from Keleni Tuinua and her colleague Mele Tu'itavuki. They denied having stopped the accused in the street. They claimed that it had been him who had called out to them. They said that they were on their way to buy some plastic wrappings for food for the church conference at Ha'apai and the accused had stopped his vehicle and asked them where they were going. They said that they walked over and stood by the door of his vehicle. Tu'itavuki told the court that she was standing behind Keleni and she could not recall what Keleni and the accused talked about. She said that she did not see any cheques being handed over.

[36] In her examination-in-chief, Keleni said:

> " We both stood in front of Maseia's (a bookshop) beside 'Amini's (the accused's) vehicle and we talked to him.
>
> Q. What did he tell you?
> A. 'Amini asked us what we bought and we told him that we were buying something to wrap the food in -- some plastic stuff to wrap the food in.
>
> Q. Plastic wrapper?
> A. Yes.
>
> Q. Did he ask you what the food was for?
> A. No.
>
> Q. What happened after you told him you were buying plastic wrapper?
> A. Then he handed the cheque and I told him I could not accept the cheque and he said it's okay he's not going to let anyone know.
>
> Q. Before he handed you the cheque did he speak to you?
> A. Yes.
>
> Q. What did he say?
> A. Before he handed me the cheque he told me that $50 was his donation for preparation of the food and the other $50 is just for myself.
>
> Q. Did you ask him for some money?
> A. No.
>
> Q. Did he tell you to give some money to the workers for lunch?
> A. No.

Q. So what did you mean by saying you cannot accept the cheque?
A. Because at the time I knew the thing that had happened to 'Ofa Pouono but the reason I accepted was because he insisted me to take it.

Q. How many times did he tell you to take it?
A. Twice.

Q. Why did you take the cheques?
A. The reason why I took the cheques was not for any other reason but 'Amini told me to take them."

[37] It then emerged in cross-examination and re-examination that it was not until 25 minutes to two o'clock, on that same afternoon that Keleni gave evidence, that she admitted, for the first time, receiving the two cheques from the accused. In fact, earlier that same day when confronted by Mr Kefu she had apparently denied any knowledge of the cheques. It is fairly obvious, therefore, that her last-minute admission was made in the knowledge that an officer from Westpac was going to be producing the two cheques in question which would show her signature on the reverse side.

Conclusions

[38] Even before I heard the evidence about the involvement of the two girls from Crown Law, I was satisfied that the Crown case against the accused could not succeed. The prosecutor's contention that the accused paid $400 to 'Ofa Pouono in order to induce him to adjourn the Customs case *sine die* (or "forever" as it was put in submissions), simply defies common sense. The case was a high profile case in which one of the accused was the Speaker of the Legislative Assembly and a Noble of the Realm. As it turned out, Hon Veikune was stripped of his Title following conviction. It is inconceivable that any law practitioner could seriously believe for one moment that Crown counsel could somehow just make such a case go away. The Crown has failed to establish one of the essential elements of the charge namely, that at the time he paid across the money, the accused intended to bribe 'Ofa Pouono in the manner alleged in the indictment.

[39] For his part, the accused came across as a plausible witness and, with one or two exceptions which were of no real overall consequence in the end, I am satisfied that his recollection of the relevant events was both reliable and credible. Whilst the ethical issues involving the accused's dealings with his client's money in the civil case are of obvious concern, they have no bearings on the essential elements which I need to deal with in the present criminal case.

[40] My conclusion is that the Crown has failed to establish guilt on the part of the accused. On the contrary, I am satisfied and accept that the payment in question was made, as the accused contended from the outset, simply as a mark of appreciation, albeit a misguided mark of appreciation, for Mr Pouono's cooperation in settling the civil case. The accused is accordingly acquitted and discharged.

Ha'angana v Kingdom of Tonga

Supreme Court, Nuku'alofa
Ford J
CV 614/2005

19 April 2006; 8 September 2006

Civil procedure – judicial review application – cross-examination – not appropriate in this case

Competing heirs' claims had been lodged to two allotments formerly owned by Manitisa Heimuli, deceased. The applicant alleged that Manitisa Heimuli had died without any legitimate issue and he claimed to be the rightful heir to the allotments because his late father was Manitisa's older brother. Unbeknown to the applicant at the time, Viliami Hurrell Heimuli had also filed an heir's affidavit to the two allotments claiming that he had been born in 1943 as the illegitimate son of Manitisa and Susanna Hurrell but that his birth was later legitimated in 1947 when Manitisa and Susanna were married. On 15 August 1972 Viliami's "illegitimate" birth had been re-registered by an asterisked addition, numbered 167A, to the original entry of birth in the register book showing the child's name as Viliami Hurrell Heimuli, the father as Manitisa Heimuli, the mother as Susanna Heimuli and the child's status as "legitimate". Viliami had passed away in 2003. The applicant filed an application for judicial review seeking appropriate orders requiring the Registrar General of Births, Deaths and Marriages to remove from the official register the entry recording the legitimation of Viliami on the grounds that he never was the son of Manitisa. Counsel relied on supporting affidavits and the fact that the affidavit evidence had gone uncontested. The respondent, representing the Registrar General of Births, Deaths and Marriages, contended that the applicant had failed to establish any illegality in the re-registration of Viliami's birth as "legitimated".

Held:

1. In judicial review proceedings leave was rarely given to cross examine deponents to affidavits but cross-examination should be allowed whenever the justice of the case so required. This was not an appropriate case for allowing cross-examination.
2. Where a person was legitimated by the marriage of his parents subsequent to his birth then section 3(1) of the Legitimacy Act gave immediate recognition to the legitimation from the date of the marriage. Recognition of the person's legitimacy may be achieved through a subsequent court order or reregistration of the details of the person's birth (as was the case with Viliami) but such recognition was no more than a formal recognition of the legitimation brought about by section 3(1) of the Act.
3. The applicant had failed to rebut the presumption of regularity which meant that the re-registration of Viliami Hurrell's birth as "legitimated" was to be regarded as valid until proved to the contrary. The application for judicial review was dismissed.

Cases considered:

Maamakalafi v Finau [2004] Tonga LR 218 (CA)
Maliepo v Faka'osilea & Minister of Lands [1995] Tonga LR 53

Statute considered:

Legitimacy Act (Cap 32)

Counsel for applicant : Mrs Vaihu
Counsel for respondent : Miss Simiki

Judgment

The application

[1] The 53-year-old applicant is a Tongan national formerly of Kolomotu'a, Tongatapu but now resident in Palo Alto, California. He is in a poor state of health suffering from diabetes and he was unable to travel to Tonga for the hearing. A medical report produced to the court states that he is dependent upon dialysis treatment.

[2] The case relates to conflicting heirs' claims to two blocks of land in Kolomotu'a -- a town allotment called "'Ufilei" and a tax allotment called "Lele". The allotments were formerly owned by the late Manitisa Heimuli who died, according to the applicant, without any legitimate issue. In March 2002 the applicant filed an heir's affidavit claiming to be the rightful heir to the allotments because his late father was Manitisa's older brother. Unbeknown to the applicant at the time, a Viliami Hurrell Heimuli, who for ease of reference I shall refer to simply as "Viliami" or "Viliami Hurrell", also filed an heir's affidavit to the two allotments claiming that he was born in 1943 as the illegitimate son of Manitisa and Susana Hurrell but that his birth was later legitimated in 1947 when Manitisa and Susana were married. Viliami passed away in 2003.

[3] The proceeding before the court is in the form of an application for judicial review filed by the applicant seeking appropriate orders requiring the Registrar General of Births, Deaths and Marriages to remove from the official register entry No.167A/43 which is the re-registration entry recording the legitimation of Viliami Hurrell. It is alleged by the applicant that the re-registration was procured by fraud on the part of the said Viliami Hurrell in that he never was the son of Manitisa.

The plaintiff's case

[4] The applicant accepts that Viliami Hurrell was born on 2 April 1943 and that on 6 August 1947 his mother Susana married Manitisa. It is the applicant's contention, however, that Viliami's father was not Manitisa but another man from Ha'apai. The main challenge to Viliami's status comes in the form of four affidavits filed in support of the application by relatives who recall the circumstances surrounding the marriage of Manitisa and Susana. Perhaps the most powerful is the affidavit of Manitisa's nephew, 85-year-old Samisoni Pelesikoti, who was born in Kolomotu'a on 16 November 1920. He deposed:

> "3. That, one Manitisa Heimuli (now deceased) the son of Semesi Heimuli and 'Akosita Heimuli is the youngest brother of my mother the late Lavinia Moala Heimuli who was the eldest out of six children of their said parents. The said Manitisa Heimuli was about eight years old when I was born and when I grew up I got to know him very well.
>
> 4. That, I recall in the 1940s whilst I was serving in the Defence Force and was almost 27 years old a wedding in the family took place which was my uncle the said Manitisa Heimuli and Susana Hurrell. I recall it vividly because there (was) uproar in our family due to Manitisa marrying a lady who already had two children by other men. These two children were a girl namely 'Evelingi Hurrell who later married Hon 'Akau'ola and a boy namely Viliami Kohate Hurrell who later married a lady from Ha'apai I do not know the name.
>
> 5. That, before my uncle Manitisa Heimuli's marriage to Susana, he had two illegitimate children namely Kisuafi Lepa (male) which my mother adopted through Tongan customary adoption and Leipua Lepa (female) which my mother's sister 'Alisi Fusimalohi adopted through the customary adoption as well. My mother and her younger sister 'Alisi there were two girls in the family and all the rest of the family got mad with Manitisa's wedding to Susana because they had wanted him to marry the mother of (his) two illegitimate children Ms Kalo Lepa instead of marrying Susana who had two children by other men.
>
> 6. That, it was common knowledge and in fact our family never acknowledged the presence in the family of Susana Hurrell Heimuli's two children Viliami Kohate Hurrell and 'Evelingi Hurrell and they

> were never children of the said Manitisa Heimuli. They never bear the family surname of Heimuli and I'm surprised to learn about Viliami Kohate Hurrell being a legitimated son of Manitisa Heimuli. I knew in Kolomotu'a where all of us live Viliami Kohate and his family and children use the surname Hurrell all the time."

Mr Pelesikoti's affidavit is dated 3 January 2006.

[5] The three other affidavits were to similar effect. Another of Manitisa's nephews, Sione Fusimalohi, aged 79 deposed:

> "4. That, in about 1947 when I was 21 years old Manitisa Heimuli married a lady called Susana Hurrell who had two children with other men prior to the marriage and they were about 4 (the boy) and 6 (the girl) years old. I heard both these children had fathers from Ha'apai. The boy was known as Kohate and his father was Finau Katoa and the girl was 'Evelingi and her father was Tohikoula Helu. This was common knowledge in the family and they were not children of Manitisa Heimuli.
>
> 5. That, I recall very well uproar and dissatisfaction in the family because all wanted Manitisa to marry the mother of his two illegitimate children rather than looking after two children his wife brought into the family. They were never close to us and always bear the surname Hurrell and not Heimuli. I am therefore very surprised when I heard Kohate also known as Viliami was legitimised to be the son of my uncle Manitisa Heimuli.
>
> 6. That, it was common knowledge also in the whole of Kolomotu'a and every one that knows my mother's family Heimuli as it is a very big family that Viliami Kohate Hurrell and 'Evelingi Hurrell the two children of Susana Hurrell wife of Manitisa Heimuli were never children of Manitisa Heimuli either illegitimate or legitimate. It is a pity the people of Kolomotu'a in the age-group of Manitisa Heimuli are either dead or not in Tonga to enable affidavits to be taken from them but I can vouch for the truthfulness of what I am proposing to in this affidavit."

[6] Another piece of evidence the applicant relies upon consists of certain items of correspondence which his counsel obtained recently from the Prime Minister's Office. The first item is a copy of a letter dated 12 December 1969 from J. C. Riechelmann, Secretary to Government, to "HBM's Commissioner and Consul" confirming that Manitisa Heimuli, a government civil servant, was wishing to spend six months pre-retirement leave in New Zealand. The letter stated:

> "He would be accompanied by his wife Susana and son-in-law Viliami Hurrell (aged 26 years), to whom Government sponsorship is extended."

In a second letter dated 18 December 1969 to the same recipient, Mr Riechelmann asked that the words "son-in-law " be changed to "stepson".

[7] The correspondence just referred to was not available at the hearing and Crown counsel has, therefore, not had the opportunity of making submissions in relation to it. The letters were annexed to Mrs Vaihu's written submissions and counsel simply drew the court's attention to the fact that even in 1969 Manitisa was referring to Viliami Hurrell as his stepson, not his son. On the strength of that evidence and the four supporting affidavits the applicant invites the court to conclude that Manitisa never was Viliami's father and the Register of Births should be corrected accordingly.

The Crown case

[8] The respondent was named as the Kingdom of Tonga representing the Registrar General of Births, Deaths and Marriages. The descendants of Viliami Hurrell took no part in the proceeding.

[9] Miss Simiki took the court chronologically through all the official records relating to the registration of the legitimation of Viliami Hurrell beginning with the original entry

recording his birth on 2 April 1943. The large handwritten register book was produced at the hearing. It is now in a rather delicate and fragile state but the relevant entry (No.160) is clearly recorded. It shows the child's name as Viliami Hurrell, the father's name as Manitisa Heimuli and the mother as Susana Hurrell. The child's status is shown as illegitimate. The birth was registered on 8 April 1943 by one " Tinalasa Hurrell". The next relevant historical record was the registration on 6 August 1947 of the marriage between Manitisa Heimuli and Susana Hurrell.

[10] On 8 August 1972 Viliami Hurrell made an application in writing to the Registrar of the Supreme Court to have his birth legitimated. His letter (as translated) reads:

> "Registrar of the Supreme Court
> Nuku'alofa
> Tonga
>
> Dear Sir,
>
> Application is respectfully made to your Honour for leave to legitimise my birth as a legitimate child according to the Legitimacy Act (Cap.62 (sic) of the Laws of Tonga).
>
> Attached herewith is the copy of my birth certificate and my parent's marriage certificate. Neither of my parents were married at the time of my birth.
>
> I hope that you will kindly grant me the opportunity that the law provides.
>
> Yours sincerely
> Sgd: Viliami Hurrell"

[11] There is a handwritten note dated 18/8/72 at the foot of the letter which was presumably written by the Registrar or Assistant Registrar to one of the clerks which reads:

> "Clerk
> This is in order. Have him re-registered as legitimated child by subsequent marriage of parents on 6/8/47. Fee paid."

[12] On 15 August 1972 an asterisk was placed beside the original registration (No.160) of Viliami Hurrell's birth on 8 April 1943 and the corresponding asterisk at the foot of the same page effectively re-registered Viliami's birth as No.167A showing the child's name as Viliami Hurrell Heimuli, the father as Manitisa Heimuli, the mother as Susana Heimuli and the child's status as "legitimate".

Submissions

[13] Miss Simiki submitted that in making his application in letter form supported with his original birth certificate and the marriage certificate of his parents, Viliami had, according to the evidence of the present Chief Registrar, complied in all respects with the working procedure back in 1972. She submitted that the Registrar, in turn, had acted correctly administratively when, in reliance on the application and supporting documents, he gave directions and authority for Viliami Hurrell's status to be legitimised. Crown counsel further submitted that, accordingly, the applicant had failed to establish on the balance of probability that the certificate No. 167A/1943 was issued on wrong principle or under mistake or error of law or as a result of fraud.

[14] Mrs Vaihu submitted that the Registrar should not have accepted the letter of application from Viliami Hurrell and his actions in acting upon the letter and the marriage certificate "was unreliable". Counsel argued that the "justice of the case demands that the parents should have been required to depose that the child legitimated was theirs and should be approved as such." Mrs Vaihu also noted that the four affidavits that had been filed in support of the application had not been contested.

Conclusions

[15] I deal first with Mrs Vaihu's submission that the affidavit evidence was uncontested. As is stated in Halsbury 4th ed. Vol 1(1) para 176:

> "In judicial review proceedings leave will rarely be given to cross-examine deponents to affidavits . . . Nevertheless cross- examination of deponents should be allowed wherever the justice of the particular case so requires."

I do not consider that this was an appropriate case for allowing cross examination of the deponents to the four affidavits filed on behalf of the applicant. None of the deponents were, of course, able to give direct evidence as to who Viliami's father was. Their affidavit evidence was, therefore, necessarily based on hearsay. Furthermore, two of the deponents were only young children when Viliami was born in 1943. I see no merit, therefore, in Mrs Vaihu's submission that the affidavit evidence was uncontested.

[16] Mrs Vaihu was not able to refer to any legal authority in support of her contention that the Registrar should not have acted on Viliami's written application. As Miss Simiki observed, the evidence of the present Chief Registrar of this court established that Viliami followed the correct working procedure back in 1972 for having a birth re-registered as a result of the subsequent marriage of an illegitimate child's parents. In any event, the presumption of regularity applied by the Court of Appeal in *Maamakalafi v Finau* [2004] Tonga LR 218 (CA), would confirm the legality of the re-registration of Viliami Hurrell's birth unless the contrary was proved.

[17] Mrs Vaihu was unable to cite any legal authority in support of her other submission that the parents should have been required to depose that the child legitimated was theirs. The fact of the matter is that there simply was no requirement for the parents to provide such information and that continues to be the legal situation. Counsel seems to overlook the fact that, as a matter of law, the status of an illegitimate child changes automatically to that of a legitimated child upon the subsequent marriage of his parents. It was not strictly necessary, in other words, for Viliami to go through the steps he did in 1972 to have his birth re-registered. Under section 3 of the Legitimacy Act (Cap 32) he had been a legitimated child ever since his parents had married back in 1947.

[18] The legal position in this regard was explored by the Court of Appeal in some detail in *Maliepo v Faka'osilea & Minister of Lands* [1995] Tonga LR 53. In that case the court held that where a person is legitimated by the marriage of his parents subsequent to his birth then section 3(1) of the Legitimacy Act gives immediate recognition to the legitimation from the date of the marriage. The court recognised that recognition of the person's legitimacy may be achieved through a subsequent court order or re-registration of the details of the persons birth (as was the case with Viliami Hurrell) but the court concluded, that such recognition, " is no more than a formal recognition of the legitimation brought about by section 3 (1) of the Act."

[19] The final point of significance appearing in the 1943 Registrar Book is that alongside the original entry recording the birth of Viliami Hurrell (entry No.160) at the far right-hand side of the page immediately above the signature of "Tinalasa Hurrell", the person who registered Viliami's birth on 8 April 1943, are two handwritten signatures that were inserted into the Register Book subsequently. The signatures are those of Susana Heimuli and Manitisa Heimuli and they are dated 31 May 1957. Mrs Vaihu drew the court's attention to the fact that some of the correspondence she had obtained from the Prime Minister's Office contained the signature of Manitisa Heimuli when he was still a government employee. She does not say so in so many words but presumably the conclusion she is inviting the court to draw is that Manitisa's signature in that correspondence is different from the signature appearing in the Register Book. If that is counsel's contention then I do not accept it. I am satisfied that the signatures are the same and they are all the genuine signatures of Manitisa Heimuli.

[20] There was no evidence as to why Manitisa and his wife went along to the Registry Office on that particular day in 1957 and signed their respective signatures alongside the original entry of Viliami's birth but it is clear evidence, if any further evidence is required, from Manitisa acknowledging that he, in fact, was Viliami's father. There is no evidence that any of the deponents who filed affidavits in this case had knowledge that the name "Manitisa Heimuli" appeared as Viliami's father on his original birth certificate entry back in 1943. Nor would they have known that later, in 1957, Manitisa actually attended the Registry Office and signed his name alongside that original entry thus acknowledging that he was Viliami's father. Not even counsel for the applicant was aware of these matters until the hearing and she, quite properly, made an acknowledgement to that effect in her written submissions. If the individuals who filed affidavits in support of the applicant's

case had been aware of these facts at the time they swore their affidavits then they may have been more reticent about some of the more categorical statements they deposed to.

[21] Why Manitisa throughout his life apparently kept referring to Viliami as his stepson and why he apparently deliberately concealed from the rest of his family the fact that he was Viliami's father (accepting the affidavit evidence in this regard) is something that now will probably never be known. I am satisfied, however, for the reasons mentioned above,
280 that Viliami Hurrell was indeed the legitimated son of Manitisa Heimuli and his wife Susannah.

[22] The application for judicial review is dismissed. The respondent is entitled to costs to be agreed or taxed. As Viliami Hurrell's next of kin have not been a party to this litigation, I direct the Chief Registrar to forward a copy of this judgment to the office of the Minister of Lands.

Fa'aoso v Paongo anors

Supreme Court, Nuku'alofa
Ford CJ
CV 394/2006

8 September 2006; 11 September 2006

Unlawful imprisonment and assault – liability admitted – damages claimed – $10,000 awarded

In September 2003 the plaintiff, who was only 12 years of age at the time and a student in Form 1 at Api Fo'ou College, was savagely beaten by two police officers after being arrested and falsely accused of theft from a van of a mobile phone, a bag and a wallet containing money. He was held in custody for 20 hours and following his release he was taken to hospital where he received five stitches to a wound to his forehead and he was given Panadol tablets to relieve the pain. He had bruising on the back and side of his body from kicks he had received and he had been left with a small scar on his forehead which was still visible at the time of the trial three years later. He brought a claim against the police officers concerned and the Crown as their employer seeking damages under various heads, including damages for unlawful imprisonment and assault totalling $29,000. The defendants admitted liability and the hearing proceeded on the issue of damages only. No disciplinary action had ever been taken against the two police officers involved.

Held:

1. There seemed to be a culture of violence in some quarters of the police force. Police officers had to understand that their role in criminal investigations was exactly that. In other words, their task was to investigate the case through interviewing witnesses and through the appropriate use of forensic science and then come up with hard factual evidence that would stand up in a court of law. It was not simply to extract a confession from an accused through the use of force or violence.
2. In December 1995 Tonga acceded to the Convention on the Rights of the Child and although the Convention still had to be ratified, the accession indicated a willingness by the nation to be bound by its terms. All the obligations of a State in regards to the apprehension and detention of a child (defined as a person under the age of 18) set out in Article 37 of the Convention had been flagrantly abused.
3. In assessing damages it was important to take into account levels of ordinary income in Tonga and the value of money and general conditions in the Kingdom.
4. The plaintiff was awarded $5,000 for compensatory or basic damages, including aggravated damages and damages for wrongful imprisonment and a further $5,000 for exemplary damages together with costs.

Cases considered:

'Akau'ola v Fungalei [1991] Tonga LR 22
Edwards v Pohiva (Court of Appeal, App No 01/03, 25 July 2003)
Lavaka v Ministry of Police [2000] Tonga LR 17
Manu & Kingdom of Tonga v Muller [1997] Tonga LR 192
Tonga v Ministry of Police [2000] Tonga LR 111

Rules considered:

Convention on the Rights of the Child

Counsel for plaintiff : Mr Fifita
Counsel for defendants : Mr Kefu

Judgment

Preamble

[1] Counsel for the plaintiff began his brief opening address at the commencement of this trial with a quotation on "liberty or death" which he attributed to Thomas Jefferson. It would seem that he made a similar opening speech in the case of *Tonga v Ministry of Police* [2000] Tonga LR 111. At page 116 of the official report on that case, Finnigan J. notes:

> "Counsel for the plaintiff chose to open his case by quoting Thomas Jefferson; "Give me liberty or give me death", and I mention it because the remark was endorsed on behalf of the defendants by their counsel in his submissions."

[2] Before it becomes hallowed in precedent through repetition in this jurisdiction, it is perhaps timely to set the historical record straight. The remark was made, not by Thomas Jefferson, but by the American patriot, Patrick Henry, at a meeting of delegates held at a church in Richmond, Virginia, on 23 March 1774 -- 5 months after the Boston Tea Party. A commentator reported:

> "He spoke without any notes in a voice that became louder and louder, climaxing with the now famous ending. Following his speech, the vote was taken in which his resolution passed by a narrow margin, and thus Virginia joined in the American Revolution."

[3] For the record, the final paragraph of Henry's speech, which embodies Mr Fifita's quotation, reads:

> "It is in vain, sir, to extenuate the matter. Gentleman may cry, " Peace! Peace!" -- but there is no peace. The war is actually begun! The next gale that sweeps from the North will bring to our ears the clash of resounding arms! Our brethren are already in the field! Why stand we here idle? What is it that gentlemen wish? What would they have? Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others might take; but for me, give me liberty, or give me death!"

The plaintiff's case

[4] The claim is brought on behalf of a minor, 'Okusi Fa'aoso, who was savagely beaten by two police officers in September 2003 after being falsely accused of theft. The two police officers are named respectively as the first and second defendants. The plaintiff told the court that he was born on 4 February 1991, which would have made him only 12 years of age at the time of the attack but the statement of claim states his age at 13. The point was not picked up by counsel. To their credit, the defendants admitted liability and the hearing proceeded on the question of damages only. Senior Crown counsel, Mr Kefu, represented all the defendants.

[5] The plaintiff is the third child of a family of eight children. The 49 year-old father, Fuapau Fa'aoso, works as a planter. The family reside at Kolonga which is a village far out to the eastern side of Tongatapu. At the time of the incident, the plaintiff was in Form 1 at 'Api Fo'ou College. He told the court that his mother is a close relative of Hon. Nuku, a Noble of the Realm, and for two years he had been staying at Hon. Nuku's home which is close to the college. He would return home to Kolonga on weekends. Hon. Nuku paid his school fees.

[6] Between the hours of 7 and 8 p.m. on a Friday night early in September 2003 (the exact date was not identified in evidence) Hon. Nuku dropped the plaintiff at "Sia Leka", a take-away/restaurant in Nuku'alofa. He was intending to return later to pick him up. Approximately 30 minutes later, as the plaintiff came out of the restaurant and started waiting for Hon. Nuku, he saw two women close by a vehicle having an argument and then one of the woman turned to him and accused him of having taken something from her car. He denied knowing what she was talking about and the defendants now accept that he was wrongly accused. The same woman then told the plaintiff that she was going to report the matter to the police and she walked off towards the police station.

[7] The plaintiff said that he remained outside the restaurant waiting for Hon. Nuku and a short time later the woman returned with police officer Paongo. At that point the plaintiff ran away. He was asked in evidence why he ran away. He replied, "I was scared."

[8] Paongo soon caught the plaintiff and he asked him about the missing items which he identified as a mobile phone, a bag and a wallet containing $1000. When the plaintiff denied any knowledge of the theft, the officer arrested him by grasping his collar, slapping and punching him and then forcing him to walk with him back to the Nuku'alofa Police Station. Other people were watching. The following events (minus the paragraph numbering) are taken from the pleadings in the statement of claim. The allegations were all admitted by the defendants in their statement of defence:

> "At the front of the (police) station, Paongo continued battering the plaintiff. There was another officer present but he did nothing to help the plaintiff. Paongo took the plaintiff to the charge office and interviewed him regarding the lost mobile, bag, and a wallet that was stolen from a van parked in front of Sia Leka. The plaintiff told him that he did not know anything about them. The plaintiff then was taken upstairs where 'Ahofono questioned him about the theft of the said lost items. He also asked him his name, address, age, and his parents. He told 'Ahofono that he came from Kolonga, he was 13 years of age, and his parents' names. The plaintiff told 'Ahofono that he did not steal them and he knew nothing about the lost items. After the denial 'Ahofono battered the plaintiff by hitting and punching which caused the plaintiff to fall down and while on the floor 'Ahofono kicked him (he was wearing sandals) on the stomach and back. The plaintiff did not know how many hits, punches and kicks but there were not less than 10 altogether. The plaintiff was helpless while in the hands of the defendants. He could not do anything but apologise and beg for mercy for he was in pain. After the said battery the plaintiff was locked in a cell overnight. The next morning, Paongo and 'Ahofono took him upstairs and questioned him on the same matter. The plaintiff continued to deny any knowledge of the said stolen items. Paongo then hit the plaintiff on the face. The said hit caused the plaintiff to feel dizzy and darkness and he fell on the floor. On the floor he felt punches and kicks from Paongo all over his body. During this time, another police officer came into the interviewing room but did nothing to help the plaintiff. Paongo stopped battering the plaintiff and 'Ahofono who was at all times present, hit the plaintiff's head with a chair. The said hit was hard which injured (cut) the plaintiff's head. Blood ran out from the plaintiff's head injury. This was an unlawful battery on the plaintiff by 'Ahofono. 'Ahofono took the plaintiff downstairs to a water tap and told the plaintiff to wash off the blood. He also gave the plaintiff his T-shirt to hold onto his head to stop the blood flowing. The plaintiff was then taken upstairs again and again questioned. Before the plaintiff could say anything 'Ahofono moved and pointed his finger at him saying that he was going to hit him. The plaintiff was in fear and believed that 'Ahofono could hit him. This was an unlawful assault by 'Ahofono on the plaintiff. The plaintiff was in fear of further battery and assault. He told 'Ahofono that he stole the said properties and gave them to Tevita of Kolonga thinking that he would be released to go home."

[9] The statement of claim then described what happened when the police officers took the plaintiff back to his home village:

> "Paongo and 'Ahofono then took the plaintiff to Kolonga in a police car to recover the lost properties from Tevita. At Kolonga, Paongo and 'Ahofono found out that the plaintiff was lying that (sic) he gave anything to Tevita. 'Ahofono then asked the plaintiff to show them where his parents' house was and the plaintiff told them where his parents' house was. Paongo and 'Ahofono went to the plaintiff's house and met his father, Fuapau Fa'aoso. Paongo and 'Ahofono told the father that they were after a case from Kolonga. After a few minutes talking they went back to the police car to go back to the station. At all

these times at Kolonga the plaintiff was locked in the police car with another officer. When the police car was about to reverse the plaintiff's brother (Ma'ake) who happen to pass by the police car, told his father that the plaintiff was in the police car and he was injured. The father called out to the officers to wait for him. The police car was in a hurry to drive off but was blocked by traffic so the father reached it. This was the first time the father knew that the plaintiff was arrested and was injured for the defendants did not let the plaintiff's parents know that they had arrested the plaintiff. The father asked 'Ahofono and Paongo to take the plaintiff to hospital but the said officers took him to the station and locked him in the cell. Shortly after the locking of the plaintiff the father arrived at the station and asked whether the plaintiff was taken to the hospital. The officers said there was no vehicle available. The father told them that he could provide one to take the plaintiff to the hospital. He then asked Tevita of Kolonga to take the plaintiff to the hospital."

The plaintiff was eventually released from custody at approximately 4.30 pm on the Saturday afternoon having been arrested at approximately 8.30 pm the previous evening -- a total period of wrongful imprisonment of 20 hours.

[10] The plaintiff told the court that at the hospital he received five stitches to the wound to his forehead and the doctor gave him Panadol tablets to relieve the pain. He said that he had bruising on the back and side of his body from the kicks. He said that he continued to suffer pain and headaches for two weeks after the incident. He has been left with a small scar which is still visible today on his forehead just about the hairline. He said that he has been left with no other residual effects from the attack.

[11] The plaintiff said that he never returned to college after the incident for the reason that, as he was being released from custody, the two police officers threatened him a final time and told him that if they ever saw him in town again they would beat him up. It is difficult to know what to make of this evidence because it did not emerge from the pleadings nor was it brought up by his counsel in evidence. It arose out of questions from the Bench. The plaintiff said that he enjoyed school but he frankly acknowledged that he was not doing very well in his study. He said that, at the time, his ambition in life had been to help his father on the plantation when he left school and that is what he is doing now. Mr Kefu suggested that he could have gone to another college closer to Kolonga. I have taken notice of these matters but I am reluctant to place too much emphasis on them simply because they had not formed part of the plaintiff's case.

[12] In cross examination Mr Kefu asked the plaintiff to specify the exact number of slaps, punches and kicks he received on each occasion. The plaintiff gave numbers but I am reluctant to place too much weight on their accuracy. It struck me that the plaintiff was trying to be helpful to defence counsel in the same way that he readily admitted, when it was put to him by Mr Kefu in cross examination, that Hon. Nuku was the Minister of Police at the time the incident happened. Later, however, Mr Kefu acknowledged to the court that he had been mistaken and the Minister of Police at the relevant time had been Hon. Clive Edwards.

[13] The plaintiff's father, Fuapau, told the court how he first learned of what was happening to his son. He said that on the Saturday morning in question he was cleaning his shot gun when the police arrived at his home at Kolonga. 'Ahofono came to his house and told him that he was investigating a case involving the theft of a mobile phone and $1000 cash. The officer did not tell Fuapau that he had 'Okusi out in the police car. He said that they had checked out a neighbour, Tevita Filikitonga (then aged about 22), and he said that he wished to speak to Fuapau's son, Pio, about the alleged theft. The father told the officer to go ahead and speak to Pio who was in the house at the time. Pio was only 4 or 5 years old at the time and so, although the plaintiff did not give evidence about this aspect of the case, it is fairly obvious that in desperation he had given the police his young brother's name as the person he had given the stolen items to as a ruse in the same way that he had first told them he had given the items to Tevita.

[14] Fuapau told the court that when his other son, Ma'ake, came inside and told him that 'Okusi was outside in the police car injured, he immediately went to see him. As he approached the police car the driver attempted to do a U-turn and drive away quickly but another vehicle had turned into the road and blocked his exit. Fuapau called out to the

police car to stop. He noticed that 'Okusi was in the back seat sitting between two police officers holding his forehead with a piece of cloth and he could see blood coming from the wound. Fuapau asked the police to let his son out of the car and they did so. He asked his son why he was injured. The plaintiff replied that he had been beaten up by the police for the suspected theft of a mobile and $1000 which belonged to a lady in town. He told his father that he knew nothing about the case.

[15] Fuapau said he told the police to take his son to hospital to have his wound attended to. The police said that they would do that and they then drove off. Fuapau saw his son again approximately 1 1/2 hours later at the Nuku'alofa Police Station. He had borrowed a car from his neighbour, Tevita, and had driven into Nuku'alofa to see how his son was and he was upset to find that he had still not received any medical treatment for his injury. He told 'Ahofono about his concerns and the officer replied, "it's okay because it's just a minor injury -- just a scratch." In the end, however, the police allowed Fuapau to take his son to hospital accompanied by a police officer. He received five stitches to his wound. The plaintiff was then returned to the police station and Fuapau next saw him between 5 and 6 p.m. that same evening following his release from custody.

[16] The court then heard how Fuapau made a personal complaint to the Minister of Police the following day. The defendants admitted the following further allegations pleaded in the statement of claim:

> "The father made several complaints to the Minister of Police at the time about the unlawful actions of Paongo and 'Ahofono against his son and he was told that actions would be done against Paongo and 'Ahofono. Paongo and 'Ahofono with other officers went and apologised to the father but the apologies were not accepted. At one time some officers and Paongo and 'Ahofono successfully persuaded the father's younger brother, Sione Folo to go with them and apologise to the plaintiff's father. In fact they all went to the Minister of Police and the father told the Minister that he couldn't forget what his officers did to his son. He did not accept the apology. On 10.02.2004 the father wrote to the Minister of Police regarding his complaint against his officers and he was told that work on it was on (sic) for it would be better and faster if departmental disciplinary actions would be taken. The father went overseas hoping that disciplinary actions against the officers would be done as advised by the Minister. When the father came back in 2006 he found out that nothing had been done by the third defendant against Paongo and 'Ahofono. The father inquired about his complaint but the file was not found in the Police Department, he was very disappointed."

[17] It appears that no disciplinary action has been taken against the two police officers and, if that is the case, it is naturally a matter of some concern. The father also told the court about a medical report he obtained from the doctor who treated his son after the assault. He was requested by the police to give them the report and thereafter it disappeared. Crown counsel told the court from the Bar that he had also made inquiries as to the whereabouts of the medical report, but he had been unable to locate it.

Submissions

[18] The plaintiff has claimed damages of $29,000 made up as follows:

> "1. Fear, pain, blood loss, and inconvenience (including failing to take him to hospital) $2,000
>
> 2. Battery and assault $14,000
>
> 3. Unlawful imprisonment $3,000
>
> 4. Aggravated damages $3,000
>
> 5. Exemplary damages $7,000"

[19] Mr Fifita referred the court to several comparable cases including *Lavaka v Ministry of Police* [2000] Tonga LR 17 where a 14-year-old boy suspected of theft was taken into custody and beaten by the police with a belt and iron bar. He was given no opportunity of consulting a lawyer or his guardian. The victim in that case suffered bruises on his back

and chest and he was distressed for a week. No medical treatment was required. The court awarded him damages totalling $13,500 made up as follows:

> Unlawful imprisonment $3,000
>
> Assault $5,500
>
> Exemplary damages $5,000

[20] In *Tonga v Ministry of Police* [2000] Tonga LR 111, a 13-year-old boy had also been accused of theft. He was assaulted by a police officer about 50 times in the police car and when the police car arrived at the Nuku'alofa Police Station the officer struck the boy a blow on the back of his head causing him to fall down unconscious. Upstairs at the police station the boy was again assaulted, this time with an iron bar. He finished up with red and black bruises on his stomach and buttocks and with skin coming off his body in places. The plaintiff did not return to school again. The judge awarded him $12,500 general damages and $1,000 exemplary damages. The judge clearly would have awarded a higher figure than $1,000 for exemplary damages but the plaintiff had only claimed that figure.

[21] In an older authority, *Manu & Kingdom of Tonga v Muller* [1997] Tonga LR 192, the Court of Appeal had before it an appeal by the Crown in another case involving wrongful arrest, assault and false imprisonment by a police officer. The trial judge had awarded the plaintiff general damages in the sum of $10,000 and exemplary damages of $1,500. In that case, the plaintiff had been subjected to punches, blows and kicks by the police officer which had left him with a 5% permanent partial disability in his left knee. There was also an element of economic loss involved in that he was unable to work again as a rigger. The Court of Appeal upheld the damages award and, in relation to the award for exemplary damages, it noted:

> "The award of $1,500 exemplary damages, in the circumstances found by the trial judge, was a modest one indeed. A high reward, in our view, would have been justified."

[22] Mr Kefu did not challenge the relevance of any of the authorities cited by Mr Fifita but he asked the court to note that in this case the defendants had admitted liability. He also made the point that when the police officer saw the blood coming from the wound to the plaintiff's forehead after he had hit him with the chair, he took the plaintiff downstairs, washed the blood away and took off his own T-shirt and gave it to the plaintiff to hold over the wound.

Findings

[23] As long ago as 1991 Chief Justice Martin, in the case of *'Akau'ola v Fungalei* [1991] Tonga LR 22, issued the following admonition to police officers:

> "A number of police officers still appear to believe that they have the right to exercise discipline over the public . . . such abuse of authority will not be tolerated, and where it is proved to have occurred it will be stamped on, with increasing severity, until the bully boy in uniform no longer roams our streets."

It is apparent from the cases I have referred to above and from the facts of the present case that this quite simple message from the former Chief Justice has not got through. There still seems to be a culture of violence in some quarters of the police force. Police officers must understand that their role in criminal investigations is exactly that. In other words, their task is to investigate the case through interviewing witnesses and through the appropriate use of forensic science and then come up with hard factual evidence that will stand up in a court of law. It is not, as I suspect some officers still believe, simply to extract a confession from the accused through the use of force and violence, if necessary.

[24] In December 1995 Tonga acceded to the Convention on the Rights of the Child. The convention still has to be properly ratified but, as this Court has noted in other cases recently, the accession indicates a willingness by the nation to be bound by its terms. Article 37 of the Convention, in four paragraphs, sets out the obligations of a State in regards to the apprehension and detention of a child (defined as a person under the age of 18). The opening words of each paragraph are relevant to the present case. They read:

> "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment . . .
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily . . .
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age . . .
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance . . . "

In the present case, all of these obligations have been flagrantly abused.

[25] There is one caveat which needs to be borne in mind in any assessment of damages which I suspect may not have been given appropriate recognition in some of the previous decisions in this area of the law. It was referred to by the Court of Appeal in *Manu*'s case in these terms:

> "It is important that the Supreme Court, in assessing damages, takes into account levels of ordinary income in Tonga and the value of money and general conditions in the kingdom."

[26] In *Edwards v Pohiva* (Court of Appeal, App No 01/03, 25 July 2003), the Court of Appeal noted with approval that in fixing damages in a wrongful imprisonment case I, as the trial judge, had taken into account evidence relating to earnings in Tonga which I concluded gave a reasonably accurate barometer of the value of money in the Kingdom. In that case I noted:

> "The relevant records show that the highest-paid public official is the Prime Minister, his basic salary is shown as $32,918. Ministers of the Crown have a basic salary of $28,760 and then the levels decrease down to the lower scales in the public service which lie somewhere between $2,500 and $3,500 per annum."

There has been some increase in rates of pay in the civil service since that case which received widespread publicity at the time but the fact still remains that many Tongans have no regular source of income. All these factors need to be borne in mind otherwise awards of damages could soon spiral and end up out of proportion in relation to the value of money and general conditions in the Kingdom.

[27] Compensatory damages or "basic damages" as they were referred to by the Court of Appeal in *Edwards* are awarded for pain and suffering and loss of enjoyment of life. In the present case under this head I have taken into account the nature of the unlawful assaults and battery the plaintiff was subjected to and his resulting injuries. I also note that he has not been left with any residual disability. Aggravated damages are simply another head of compensatory damages. They need not be specifically pleaded. They are designed to reflect the manner in which or the motives with which the wrong has been committed and they can include a penal element. Damages for false imprisonment can include compensation for loss of liberty and damage to reputation, humiliation and injury to feelings which can result from loss of liberty. Exemplary damages, as the Court of Appeal confirmed in the *Edwards* case are not only punitive but they may also be a deterrence. Both elements are appropriate in considering a case of police abuse.

[28] The Court of Appeal in *Edwards* also noted that exemplary damages should be awarded if, but only if, it is considered that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants. I say at once that the award I propose to make in respect of basic and aggravated damages is, in my view, an inadequate punishment for the defendants, particularly given the warnings that this Court has issued to police officers in similar cases in the past and for that reason I will be making a separate award of exemplary damages.

[29] Under the head of compensatory or basic damages, including aggravated damages and damages for wrongful imprisonment, I award a total of $5,000. For exemplary damages I also award the sum of $5,000 making a total damages award of $10,000. The plaintiff is entitled to costs to be agreed or taxed.

R v Fainga'anuku

Supreme Court, Nuku'alofa
Ford CJ
CR 141/2005

11-13 and 23 October 2006; 31 October 2006

Criminal law – charges of indecent assault and rape – no corroboration – case established – convicted

The accused was charged with two counts of indecent assault and four counts of rape. It was alleged that on 14 April 2005 he abducted the 16 year old schoolgirl complainant from a bus station in Nuku'alofa and took her to his home in a bush area near Fua'amotu where he held her captive against her will until 16 April. During the three days in question, the accused allegedly twice indecently assaulted the complainant and raped her on four separate occasions. The 30-year-old accused who conducted his own defence admitted the various acts detailed in the particulars of the indictment but he was adamant that in each instance the complainant had been a willing participant and had consented to what was going on. The accused contended that the complainant had opportunity to escape or to complain to a neighbour when she met her on the second night of the alleged abduction and her failure to do so confirmed that she was not being held captive against her will.

Held:

1. In Tonga there was no requirement that the evidence of the complainant in a rape case must be corroborated. It was the practice, however, consistent with the requirements of the common law, to warn the jury to proceed with caution before acting on uncorroborated evidence, particularly when the issue was consent or no consent. A judge sitting alone must be mindful of this requirement.
2. After analysing the evidence, the court rejected the accused's version of events and held that the Crown had established all the essential elements of the various charges beyond reasonable doubt. The accused was convicted on all counts.

Cases considered:
R v Lasike [2006] Tonga LR 164
R v Talanoa [2006] Tonga LR 101

Counsel for the Crown : Mr Sisifa
The accused in person

Judgment

Introduction

[1] The accused is charged with two counts of indecent assault and four counts of rape. Although he is not charged with abduction, the thrust of the case for the Crown is that on Thursday 14 April 2005 the accused abducted the 16-year-old schoolgirl complainant from one of the bus stations on the foreshore at Nuku'alofa, took her by bus to a bush area near Fua'amotu, and then held her captive against her will in his home at Fua'amotu until the night of Saturday 16 April. During the three days in question, the accused allegedly twice indecently assaulted the complainant and raped her on four separate occasions.

[2] The complainant still attends school in the fifth form at a local college. The incident occurred during the first term school holidays in 2005. After giving evidence as the first

witness for the prosecution, the complainant ended up being later recalled to the witness box to answer further questions on certain allegations the accused had made upon which she had not been given the opportunity to comment. The following narrative is a summary of her overall evidence and it includes some non-contentious evidence from other witnesses.

The case for the prosecution

[3] The complainant told the court that on the Thursday in question she had attended special study classes during the morning and around 1:30 p.m. she was sitting at the bus station waiting for a bus to take her home to Sopu. While she was waiting for her bus, a "boy" approached her and told her that the accused wanted to see her. The boy pointed out the accused who was sitting on a bus destined for villages on the eastern side of Tongatapu out past Fua'amotu. At that stage the bus was not picking up passengers. It was stationary at holding bay by the Vuna Road entrance to the bus station waiting for other buses to move out of the official bus stop area.

[4] The complainant then walked over to the eastern districts bus. Apart from the driver there were only four passages on the bus and they were all male. They turned out to be from Fua'amotu and they were all well acquainted. The accused was seated a short distance back from the driver facing the entrance door. The complainant stood at the entrance door and asked the accused what he wanted. He said that he had a message for her. At that point the driver of the bus remembered that he had a mobile telephone to be repaired and he asked the complainant whether she wanted to get on the bus or remain at the bus station. She indicated that she did not wish to board the bus and she returned to her seat at the bus station. The bus then drove away.

[5] When the bus returned some 20 minutes later the same boy approached the complainant and repeated his earlier request that the accused wished to see her. Again, she walked over to the eastern districts bus and stood at the doorway and asked the accused what he wanted. At the same time, one of the other boys in the bus, who was seated just behind the driver, grabbed hold of the study book the complainant was holding and threw it towards the rear of the bus. The complainant did not enter the bus immediately but she waited. A short time later some female passengers boarded. She described them as "three girls" and "two Fijian women." At that point the complainant also entered the bus to retrieve her school book.

[6] When she entered the bus, the complainant saw that the accused had moved to the very back seat and he was holding on to her study book. She approached him and he told her to sit down in the backseat. She refused and she asked him to return her book. Then, using both of his hands, the accused grabbed the complainant by the shoulders and forced her to sit in the backseat in the corner of the bus. He sat beside her and said that he wanted to tell her something. She asked him to tell her quickly what he wanted because she was in a hurry to catch her bus to Sopu. They then started arguing and the bus began to move off.

[7] The complainant tried to stop the bus. She called out to the driver and asked him to let her off because she was not going to Fua'amotu but to Sopu. She said that she could see the driver's face in the internal rear vision mirror and he was laughing. He did not stop the bus. The complainant told the court that at that point she made up her mind that she would go wherever the bus was heading and she would then return. She had no intention of getting off the bus until it returned to the central bus station.

[8] As the bus reached the old Office Equipment Building, still in Nuku'alofa, the complainant again tried to get the driver to stop but he refused and, at the same time, the accused told her to sit still and stop acting like a child. The accused then tried to converse with her. He asked her questions like how old she was and whether she was still attending school. She told him that she was still attending school but she refused to answer most of his other questions. On the way out to Fua'amotu the accused tried to kiss the complainant and she struggled to prevent his advances. She said he used his hands and shoulders to force her to sit in the corner seat and he threatened to punch her. The bus eventually reached Fua'amotu where the accused lived but he stayed on the bus and he forced the complainant to remain in the backseat corner. The complainant wanted to call out to the Fijian women when they were getting off the bus but the accused told her that if she called out to anyone he would punch her. She also wanted to call out to the three girls when they got off the bus but again the accused threatened to punch her and she was afraid of him.

[9] The bus travelled on as far as the next village of Nakolo, where the last passenger alighted, and then it turned around and headed back towards Fua'amotu. The only passengers at that stage were the complainant, the accused and the four males who had been on the bus from the outset. They were obviously well acquainted with both the accused and the driver and they appeared to be going along for the ride. At a bushy area somewhere between Nakolo and Fua'amotu the accused told the driver to stop the bus. The complainant said that it was not a regular bus stop and there was bush on both sides of the road. The complainant said that when the bus stopped, the driver called out to the accused "to do it in the bus" and she said that she then realised that the accused was going to rape her. She asked the driver to take her on to Fua'amotu village but he refused and he also told her that the bus was not going back into Nuku'alofa. The accused then grabbed her by the hands and pulled her off the bus. The complainant was asked in examination in chief why she did not ask the other boys on the bus for help. She replied that they were all making fun of her.

[10] One of the four male passengers still on the bus was the person the complainant described as a "boy" who had first approached her back at the bus station and told her that the accused wanted to speak to her. He turned out to be a 20-year-old plantation worker known as "Fou". Fou was called as a witness for the Crown and it was clear from his demeanour that he was of limited intelligence. He could not read or write and he seemed to have difficulty understanding even some of the more basic questions that were put to him.

[11] After the accused forced the complainant off the bus he let go of her hands and the bus drove off. She was not sure where they were at that point. The complainant and her family were from Ha'apai. They had moved to Tongatapu only three years previously. The complainant told the accused to take her home. There was a house in the bush on the opposite side of the road and she noticed three male occupants. The accused told her that he would go and ask them for a vehicle. He walked over to the house and spoke to the occupants. The complainant remained on the side of the road crying. A short time later the accused returned and the complainant heard one of the boys in the house calling out to him to change his ways. She did not know what the conversation had been about but she said that the accused swore back at the man. The complainant then asked the accused to take her home. He again grabbed hold of her hands. She told him that she was not going anywhere but she would stay on the road and wait for a vehicle. The accused forced her to go with him down a dirt path until they came to a traditional Tongan fale. The fale had no walls, however, apart from the long grass that surrounded it. It had a mattress on the ground.

[12] The accused then made a phone call on his mobile. The complainant heard him ask where the vehicle was and why it had not yet come and he then told her to wait a while and a vehicle would come to take her home. He suggested that they sit and talk in the meantime. The complainant was still crying. He put both his hands around her neck and tried to hug her. She told him to let go and take her back home but he pushed her down onto the mattress. The complainant then described to the court how she struggled as the accused forced her T-shirt and bra up above her chest and started licking her breasts and sucking her nipples. She also described how he forcibly removed her shorts and underwear and proceeded to lick her vagina. After several minutes he attempted to have intercourse but the complainant struggled and it was some time before he was able to insert his penis into her vagina. She said that when intercourse did occur it hurt and she felt something tearing in her vagina. The licking of the breasts and vagina formed the basis for the first two counts of indecent assault. The intercourse that followed gave rise to the third count which is the first charge of rape.

[13] The complainant said that by this time it was starting to get dark and she was in pain and she seemed to have lost all feeling in her left thigh. She said that at that point she didn't care anymore because she realised that she had lost her virginity. The accused had to help her to her feet and she had difficulty walking because of the pain in her thigh and vagina. They walked back out onto the road and the accused then told her that he was going to take her to his home and he would then telephone for help. When they arrived at the accused's home he told her to wait outside while he went into the living room. She was asked why she didn't attempt to escape at that point and she replied that she was still hurting, her leg was still sore and she was afraid of the accused. She also did not know where they were. The accused then came out with a towel and he told the complainant to take a shower in the outside shower. She estimated that by this time it was between 6:30

p.m. and 7:30 p.m. and it was dark. She said that she spent only about one minute in the shower because she realised that he was standing at the doorway watching her.

[14] After the shower, the accused gave the complainant a pair of his own trousers and a T-shirt to wear and he said that he would be washing her clothing. He told her to enter his bedroom through the window and he helped her climb inside. Once inside the bedroom the accused, who had gone around to the front of the house and entered the bedroom through the living room, told her that he was going to have sex again. She said that she cried and was very sad and he must have known that she was in considerable pain. She said that on that occasion he did not have to hold her down as she did not have the energy to push him away. While they were having sex on that occasion, the accused mentioned something about his mother coming back soon. That act of intercourse formed the basis for the fourth count which was the second charge of rape. The complainant said that afterwards the accused went to sleep and she lay awake crying until she also drifted off to sleep. Her final thought was that in the morning she would ask the accused's mother to return her to her family.

[15] When the complainant awoke the following morning it was daylight. She looked out the window and saw the accused cooking with his mother. She decided to speak to the mother when she came back inside. The accused then came into the bedroom and she told him again that she wanted to return home. He said that in a short while a vehicle would come. A short time later another man, who turned out to be 'Atu the husband of one of the accused's sisters, entered the bedroom and told the complainant to come into the living room and watch videos. The complainant described how, as she was about to enter the living room, she heard one of the accused's sisters saying, "let's beat her up until she dies." Another of the women in the room said let her come out and watch television. The complainant said that when she entered the living room there were three adult women present and two young girls. The accused's mother then came into the house and the complainant asked her if she could take her home. The mother did not answer but she went outside again to work on a tapa.

[16] A short time later food was served and the complainant told the court that it was during this time that she met a person called "Mele" who turned out to be her eventual rescuer. Mele was one of the three adult women in the living room. She said that she felt at ease with Mele and she asked Mele if she could take her home. Mele said that she would but her vehicle was out of petrol.

[17] "Mele" was 27-year-old Mele Latai who lived in the area close to the accused's home. She was called as a witness for the Crown. Mele told the court that on the morning of Friday 15 April 2005 her husband was at work and a younger brother of the accused had come over to her house and told her that the accused had brought a girl home on the Thursday night. Mele said that she decided to go over to the accused's home to watch videos because she was "inquisitive" about the girl that the accused had come home with. She recalled that when the complainant came out of the bedroom she asked her some questions about where she was from and when the others went out to the kitchen for food she asked the complainant if the accused had done anything to her and the complainant replied that he had, the night before. She asked the complainant if she wanted to go home and the complainant immediately replied that she did. Mele was asked in examination in chief what made her put that question to the complainant and she replied: "because I knew she wanted to go home. She was crying and having difficulties. I asked her if she was homesick and she said that she was."

[18] After the meal, Mele's husband called her and she returned home. Around eight o'clock that same Friday evening she returned to the accused's house and asked his younger brother to tell the complainant to come out and go home with her to have a bath. The complainant came out and went back with Mele to her house. The two women talked in Mele's bedroom. Mele asked her if that was the first time she had been with a man and the complainant explained that it was. Mele then told her that the accused was married with children and he was not divorced. After they talked, the complainant took a bath and Mele got some of her own clothes for her to wear. Mele told the court that there was then a knock on the door. It was the accused who had come for the complainant. Mele asked the complainant if she wanted to spend the night with her but the complainant said that she was going with the accused to his home.

[19] Sometime later that same evening Mele again returned to the accused's house. She explained that she wanted to see if the complainant was alright. She said that when she

arrived, the complainant and the accused were watching videos in the living room. She said that she could see that the complainant was still having difficulties and she was obviously pleased to see Mele again. The accused told Mele that on the way home from her place they had called into a clubhouse and some of the people at the club had made jokes about them because the complainant was a new face in the area. The complainant told the court that that never happened and she had told the accused at the time to stop lying. After they had been watching videos for a short time, the accused got up and went into the bedroom. Mele said that half an hour later he called out to her to tell the complainant to come into the bedroom which she did. Then, a short time after that, the accused called Mele into the bedroom and he told the complainant to tell Mele that he would be taking her back to her family, not Mele. Mele said she told the complainant not to worry because she would still come back the next day and take her home. She then returned to her own house.

[20] In reference to this part of the chronology, the complainant told the court in her evidence that after Mele had gone the accused again forced her to have sex. She told him that she did not want to lie down but he pulled her down on the bed by the collar of her shirt. The complainant continued in evidence: "When I was lying there, I told myself what's the use of struggling when I've lost my virginity. As I was lying there I thought I did not care about what happened so long as I see my parents again." That incident constituted the basis for the fifth count which was the third charge of rape. The complainant was in the witness box for a long time. She gave evidence about another incident early the following morning when the accused again forced her to have sex. That evidence formed the basis for the final count in the indictment, the fourth allegation of rape which occurred on Saturday 16 April.

[21] Returning to Mele's evidence, she told the court that on Saturday 16 April she returned to the accused's house at around 8 o'clock in the evening to pick up the complainant and take her home. Why she did not turn up earlier in the day is something that was not canvassed in evidence but the complainant said she told her that she had had to get petrol for her vehicle and take someone to the airport. In all events, Mele told the court that when the complainant came out of the bedroom on that occasion she could see that she had been crying and she was no longer wearing the clothing Mele had given her the night before but she was again wearing the accused's clothing. The complainant was obviously delighted to see Mele. She went back into the bedroom to retrieve Mele's clothing.

[22] As they were both leaving the property the accused's mother, who had been in the living room, called out and said that if the accused had not already been married he would have married the complainant. Mele said that she did not answer the remark. Mele then picked up two other friends from Fua'amotu to accompany her and she drove the complainant back to her parents' home. The complainant's disappearance had apparently been the subject of broadcasts over the local radio. The court heard how the complainant's parents reacted with delight to her homecoming and the father gave Mele money for petrol and some food items.

[23] The following day the complainant made a formal complaint to the police at the Nuku'alofa Police Station. The court was told that, for some inexplicable reason which was not explained in evidence, the police did not believe her and they refused to act on her complaint. The complainant's father apparently then complained to a senior officer and that officer suggested that, as the incident had happened in the eastern districts, the complaint should be made to the police at the Mu'a Police Station. It was the Mu'a police who investigated and prosecuted. The complainant was also medically examined at Vaiola Hospital. The doctor who carried out the medical examination gave evidence and confirmed to the court that his findings on examination were consistent with the complainant having been a virgin and then being victim to the four acts of sexual intercourse she had described.

The case for the defence

[24] The 30-year-old accused acted in his own defence and he elected to both give and call evidence in support of his case. He is an articulate speaker and he demonstrated some skill in his cross-examination of the prosecution witnesses. In his evidence, given on oath, the accused told the court that he is a married man with four children aged between nine and two but, at the time of the alleged offending, he had separated from his wife. He described his occupation as a peacekeeper with the Tongan army and he said that he had served in

the army for six years. He lives with his mother and siblings in the village of Fua'amotu. In April 2005, the house was occupied by the accused, his mother, his two brothers, three sisters and 'Atu, the husband of his 19-year-old sister.

[25] Referring to the events at the bus station on the afternoon of Thursday 14 April, 2005, the accused said in evidence that he was sitting on the Fua'amotu bus and he noticed the complainant walking in from the footpath and going to sit in one of bus shelters. He claimed to have seen her before but he had never spoken to her nor did he know her name. He said that he asked Fou to go and give a message to the girl. The message was to ask the girl, "if it was convenient for her to come over to the bus." He explained that he liked the girl when he saw her and he wanted to ask her to be his girlfriend.

[26] The accused then told how the girl came over and stood at the door of the bus and he asked her if she wanted to be his girlfriend. She replied that she did and he was "excited" when she gave that response. The conversation between the pair was then interrupted by the bus driver who announced that he was going to get his telephone fixed and he asked the complainant whether she wanted to get on the bus or wait for it to return. The accused said that the complainant told him to go and she would wait for them to return.

[27] The accused said that when the bus returned to the station, he again asked Fou to go and get the girl and he did. He said that the complainant was willing to come across and get in the bus. She did not ask for her book back but she stood and talked to the accused and after a relatively short time the bus took off for Fua'amotu. The accused said that he sat with the complainant in the backseat of the bus and at no time did she try and stop the bus. He said that when the bus arrived at Fua'amotu they did not get off at his home because, as he put it, there were still some passages on the bus. So they remained on board while the bus travelled on to the next village on the eastern side which is the village of Nakolo. There were no passengers for any villages beyond Nakolo and so the bus turned around and began to travel back in the direction of Fua'amotu.

[28] As the bus was approaching a bushy area between Nakolo and Fua'amotu, the accused suggested to the complainant that they should get off the bus at that point and go back to his home in the evening and he told the court that she agreed. He admitted that the driver of the bus called out and asked them if they, "were going to do it on the bus." In cross-examination the accused was asked by Mr Sisifa why he had gone to the house across the road after getting off the bus. He replied, "because someone from that house had seen us getting off the bus." He could not or did not explain, even when asked directly, the conversation he had had with the occupants but he denied the complainant's evidence that one of the occupants had called out after him and that he had swore back at that person. He said that he was over at the house for 10 or 11 minutes and there were vehicles going past during that time but the complainant made no effort to stop any of them. When that proposition was put to the complainant she strongly denied that any vehicles had come along and she estimated the time period as only a few minutes.

[29] The accused said that at no time did he have to force the girl as they walked along the path to the small Tongan fale. He continued:

> "When we got to the little fale, we talked in the fale. She consented to us having sexual intercourse. She took off her own pants and we had sex. After that we came to my home."

I need not repeat the rest of the accused's evidence. In summary, he admitted the various acts detailed in the particulars of the indictment but he strongly denied that they amounted to indecent assault or rape. He was adamant that in each instance, the complainant had been a willing participant and had consented to what was going on.

[30] In his closing submissions, the accused highlighted two matters in particular which he submitted confirmed that the complainant had consented to all that had happened. First, on the Friday night when the complainant walked across with Mele to Mele's home, the accused stayed behind and had a bath. He then walked over to Mele' house, knocked on the door and Mele came to the door holding the complainant's hand. He said that Mele then asked the girl whether she wanted to spend the night at her house and the girl replied that she would go home with him (the accused). That evidence, the accused submitted, showed that the complainant and he had developed "feelings for each other."

[31] The second matter highlighted by the accused, was the failure of the complainant to try and escape from the house at any time on the Saturday. The accused said that they had

consensual sex on the Saturday morning and he had then gone to the plantation. Apart from when he came home for a meal, the accused said that he was away for virtually the whole of the day. The accused asked rhetorically, if the complainant was being held captive against her will, why did she not try and escape from his home on the Saturday or while she was with Mele on the Friday night. On the face of it, those submissions would seem to have substance.

[32] The accused called the driver of the bus, 37-year-old Tevita Manumu'a. He said that he did not recall overhearing any of the conversations between the complainant and the accused when she boarded his bus on the Thursday afternoon. He could not recall the book throwing incident and he did not hear the complainant call out or try to stop the bus at any stage. He admitted that when he stopped the bus in the bush area between Nakolo and Fua'amotu he called out and asked them if they were going to do it on the bus or get off. He said the reason he asked was because of, "the way they were acting - the way they were sitting."

The law

[33] The essential elements the Crown must prove beyond reasonable doubt in order to establish a charge of indecent assault or rape were not in dispute. They were fully reviewed by this Court recently in *R v Talanoa* [2006] Tonga LR 101 and *R v Lasike* [2006] Tonga LR 164. I will not repeat them. In Tonga there is no requirement that the evidence of the complainant in a rape case must be corroborated. It is the practice, however, consistent with the requirements of the common law, to warn a jury to proceed with caution before acting on uncorroborated evidence, particularly when the issue is consent or no consent. A judge sitting alone must be mindful of this requirement.

Conclusions

[34] The issue entirely in this case is one of credibility. I turn first to consider the submission made forcefully by the accused that the evidence of the complainant's conduct at Mele's house on the Friday night and her failure to try and escape at any time during the Saturday is confirmation that she was a willing partner to everything that happened to her. That evidence was not disputed.

[35] When the complainant was asked directly why she elected to return with the accused to his home rather than stay the night with Mele, she replied: "because I was afraid of him." Then, in reference to the Saturday, the complainant said that in the morning she had an argument with the accused because he did not want to take her home. He told her that they were going to stay together and she commented that when he made that remark to her, she thought it meant that they were going to live in a de facto relationship until she died. She cried and told him to let her go because she wanted to go home. The accused then disappeared. She did not know that he had gone to the plantation. She did not know where he had gone.

[37] When the complainant was asked why she did not try and escape sometime during the Saturday she said that it was because she knew that Mele was coming to pick her up and take her home. Mele had told her that the previous evening. She knew that Mele first had to get petrol for her vehicle and take someone to the airport. As evening approached and there was still no sign of Mele, the complainant no doubt felt that she had been let down again. Mele told the court that when she eventually arrived to pick her up, the complainant came out of the bedroom and she could tell that she had been crying. This evidence, which I accept, satisfies me that the complainant only cooperated with the accused out of fear.

[38] Although the accused, as I have mentioned previously, is articulate and he gave his evidence in an unassuming and convincing manner, I am afraid that I simply did not believe him. The notion that he could call a 16-year-old schoolgirl, who was a complete stranger to him, over to his bus and ask her straight out if she would be his girlfriend and to have her respond immediately that she would, simply defies belief, as does so much of his evidence from that point on. I did not find the evidence of the bus driver or that of one of the other male passengers on the bus who the accused also called as witnesses reliable. They seemed to have selective recall.

[39] Having rejected the accused's version of events, it is still necessary for me to return to the prosecution case and satisfy myself that the Crown has established all the elements of

the various offences beyond reasonable doubt. I say at once that I have been so persuaded. Both the complainant and the other key prosecution witness, Mele, were totally convincing witnesses. There were some inconsistencies in the complainant's initial evidence but they were of a relatively minor nature and, in any event, they were clarified when she was recalled to the witness box.

[40] It was clear from the complainant's demeanour and her evidence that the ordeal she described and had to relive again in the witness box must have been a sheer nightmare for her in every way. The horror of having been subjected to the indecencies and threats she described and of having to live three days in captivity in the belief that she might never see her parents and family again simply defies comprehension.

[41] The accused is convicted on all counts.

Wolfgramm anor v Robertson anors

Supreme Court, Nuku'alofa
Ford CJ
CV 265/2005

4, 5 May and 31 August 2006; 11 November 2006

Contract law – terms of contract – court interpreted contract

Essentially, the dispute giving rise to proceedings was a family dispute over payment of the purchase price for solar power equipment. The plaintiffs were husband and wife residing in Tonga. The second and third defendants took no part in the proceeding but the first defendant, who at all material times was residing in Queensland, Australia, was the plaintiff's son-in-law. He was married to their daughter, Brenda. He was treated as the sole defendant in the case. The plaintiffs operated a hydroponic farming business in Nualei and because they were increasingly concerned about the rising power charges they began to explore the possibility of acquiring a solar system unit to replace the electric motor that operated 24 hours a day pumping water into the hydroponic channel system. Mrs Wolfgramm contacted the defendant in March 2004 and arranged for the purchase of a solar power system. She then transferred to the defendant's bank account the sum of AUD$3,300 which she understood was the total purchase price of the solar equipment. Approximately 6 months later she again contacted the defendant inquiring about delivery of the equipment and the defendant told her that he and Brenda had decided to bring it with them to Tonga and install it themselves. The plaintiffs understood that the couple were moving to Tonga to live. The defendant claimed that the intention always was that he and his wife would spend several months in Tonga in assisting the plaintiffs to set up the solar equipment and with various building projects around their property but then the couple would travel to Rarotonga to live in a house owned by Mrs Wolfgramm. The defendant and his wife arrived in Tonga on Christmas Day 2004 and the solar equipment arrived on 16 February 2005 by which time the relationship between the parties had deteriorated. The defendant took legal action to prevent the solar equipment leaving the wharf. He claimed that the money paid by the plaintiffs had been a deposit only and he was not prepared to authorise the release of the equipment to the plaintiffs until they had paid him the balance of the total purchase price which he claimed was AUD$9,455.10. The plaintiff sought an order authorising the release to them of the solar equipment stored at the wharf. The defendant counterclaimed in respect of the sum of money which he contended was still owing. There was an issue over the exact nature and terms of the agreement between the parties.

Held:

1. It was not contended that the case fell within the legal presumption that, notwithstanding the presence of consideration, parties to a family agreement do not intend to create legal relations in the arrangements made between them.
2. The court adopted the prerequisites to the formation of a contract stated by the New Zealand Court of Appeal in *Fletcher Challenge Energy Ltd v The Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433, para [53] in these terms:

> "(a) An intention to be immediately bound (at the point where the bargain is said to have been agreed); and
>
> (b) An agreement, express or found by implication, or the means of achieving an agreement (e.g. an arbitration clause) on every term which:
>
> (i) was a legally essential to the formation of such a bargain; or
>
> (ii) was regarded by the parties themselves as essential to their particular bargain . . .
>
> Whether the parties intended to enter into a contract and whether they have succeeded in doing so are questions to be determined objectively. In

considering whether the negotiating parties have actually formed a contract, it is permissible to look beyond the words of their "agreement" to the background circumstances from which it arose -- the matrix of facts. This can include statements the parties made orally or in writing in the course of their negotiations."

3. It was a fact of life that commercial parties, even when legally represented, would quite frequently contract in a manner that did not deal precisely with a problem that later emerged. The law's task was to give effect to freely accepted mutual obligations; it was therefore the courts' responsibility to identify and find means of giving practical and just effect to those obligations even if they had not been expressed meticulously -- see *McMillen v Covic* [2004] 2 NZLR 106.
4. It was not open to counsel to cross-examine the opposing party suggesting a certain state of facts which his own party's testimony failed to support or deny. Any such questions may be taken into account in evaluating the latter party's case.
5. The plaintiffs succeeded in their claim and the defendant failed in respect of his counterclaim. The plaintiffs were awarded costs along with reimbursement from the defendant for storage charges.

Cases considered:

Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty (1985) 2 NSWLR 309
Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd [2002] 2 NZLR 433
McMillen v Covic [2004] 2 NZLR 106
Prenn v Simmons [1971] 1WLR 1381
Verissimo v Walker [2006] 1 NZLR 760

Counsel for plaintiffs : Mr Niu
Counsel for defendants : Mr Garrett

Judgment

Introduction

[1] In this proceeding the plaintiffs seek an order authorizing the release to them of certain solar power equipment presently stored on the main wharf at Nuku'alofa. The first defendant, who is their son in law, claims that until such time as the plaintiffs reimburse him for the balance of the purchase price and the shipping costs, they are not entitled to have the equipment released. The first defendant has lodged a counterclaim in respect of the sum of money which he contends is still owing.

[2] The dispute over the solar power equipment arose in early 2005. The first defendant, who then lived in Brisbane, Australia, with his wife, the plaintiffs' daughter, had purchased the equipment and had arranged for its shipment to Tonga. The consignment arrived at the Port of Tonga on the vessel "Forum Samoa II" in early 2005. The second defendant is alleged to have been the shipping company responsible for handling the shipment of the goods and the third defendant is described as the agent of the second defendant in Tonga. As it turns out, neither the second nor the third defendant took any part in the proceedings. They were not involved in any way in the dispute. They were named as necessary parties, however, by the plaintiffs when they earlier successfully applied for an interim injunction restraining any of the defendants from removing the equipment out of Tonga pending the outcome of the present proceeding. For the purposes of this judgment, therefore, I propose to proceed on the basis that there is only one defendant, namely, Peter Robertson and I will refer to him either by his name or simply as "the defendant". The dispute, in essence, is over payment of the purchase price for the solar power equipment.

Background

[3] The plaintiffs are husband and wife. They are described in the pleadings as farmers residing at Nualei. They have five adult children. Up until the events giving rise to this litigation they carried on the business of growing tomatoes by hydroponic farming. The court was told that they were the only hydroponic farmers in the Kingdom. Their tomato

shed was 85 feet long and held 500 plants. Sixty eight-year-old Fred Wolfgramm ("Fred") told the court that he had carried on hydroponic farming for some 10 years. He explained how the hydroponic system worked. The crops are grown in a series of plastic channels fed by water pumped into the channel system by a 1 hp electric motor which operates around the clock.

[4] Ana Wolfgramm ("Ana") was born in the Cook Islands but from the age of 14 she lived and worked in New Zealand coming to Tonga to settle in 1983. Ana has a dwelling house and some other property in the Cook Islands which figured in the evidence.

[5] The defendant married the Wolfgramm's daughter, Teresa Brenda, ("Brenda") in 2001. During the sequence of events surrounding this litigation, the Robertsons moved from Brisbane to the Cook Islands with an eventful stopover in Tonga. In the Cook Islands Peter has a position as National Internet Computer Coordinator at the Prime Minister's office.

[6] Mindful that this litigation is essentially a family dispute, the court took a brief adjournment before the hearing commenced to see if it was possible for the parties to negotiate some type of last-minute settlement. Unfortunately, despite counsels' best endeavours, settlement did not prove possible. It is an unfortunate fact of life, which I am keenly conscious of, that this judgment will not assist in any future reconciliation between the two families.

The plaintiffs' case

[7] Although the exact date was not pinpointed in evidence, it would appear that at least from 2003 the plaintiffs were becoming increasingly concerned about the rising power charges in Tonga and the effect that the electricity price rises were having on their hydroponic farming business. Arising out of these concerns the Wolfgramms began to explore the possibility of acquiring a solar system unit to replace the electric motor.

[8] Ana told the court that at one stage, identified subsequently as 29 December 2003, a German benefactor, who had a particular interest in hydroponic farming, gave them €2,500 towards the purchase of a solar power system. Ana said in evidence that she estimated that figure to convert to approximately AUD$5,000 or TOP$6,000. The money was given to Ana by cheque in Euro currency. She did not bank the cheque immediately but kept it at her home.

[9] It was probably around this same point in time that Ana began having discussions with the defendant in Brisbane about the possibility of acquiring a solar power system that would suit their needs. The evidence of how these discussions began and developed was rather vague but the discussions themselves took place in telephone calls between the parties. Fred, who is hard of hearing, took no part in these conversations but Ana would speak to Peter about the subject usually in the course of general telephone conversations with Brenda. At that stage, of course, the families were on good terms and communicating freely. There was reference to these conversations being "three-way" but the most reliable evidence was that, at times, Peter and Brenda would pass the receiver from one to the other.

[10] Ana said in evidence that one day, which was identified from documentary evidence as being 3 March 2004, Peter told her in the course of one of these telephone conversations that he had a friend who could get a solar power unit for a special price but she would have to send the money across to him straight away that same day otherwise she would not qualify for the special discounted price. Ana said that she could not recall the exact amount that Peter asked for but it was the amount that she ended up sending him on that same day. Peter gave her his bank account details to enable her to make the transfer. The Telegraphic Transfer Application form was later produced as an exhibit. It showed that the amount transferred by Mrs Wolfgramm was TOP$4,980.39 which was equivalent to AUD$3,300. The receiving bank appears to have then deducted a bank transfer charge because the net amount credited to Peter's account the following day, 4 March 2004, was AUD$3,281. In other words, the documentation shows that the amount Mrs Wolfgramm alleges that Peter told her she had to send across "straight away that same day" to purchase the solar power system at the special discounted price was AUD$3,300.

[11] Fred recalled Ana telling him about the telephone conversation and then driving her into town that same day to enable her to transfer the money. Ana took with her the

Eurocheque. She banked the cheque at the ANZ Bank in Nuku'alofa and had the bank make the transfer in the sum of AUD$3,300 into Peter's account with the Westpac Banking Corporation in Brisbane.

[12] Ana told the court that she then heard nothing further from Peter until about six months later when she telephoned Brenda to see how they were. This was probably one of the three-way telephone conversations I have earlier described because she recalled that in the course of the conversation she asked if Peter had bought the solar power unit and she was told, " we've decided to bring it with us and install it ourselves when we come."

[13] Ana said that sometime earlier (most likely in 2002) Brenda and Peter had expressed an interest in coming to Tonga to live. Ana recalled suggesting to them at the time that if they really wanted to come to Tonga to live then they should first come and have a look around the place because they might not like Tonga. Following on from that conversation, Brenda and Peter travelled to Tonga for a week or two in 2002 and appeared to like what they saw. Ana said that later Peter was made redundant from his job and her understanding was that the couple then thought of retiring to Tonga.

[14] Brenda and Peter sold their property in Brisbane and arrived in Tonga on Christmas Day 2004. They stayed with Fred and Ana. It was not, however, a happy sojourn. The reasons for the feud that then developed between the two families were canvassed in some detail in the course of the trial but I see no purpose in recapitulating that part of the evidence. One of the issues, however, related to the building of a carport by Peter and Brenda on the Wolfgramm property which Fred, in particular, considered a totally substandard construction. Another issue, and probably the source of most of the bitterness, related to Ana's properties in the Cook Islands.

[15] Ana told the court that quite unexpectedly Brenda asked her one day during this same period about her properties in the Cook Islands and said to her that she and Peter were planning to live in Ana's house at Rarotonga and build a shop out the front of the house. They were also planning to build a restaurant on another hillside property owned by Ana. Ana said that she was very upset with Brenda for not having discussed her intentions in this regard with her previously. In any event, she did not approve of Brenda's proposals and she obviously made this very clear to her daughter and son-in-law.

[16] Evidence was then given about an incident in late January 2005 when Ana and Brenda had a heated argument by the roadside stall outside the Wolfgramm home at Nualei. Ana was selling tomatoes at the stall at the time. She said that during the course of that argument Brenda threw some e-mail correspondence at her and said, "this is a $14,000.00 gift from me to you." Brenda then told Ana what other members of the family thought of her before going back inside the house to pack up. She and Peter then ordered a taxi and left the property. Ana told the court that she did not see her daughter and son-in-law again until the opening day of this trial. Ana said that she found out later from others that Brenda and Peter had planned all along to go to the Cook Islands to live but they had not made that disclosure to her or Fred.

[17] Fred recalled the incident by the roadside stall. He said in evidence that he saw his daughter, "swinging her fists around." He stayed about 50 yards away and did not get involved in the argument but he saw his daughter give Ana some paper. He said that later in the day after Brenda and Peter had packed up and left the property, he and Ana looked at what was on the paper. It was an exchange of e-mail correspondence.

[18] At that stage the solar power system had still not arrived in Tonga but Ana noted that the three pages of e-mail correspondence Brenda had thrown at her was correspondence relating to the solar power system. The documentation showed the estimated date of arrival in Tonga as 16-18 February 2005. The documents also revealed that the consignment included some other items which, it was not disputed, belonged to Peter, namely, a chainsaw, toolbox and ride-on mower.

[19] It appears from the documentation that the solar power equipment eventually arrived in Tonga on 16 February 2005. The Wolfgramms were duly notified of its arrival sometime after the Robertsons had departed. Using the e-mail correspondence as authority, Fred and Ana then endeavoured to uplift the consignment from the wharf. They had meetings with Dateline Shipping. They paid the import charges and dues amounting to $2,521.89, the cargo clearance fee of $29.22, the quarantine entry fee of $8 and the port handling charges of $66.15. They were still unable to uplift the unit, however, because the defendant's Cook Islands solicitor had e-mailed the shippers accusing the Wolfgramms

of making, "a false claim of ownership" to the solar equipment and he demanded that the goods be shipped from Nuku'alofa to Rarotonga on the next available vessel. It was at that point in time that the Wolfgramms successfully obtained an injunction from this court preventing the solar equipment from leaving the Kingdom. The unit still remains on the wharf.

[20] In essence, the plaintiffs' case is that as they had paid the defendant the exact amount of money he had asked for during the course of the telephone conversation on 3 March 2004 and as they had paid the other charges required to uplift the equipment from the wharf, the solar equipment in question rightly belongs to them. Ana said in evidence that at no stage during any of their telephone conversations did Peter or Brenda say anything about shipping costs. Ana was adamant that the only statement made to her in this regard was to the effect, "we will bring the equipment with us and install it ourselves."

The defendant's case

[21] The defendant does not deny receiving the AUD$3,281 on 4 March 2004 but he claims that the payment was a deposit only. In his statement of defence he pleads:

> "5.1 In early 2004 the plaintiff's asked the first defendant to purchase solar equipment for them from Australia for the sum of AUS$9,455.10. The plaintiffs agreed to pay the first defendant for the cost of shipping the solar equipment from Australia to Tonga.
>
> 5.2 The plaintiffs and the first defendant agreed that the plaintiffs would pay the first defendant a deposit of AUS$3,281.00 with the balance payable to the first defendant upon arrival of the goods in Tonga.
>
> 5.3 On or about 4 March 2004 the plaintiffs deposited the sum of AUS$3,281.00 with the first defendant's Westpac Banking Corporation account in Australia, being the deposit for the solar equipment."

[22] The defendant further pleads:

> "It was always agreed between the plaintiffs and the first defendant and his wife that they would spend several months in Tonga assisting the plaintiffs to set up the solar equipment and with various building projects around the property and that the first defendant and his wife would then travel to Rarotonga to live in the house owned by the plaintiff Ana Wolfgramm."

[23] The defendant told the court that it was Ana who initially raised with him the subject of solar power because electricity charges in Tonga had recently doubled. He said that they had four or five telephone discussions on the subject and he obtained some rough prices which all worked out at around AUD$10,000. The defendant said that he originally spoke to several different suppliers but he ended up dealing with just the one company, Sunshine Electrical. He explained how he looked at the feasibility of acquiring a unit which would power the hydroponic motor and household and still generate surplus power that could be channelled into the main grid at a profit. Upon enquiry, however, he found that such a system was not viable in Tonga.

[24] Rather surprisingly, the defendant was not asked any questions at all in his examination-in-chief about the specific telephone conversation on 3 March 2004 which formed such an important part of the plaintiffs' case. He did, however, produce his bank statement for the period in question which showed a credit entry in his account on 4 March 2004 of $3,281 being the amount transferred by Mrs Wolfgramm on 3 March. He said that the payment was a deposit on the solar equipment.

[25] The 3 March telephone conversation was explored in cross examination. In response to questions from Mr Niu, the defendant said that prior to that date Ana had told him to purchase the equipment if he thought that it was suitable to do the job she wanted it for. Mr Niu referred the defendant to paragraph 5.1 of his statement of defence which reads:

> "In early 2004 the plaintiffs asked the first defendant to purchase solar equipment for them from Australia for the sum of AUS$9,455.10. The

plaintiffs agreed to pay the first defendant for the cost of shipping the solar equipment from Australia to Tonga."

The cross-examination then continued:

"Q. Did she actually say that to you Mr Robertson? Did she actually say to you, I want you to buy the solar equipment for $9,455.10?
A. She told us she wanted to purchase the equipment that we had bought if it would do the job.

Q. Sorry, say that again please I can't hear properly.
A. She told us to purchase the equipment if it was suitable to do the job they wanted it for which was running the house and the hydroponic.

Q. So what about the figure of $9,455? Did she say anything about that?
A. No, the very first conversation, sorry the second conversation we had, the first one was when they wanted us to look into purchasing the equipment. After some preliminary discussions with, as I said, seven different manufacturers we were trying to estimate the power usage, we were trying to estimate their average power usage and it came to, it was round about $10,000. This place that we first, Sunshine Electrical, with them they actually came back with a specification sheet and said that it would cost $9,455 that unit (sic).

Q. And you still have that quote with you?
A. If I have a look in our stuff back at the hotel I'd say we did. I would presume so, I'm not too sure.

Q. Sorry.
A. I don't know if I've still got it with me over here. I can have a look. I've still got the documents back at the hotel room. I brought copies of all the e-mails."

[26] The court then adjourned for the luncheon break and when the hearing resumed the defendant said that he had looked for the written quotation over the break but he had not been able to find it. Mr Niu then resumed his cross-examination:

" Q. When did you last see that quote?
A. Probably when we gave the price but I can't remember the date I last saw it.

Q. You say "probably at the time you gave the price", you mean to Mrs Wolfgramm in March 2004?
A. Yes, it may have been later. As I said, I don't remember the last time I saw it.

Q. And it had a list of the equipment for that price?
A. Yes.

Q. And how long was that quote for?
A. That one was for 90 days which is the standard for most quotes in Australia.

Q. And that is, the price for the equipment would be $9,455 if paid within 90 days -- that right?
A. That's how long that price is valid for, yes.

Q. If accepted and paid within 90 days, that right?
A. Yes.

Q. And also that deposit of one third be made that day that you spoke to Mrs Wolfgramm?
A. No, we were still working out whether that was the correct equipment. As I said we spoke to her after that when we verified we would not get a grid link system and I'm still trying to ascertain the maximum power usage per day.

Q. So when you spoke to Mrs Wolfgramm on the 3rd of March 2004, that's the day the money was sent to you, when you spoke to her on that day you had not decided yet whether that equipment was the one the Wolfgramm's needed -- that right?
A. That's right, yes.

Q. But you told her that one third deposit -- Mrs Wolfgramm said that you wanted the deposit made. She said you wanted the money sent on that day?
A. No.

Q. You are saying you did not tell her that you wanted the money sent on that day?
A. Not immediately, no.

Q. You heard her say you told her you wanted the money paid to your account that day?
A. Yes, I heard that.

Q. And your counsel did not put it to her that she was wrong about that. Did you hear your counsel ask her that she was wrong about you wanting the money that day?
A. I didn't recall that Sir.

Q. No. Why didn't you tell your counsel, "I never said that"?
A. Because, I'm not disputing that deposit was paid."

[27] Mr Niu then closely questioned the defendant about other entries appearing in his bank account statement for the period around 4 March 2004. On 3 March there was a debit of $1.50 for an account balance inquiry. The defendant agreed that he would have made an enquiry about his account balance on that day but he said that he regularly made such enquiries. The defendant's bank statement showed that the balance of his account as at 3 March 2004 was $467.72. The transfer of the funds from Ana the following day bought the account balance up to $3,748.72. Mr Niu then questioned the defendant about a debit entry the next day, 5 March 2004, when the sum of $3,400 was paid out on a Citibank mortgage. The defendant acknowledged that the $3281.00 transferred into his account by Ana had been paid into his personal mortgage account with Citibank the following day but he explained that he had what is called an "offset mortgage account" under which any surplus funds would go towards the reduction of the mortgage on his home. Peter was asked how long the Wolfgramm money had stayed in his mortgage account and he answered until he had paid Sunshine Electrical for the solar equipment.

[28] Under further questioning from Mr Niu, the defendant said that he paid the Sunshine Electrical account totalling $9,455.10 in two instalments. First, there was a deposit. He said, "I think we gave them $3400 in July or August" but he was unable to produce a receipt confirming any such payment. The defendant was, however, able to produce a receipt which showed that as at the end of November 2005 he had paid Sunshine Electrical a total sum of $9,455.10 for the solar system.

[29] In his statement of defence, the defendant referred to the time when he and Brenda were staying with the Wolfgramms in Tonga and how during that period the relationship between the parties "soured". He was asked about the argument between Ana and Brenda by the roadside stall. He said that by that time the relationship was "pretty sour". He recalled overhearing the heated conversation on the roadside. He could hear the raised voices. He said he recalled Ana telling Brenda at one stage that she, "was not a proper or good island daughter." He said that he was intrigued by the cultural implications of that remark.

[30] Although he did not pinpoint the timing, the defendant said that at some stage during their stay in Tonga, Ana accused him of having stolen the deposit and having never purchased the solar equipment. Peter said that was why he went to an Internet cafe the same day and had printed out the e-mail correspondence referred to in paragraph [16] above. The date at the top of the e-mails show that they were printed out on 28 January 2004.

Adjournment

[31] At the conclusion of the defendant's evidence 5 May 2006, Mr Garrett successfully applied for an adjournment for the taking of Mrs Robertson's evidence. The hearing then resumed on the 31 August 2006. In the intervening period, Mr Garrett took the opportunity of approaching Sunshine Electrical Services in Brisbane to obtain confirmation from that firm of the defendant's dealings with them in connection with the purchase of the solar equipment. A helpful affidavit from the company's administration officer/accounts clerk, Karen Marks, was produced by consent. Ms Marks deposed that her first dealings with Mr Robertson were in mid-October 2004 when he contacted her by telephone to discuss his requirements. She said that he subsequently spoke to her on several occasions because, "he was trying to work out the configuration of a system that would best suit the people who the system was for and then to price that system."

[32] Ms Marks annexed to her affidavit a quotation she had given to Mr Robertson for the equipment. It is dated 6 December 2004 and is for a figure of AUD$9,455.10. She said that she e-mailed that quotation to Mr Robertson sometime in October 2004 but she does not explain why it is dated 6 December 2004. Ms Marks confirmed that Sunshine's records show that Mr Robertson eventually ordered the system from her company in November 2004 and he paid for it in two installments of $3000 and $6,455.10 on 19 November and 10 December 2004 respectively. The system was uplifted from Sunshine's premises by Chess Removals on 15 December 2004.

[33] Immediately prior to the resumption of the hearing on 31 August, I saw counsel in chambers. Mr Garrett said that his client had spoken to a male person at Sunshine Electrical before he spoke to Ms Marks. Mr Garrett was not able to obtain an affidavit from that other person but he had spoken to him by telephone and after discussion with both counsel, it was agreed that the court could take notice of the fact that Mr Robertson had spoken to that other person about three or four weeks before he approached Ms Marks which would mean that Mr Robertson's first contact with Sunshine Electrical was not until towards the end of September 2004. Whilst accepting that evidence, it does appear from Ms Mark's affidavit that all the conversations of any substance that the defendant had with the company took place between himself and Ms Marks.

Resumption of hearing

[34] In her evidence, Mrs Robertson told the court that she had two children and three grandchildren so, although she was not asked about it, her marriage to the defendant in 2001 was presumably her second relationship. She said that it was probably towards the end of 2003 that she and her husband decided to move to Rarotonga. She explained that her mother, the second plaintiff, had offered them her home in Rarotonga which was in a rundown state of repair. She said that they planned to visit Tonga for a short period of approximately 2 months en route to the Cook Islands. Mrs Robertson gave evidence about the various telephone conversations she had with her mother in relation to the acquisition of the solar equipment. She said that they were all " three-way conversations" in which her husband, Peter, also participated; sometimes she and Peter would pass the receiver back and forth between each other. She recollected that the telephone calls began early in 2004 and, as she put it, there was "a lot of toing and froing" over the most appropriate type of system.

[35] In examination in chief, Mrs Robertson was asked by Mr Garrett about the important conversation leading to the transfer of her mother's money into Peter's bank account:

> " Q. Have a look at document D1 in the bundle in front of you there. You will see an entry on 4 March. My accounting knowledge is terrible but there is a sum of $3,281 there and it's got a reference F.C.Wolfgramm -- see that?
> A. Yes.
>
> Q. What is that entry? Tell the court what that entry is as far as you know?
> A. Um, okay, that, that was the money that my mother sent over for the deposit on the solar system (sic) that we -- you know. At that stage we just given them estimates of several quotes which were between $9,000 and $10,000 and we also informed her that each company would want a third deposit and so that was a guestimate (interrupted)

Q. Just lets break that up because you covered important ground there, who told your mother that the estimate was $9,000 to $10,000?
A. Um, well Peter and I did. Well he actually spoke with her but we were on together on the same phone.

Q. So this was another of the three-way conversations?
A. Yes.

Q. And what was discussed by you and in your presence of the balance to be paid, about the balance, if any, to be paid?
A. Um, that was by telephone discussion again. Most of our, well, all of our correspondence was by telephone and we settled the Sunshine Electrical account. They were the best supplier. We told my mother by phone what the cost price was and she agreed to pay the balance and the freight costs upon arrival here in Tonga and she also agreed (indecipherable).

[36] The same topic was covered by Mr Niu in cross-examination:

" Q. Did you know or were you present when the conversation was made with Ana over the telephone as a result of which the sum of AUD$3,281 was remitted to Peter's account? Were you present during their conversation?
A. There was actually no conversation where that amount . . .

Q. Please, just listen. Were you present during that conversation with Ana on the telephone as a result of which conversation the sum of AUD $3,281 was sent?
A. Yes

Q. You were. Thank you. Who had called who?
A. I don't remember.

Q. Okay, Ana said, no I'm sorry. When your husband Peter gave evidence he had with him a written quote from Sunshine Electrical. Do you recall if Peter had a written quote from Sunshine Electrical at that time?
A. No, he didn't.

Q. Okay, when Peter said in his evidence that he had such a quote at the time that he talked with Ana about sending the money over, Peter's wrong then?
A. Well, I'm still quite not sure. I mean, you asked me why she sent the money over, was I present at their conversation. Yes, I was but during their conversation there was no written quote discussed from Sunshine Electrical. There was no written quote discussed at that actual conversation.

Q. I'm not saying that you discussed the quote with Ana or between the two of you. I'm just asking, was there a written quote from Sunshine Electrical present with you and Peter when you were discussing this with Ana -- discussing the price I mean for sending the money over?
A. No.

Q. There was no written quote?
A. There was no written quote at the time.

Q. Okay, so I put it to you that what Peter told the court that there was such a quote at that time, Peter's wrong?
A. I don't know what date you're talking about but, um!

Q. The 3rd of March 2004, that's the date.
A. No, there was no written quote on the 3rd of March.

Q. Thank you. Did you tell or did Peter tell Ana a sum of money which was the total cost of the solar equipment when you were talking -- you or Peter were talking to Ana on the 3rd of March 2004?

A. Um, he gave her an average of some estimates that we had obtained from several companies. It was an average of between $9,000 and $10,000.

Q. Okay, an average of $9,000 to $10,000. Is that what you say?
A. Yes.

Q. Okay, when Peter gave evidence I asked him what price he told Ana on the telephone and he said the price was $9,425.10 AUD?
A. That wasn't in March.

Q. That wasn't in March?
A. That wasn't in March.

Q. Okay, so Peter did not tell that figure to Ana in March?
A. That's right.

Q. Okay. So if Peter gave evidence and said that he did, that's not correct either.
A. That's right.

Submissions

[37] Mr Garrett made no specific submissions in relation to the 3 March telephone conversation. In fact, he did not refer to it. He did, however, make extensive submissions in relation to the e-mail correspondence referred to in paragraph [16] above and in relation to the status and significance of a second bill of lading which came to light at a late stage in the proceedings relating to the same subject matter. I did not find the evidence relating to either of these matters particularly helpful or conclusive one way or the other. For the record, however, I reject the suggestion by counsel of some improprietary on the part of the Wolfgramms in relation to that documentation.

[38] Mr Niu's submissions focused more on the crucial telephone call of 3 March 2004. I set out in full a particular passage from paragraph 17 of his submissions on another significant aspect of the case:

" At no time did the defendant inform the plaintiffs of the actual costs of the equipment he purchased for them, either before or after he had purchased it; he gave no account or receipt at all to the plaintiffs, or requested payment by the plaintiffs of the difference in the price of the equipment he purchased and the money which the plaintiffs had remitted to him.

And furthermore, the defendant gifted it, that is, the difference in the price and the money remitted by the plaintiffs, and the cost of freight of the equipment to Tonga, when his wife handed the e-mail to the second plaintiff and told her that it was a gift to her of $14,000. That gift was complete upon the handover of the e-mail received by the defendant which confirmed the shipment of the equipment, which document was all that was needed to effect a receipt by the plaintiffs of the equipment when it would arrived in Tonga."

The law

[39] Halsbury states, Vol 9 para 305:

"Unlike commercial agreements, in the case of family, domestic or social agreements there is a presumption, notwithstanding the presence of consideration, that the parties do not intend to create legal relations in the arrangements made between them."

The learned authors note, however, at para 308, that there are many cases:

"Where there is prima facie an intention to create legal relations, either because the agreement is clearly of a commercial character, or the circumstances otherwise show that was the likely intention of the parties."

It was not contended by either counsel that the present case fell within the presumption stated above and clearly it did not. Both parties accepted that the purchase of the solar equipment would create a legal relationship between them. The issue is whether that relationship was created on 3 March 2004 as the plaintiff contends.

[40] The prerequisites to the formation of a contract were stated by the New Zealand Court of Appeal in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 at para [53] in these terms:

> "(a) An intention to be immediately bound (at the point where the bargain is said to have been agreed); and
> (b) An agreement, express or found by implication, or the means of achieving an agreement (e.g. an arbitration clause), on every term which:
> (i) was legally essential to the formation of such a bargain; or
> (ii) was regarded by the parties themselves as essential to their particular bargain . . .
>
> Whether the parties intended to enter into a contract and whether they have succeeded in doing so are questions to be determined objectively. In considering whether the negotiating parties have actually formed a contract, it is permissible to look beyond the words of their "agreement" to the background circumstances from which it arose -- the matrix of facts. This can include statements the parties made orally or in writing in the course of their negotiations . . ."

[41] In a more recent case concerned with the formation of a contract, *Verissimo v Walker* [2006] 1 NZLR 760, Baragwanath J, delivering the judgment of the New Zealand Court of Appeal, adopted the statement of Mahoney J. in *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty* (1985) 2 NSWLR 309 at p 326:

> "The only question considered by the [trial judge] was whether there was a binding contract between the parties. In considering the question . . . it is of assistance to distinguish between three questions: did the parties arrive at a consensus?; (if they did) was it such a consensus as was capable of forming a binding contract?; and (if it was) did the parties intend that the consensus at which they arrived should constitute a binding contract?"

[42] The court went on in *Verissimo* to state, para [31]:

> "It is convenient when discussing formation of a contract to speak of "intention". But it is trite that the subject of state of mind of the respective parties is immaterial. What matters is the message that was objectively conveyed by each to the other, discerned within what Lord Wilberforce famously called "the factual matrix": *Prenn v Simmons* [1971] 1WLR 1381. Both the words used and the factual matrix are important to the determination of what intention the court will infer from the parties' conduct or impute to them . . ."

[43] In *McMillen v Covic* [2004] 2 NZLR 106, Baragwanath J. referred to the situation where not all of the contingencies of a contract had been dealt with at the time of the formation of the contract:

> "It is a fact of life that commercial parties, even when legally represented, will quite frequently contract in a manner that does not deal precisely with a problem that later emerges . . . The law's task is to give effect to freely accepted mutual obligations; it is therefore the courts' responsibility to identify and find means of giving practical and just effect to those obligations even if they have not been expressed meticulously."

[44] The other point of principal relating to the formation of a contract relevant to the present case is subsequent conduct. In *Fletcher Challenge* at para [56] the New Zealand Court of Appeal said:

> "It is . . . permissible when considering contract formation . . . to look at subsequent conduct of the parties towards one another, including what they have said to each other after the date of the alleged contract."

Discussion

[45] The case for the plaintiffs is relatively straightforward. They allege in essence that, on 3 March 2004 in a telephone conversation between Mrs Wolfgramm and the defendant, a legally binding agreement was reached whereby, in return for them transferring the sum of AUD$3,300 into his account that day, the defendant would purchase solar eqipment which was available to him through a friend at that special discounted price. For his part, the defendant denies the existence of any such agreement. The case fairly obviously, therefore, involves significant issues of credibility.

[46] Perhaps the starting point is the statement of claim. Paragraph 5 reads:

> "In or about early 2004, the plaintiffs remitted to the first defendant in Brisbane, Australia a sum of about 2,500 Euros for the first defendant to purchase solar panels, batteries and fittings for them and the shipping thereof to them in Tonga."

Counsel's background research was inexcusably inadequate. Before drafting the pleadings, counsel for the plaintiff should have made the effort to obtain a copy of the Telegraphic Transfer Application form or other confirmation from the bank so as to be able to identify the exact date in "early 2004" and the exact amount that was remitted. Both parties proceeded on the basis that the money in question was transferred on 4 March 2004 which was the date it was credited to the defendant's bank account. It was not until a late stage in the trial that the Telegraphic Transfer Application form was produced as an exhibit and that showed the date of the transfer as being 3 March 2004 and the amount transferred as being T.$4,965.39 which equates to AUD$3,300.

[47] On 16 May 2005 the plaintiffs filed a reply to the defendant's defence and defence to the counterclaim. In paragraph 5.1 of that document they pleaded:

> " . . . During a telephone conversation between the second plaintiff and the first defendant in early 2004 the first defendant informed her that she should send AUD$3,000.00 right away so that a man he knew could get the solar equipment from Japan before the new price would come into effect. The plaintiffs accordingly remitted AUD$3,281.00 to the first defendant which was to cover the total cost of the solar equipment. No mention was made of the payment of shipping."

[48] Again, the pleading indicates inadequate background research by counsel. The figures of AUD$3,000 and AUD$3,281 should have been reconciled in the pleading. The figure of AUD$3,000 should, in fact, have read AUD$3,300 and then it should have been made clear that the difference between the AUD$3,300 figure and AUD$3,281 represented the bank transfer charge. The defendant did not, however, seek particulars or seek to have any aspect of the plaintiffs' pleadings clarified through interrogatories.

[49] When it came to the hearing, Mrs Wolfgramm did not mention anything about purchasing the equipment from Japan but she was not asked any questions on that particular topic. She was adamant, however, that in the course of the telephone conversation on 3 March 2004 the defendant told her that he had a friend who could get the solar equipment for a special price if she sent the money across to the defendant's bank account straight away. Mrs Wolfgramm, quite frankly, admitted that she could not remember the exact amount that Peter had asked for but she said that she sent across whatever the amount was that he had requested. The documentation later produced showed the amount in question as AUD$3,300. When the receiving bank deducted its transfer charge from that sum the amount actually credited to the defendant's account the following day was AUD$3,281.

[50] The defendant's position in relation to this particular aspect of the case had been set out in paragraph 5 of his statement of defence which is quoted in full in para [21] above. In essence, he confirmed that the parties entered into an agreement in early 2004 (identified later as 3 March 2004) the terms of which were that the plaintiffs asked the defendant to purchase solar equipment for them in the sum of AUD$9,455.10 and the

plaintiffs agreed to pay the shipping costs. The defendant also pleaded that the plaintiffs agreed to pay him a deposit of AUD$3,281 with the balance payable upon arrival of the goods in Tonga. The defendant acknowledged that the sum of AUD$3,281 was deposited into his bank account but he claims that the payment was simply a deposit for the solar system, not the purchase price.

[51] Against that background, evidence as to what was actually discussed in the course of the telephone conversation on 3 March 2004 becomes quite crucial in determining what, if anything, was agreed to and whether the parties in the course of that telephone conversation did, in fact, reach a consensus.

Discussion

[52] One of the problems the defendant faces is that Mrs Wolfgramm was not challenged in cross examination on any aspect of her evidence relating to that crucial telephone conversation on 3 March 2004 nor was any challenge made during cross-examination to the plaintiffs' pleadings in relation to that conversation. It is true that Mr Garrett put to the witness that the defendant had told her that the $3,281 was a one third deposit and it was also put to her that the defendant had not asked her to send the money across that day but Mrs Wolfgramm simply denied both of those propositions and she was not pressured any further on the subject of the telephone conversation. The cross-examination on these issues proceeded as follows:

> "Q. You said that Peter told you that the money you sent, the $3,281, was the whole price didn't you?
> A. Yes.
>
> Q. That's all you needed?
> A. Yes.
>
> Q. I have no choice but to put it to you that Peter told you clearly that the $3,281 was a third deposit - that's true isn't it?
> A. No, it's not true.
>
> Q. Ana, I'm not a mathematician, which is why I'm a lawyer, but would you agree that the price they say they paid $9,455 - hold on, I haven't finished the question - bearing in mind the exchange rates between sending money from Tonga and Australian dollars, would you agree that $3,200 is about one third of $9,455?
> A. I suppose it is.
>
> Q. Alright, again Ana I have no choice but to put it to you that Peter never told you that you must send this money there and then and he was going to get a special price - he didn't say that did he?
> A. Yes, he did say it because I took time to get all the way into town particularly to get into the bank to send that money to him on that day and the bank said to me I think we've got the wrong bank account and I sent it again and it went through.
>
> Q. Yes, well no one is denying that that money was deposited but I'm putting to you that Peter made it quite clear that was a one third deposit only.
> A. No sir.
>
> Q. Alright.
> A. He did not.
>
> Q. Okay.
> A. That amount he quoted of $9,000 or whatever it was, he said he didn't buy the equipment until later in the year so at that time he can't quote a price to me as the total price in March when the solar system (sic) didn't cost that much at that time. December or whenever he bought it, perhaps a price from the electrical company may have been at that price then.
>
> Q. But you have no knowledge of what, if any, fluctuations in price there were between March and December do you?

A. No, but I know the price if he had bought it in March with the money I sent him then.

Q. Yes, assuming that that's the full price, that's correct. Now you said you heard nothing for six months after you sent that money?
A. That is right.

Q. Now, I put it to you that from that time, that is in March 2004, until they arrived in December 2004 you had frequent telephone conversations with Peter and (Brenda), that's correct isn't it?
A. Not frequent. Six months after I sent him the money that's the first conversation after I sent him that money.

Q. So your claim is that for six months from March to September you had no conversation at all?
A. No, from March for about six months. That's when I decided to ring up and ask did you receive the money? Did you buy the equipment and (Brenda) said: "we've decided to bring it with us when we come and install it ourselves." She did not say she bought it or had not bought it."

That was the full extent of the cross-examination of Mrs Wolfgramm on the evidence she had given the court on the crucial telephone conversation which, she maintained, led to her transferring the money into the defendant's bank account in Australia. It could hardly be described as a serious challenge to what, after all, constituted the essence of the plaintiffs' case.

[53] A further problem the defendant faces in relation to the cross-examination of Mrs Wolfgramm is that through his questioning, counsel was suggesting a certain state of facts which the defendant's evidence failed to support. Thus, it was implicit in counsel's line of questioning of Mrs Wolfgramm, set out in para [52] above that the defendant would be admitting asking for AUD$3,300 in the crucial telephone conversation (although he would be denying that she had to send the money that same day) but he would also be saying in evidence that he asked for the money as a deposit only, the sum being one third of the total price of $9,455.00. As can be seen, however, from the defendant's cross-examination, set out in para [26] above, he denied asking for any money to be sent over to him and Mrs Robertson, in the passage quoted in para [36] above, denied that the figure of $9,455 was even talked about in the telephone conversation.

[54] Cross on Evidence, 7th Australian edition (2004) states, para 17525:

> "The conduct of cross-examination has to be carried out with particular care so far as it purports to reflect the client's instructions as to the events in issue, because, allowing for the possibilities of human error, a divergence between what a party says or does not say in evidence and the question asked by that party's counsel of the opposing witness may be taken into question in evaluation of that party's testimony or in evaluating that party's case.
>
> The problem may arise in the following ways. First, counsel for a defendant may fail to cross-examine the opposing party's witnesses on a point on which the defendant calls evidence . . . Secondly, counsel for the defendant may cross-examine witnesses called by the opposing party to suggest a certain state of facts, but the defendants' testimony fails to support, or denies, the propositions for which the cross-examination contended."

[55] The defendant's pleadings and his counsel's line of questioning of Mrs Wolfgramm in cross-examination clearly suggested that the payment of AUD$3,300 was asked for in the telephone conversation on 3 March 2004 but as a deposit, not as the total purchase price. In evidence, however, both the defendant and his wife appeared to resile from that position statement and the thrust of what they told the court was that, in the course of the 3 March telephone conversation, no specific figures were mentioned and no money transfer was asked for.

[56] On the issue of credibility generally, I found both plaintiffs to be credible and reliable witnesses. It was apparent from Mrs Wolfgramm's demeanour in the witness box that she found the whole experience of being involved in family litigation quite distasteful

but she had a simple tale to tell and what she told the court was unchallenged in cross-examination. Regretfully, I cannot say that I found the defendant a convincing witness and his story seemed to get more convoluted as the case progressed. An obvious question which remained unanswered by the defendant was how would Mrs Wolfgramm have known his bank account number to transfer the funds into unless he had given her the details in the telephone conversation on 3 March 2004 and he is unlikely to have provided that information unless he was requiring her to make a payment into his account. Furthermore, if the money was only a deposit, as the defendant contended in his pleadings, why was it syphoned off into his personal mortgage account for several months instead of being paid out to the firm supplying the equipment? Additionally, why was the defendant unable to produce the quotation he spoke about in evidence which he said he had with him at the time of the telephone conversation in March 2004 which apparently showed the requirement for a deposit. He told the court on 5 May 2006 that, during the lunch break that day, he had been unable to find the copy of the quotation he thought he had among his papers back at his hotel but there was then a gap of over three months before the hearing resumed in which he had full opportunity to approach the company he claimed supplied the quotation for another copy but none was forthcoming.

Conclusions

[57] I accept the plaintiffs' evidence in relation to the telephone conversation on 3 March 2004. I find that there was a consensus reached in that conversation as alleged by the plaintiffs. In terms of their agreement, in consideration of the plaintiffs transferring the funds asked for, the defendant was to supply a suitable solar power system acquired through a friend at that special discounted price. Nothing was discussed about payment of the shipping charges at that point in time but I accept what Mrs Wolfgramm told the court, namely, that when she later asked if the defendant had purchased the solar power unit, she was told that they were going to bring it with them and install it themselves when they arrived in Tonga. I am satisfied that at that point in time, well before the relationship soured, the defendant, as a goodwill gesture, was intending to meet the shipping costs of the solar system himself as he was with certain other items which he mentioned in evidence.

[58] Why the defendant did not purchase the discounted solar equipment he described to Mrs Wolfgramm in the 3 March telephone conversation is unclear. Perhaps, like the quotation he spoke about, it simply did not exist. I am satisfied, however, that at no subsequent point in time did the defendant ever go back to the plaintiffs and tell them that the equipment he had decided upon was going to cost AUD$9,455. I am equally satisfied that had he disclosed that price then the plaintiffs would most likely not have gone ahead with the purchase.

[59] In summary, therefore, the defendant offered to purchase the solar power equipment for the plaintiffs at a special discounted price of AUD$3,300. That offer was accepted by the plaintiffs and the money was paid. For reasons which remain unclear, the defendant either did not or could not (because it never existed) complete his part of the bargain but he, much later, purchased a more expensive unit without getting the plaintiffs approval to the new price or without even informing the plaintiffs subsequently of what he had done.

[60] Being as generous as I can to the defendant, I can only conclude that he acted as he did as a goodwill gesture towards the plaintiffs. The equipment was eventually purchased on the eve of the Robertsons departure for Tonga and at that stage the relationship between the two families was still close and the defendant, in the knowledge that he and his wife were going to be living with the plaintiffs, decided as a goodwill gesture that he would personally meet the additional costs of the new equipment as well as the transport charges. It was only after the relationship later soured that the defendant had second thoughts about the whole issue and then decided to seek recovery of the difference in the price quoted in the 3 March telephone call and the actual purchase price in November of that year. It was not open to the defendant to unilaterally change the terms of the agreement in this way.

[61] The plaintiffs succeed in their claim, therefore, and the defendant fails in respect of his counterclaim. In terms of the prayer for relief, an order is made authorizing the release to the plaintiffs of the solar equipment presently in the custody of the port authorities, subject to payment of any storage or other charges. The plaintiffs are entitled to costs to be agreed or taxed along with reimbursement from the defendant for any storage charges

they might be required to pay to the port authorities in order to have the equipment released.

R v Falemaka

Supreme Court, Nuku'alofa
Ford CJ
CR 208/2006

8 and 9 November 2006; 16 November 2006

Criminal law – indecent assault – mentally retarded complainant – unable to give consent – convicted

The 74-year-old accused was charged under section 124 of the Criminal Offences Act with one count of indecent assault of the 18-year-old complainant. The complainant was moderately mentally retarded as result of meningitis while still an infant. The incident occurred on 29 May 2006. The complainant's mother, who had been resting after attending a funeral on the morning in question, was told that the complainant had been seen riding around in a van being driven by the accused. She went to the accused's home and confronted him but he told her that the complainant had got out of his vehicle and he believed that she had gone to town. The accused gave her two pa'anga for the bus fare into town and the mother caught a bus into Nuku'alofa to look for the girl. After a futile search, the mother reported the missing girl to the Mu'a Police Station. She told the police that she was certain that her daughter was at the home of the accused. The police acted on the complaint and the girl was duly located at the accused's home. The defence was that the complainant had consented and the accused honestly believed that she had consented.

Held:

1. The evidence highlighted by defence counsel raised serious doubts about the issue of consent and the accused was entitled to the benefit of those doubts. It was accepted that the accused honestly believed on reasonable grounds that the complainant had consented to the acts that had taken place.
2. Section 124(3) of the Criminal Offences Act provides that a woman who was feebleminded, insane or an idiot or imbecile could not in law give any consent to an act which would otherwise be an indecent assault but an accused will only be guilty if he knew or had reason to suspect her to be feebleminded, insane or an idiot or imbecile.
3. The psychiatric evidence satisfied the court that the complainant came within the definition of "idiot or imbecile" and, therefore, she was unable to give any consent to the indecent assault that had taken place.
4. After considering the evidence, the court was satisfied beyond reasonable doubt that the accused had known all along that the complainant was mentally retarded within the sense of one or more of the terms used in section 124(3) of the Act and he was convicted accordingly.

Statutes considered:

Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)

Counsel for the Crown : Mr Sisifa
Counsel for the accused : Mr Pouono

Judgment

Introduction

[1] The 74-year-old accused is charged with one count of indecent assault contrary to section 124 of the Criminal Offences Act (Cap 18). The offence is alleged to have occurred on Monday 29 May 2006.

[2] In his opening address, Crown counsel indicated that the prosecution case would rely heavily upon subsection (3) of section 124 of the Act which is the provision dealing with mentally retarded complainants. The unchallenged expert evidence in the present case was that the 18-year-old complainant is moderately mentally retarded as a result of meningitis while still an infant. I will need to return to the evidence touching upon this aspect of the case.

The prosecution evidence

[3] The complainant's 52-year-old mother told the court that her husband had passed away in 2003 but the complainant was the youngest of the couples' five children. On the day in question, the mother and the complainant had attended a neighbour's funeral at 8 a.m. and following the burial, the mother had some food at another neighbour's house before laying down to have a rest. Later in the morning she was woken by another woman who told her that a girl had come across from her home with a message. When the mother arrived home she was told that her daughter-in-law had seen the complainant riding around in a van being driven by the accused. The mother said that she was certain that her daughter was still with the accused and so she ran to his home to confront him.

[4] The witness continued in evidence:

> "I ran to Sisi's (the accused's) house and saw his van parked there. When I was going into his allotment, I picked up a stick. When I went around the back I saw the van and looked to see if anyone was there but there was no one there. So I came around the front and I knocked on the door. I knocked the first time and there was no answer. Then I knocked again and after a while the door was opened and I saw Sisi. When Sisi opened the door he came down the steps and he said, "hello". I said, "hello Sisi, but I'm here because I was told that Kalini had seen my daughter in your van." He said, "Yes Vai, it's true. I was on my way when (the complainant) stopped my vehicle. I asked her where she was going and she said that she was coming to the road on her way to get a bus to go to town. When we got to Fanueli's house which is two houses from the main road, she told me to stop the vehicle and she said to stop there so she could catch the bus and she got out of the vehicle. That was the last I have seen of her." But at that time I saw that Sisi was intoxicated and when I seen his face that he was intoxicated I said, "Sisi, I think you're lying, I know for certain that my daughters in your house" and Sisi said: " No Vai, I would not lie to you. We came in the vehicle and she stopped the vehicle at Fanueli's house and got out and I believe that she has gone to town." I told him that I wanted to go to town to look for (the complainant) but I did not have any money for the bus fare and so he said, "here's two pa'anga for the bus fare." So I caught the bus into town (Nuku'alofa) and looked for her. I went to many roads, almost all the roads looking for (the complainant) until the late afternoon towards the evening."

[5] The mother then returned to the period prior to when she caught the bus into town:

> "But prior to my coming into town, I had an argument with Sisi at his house. I insisted that I come into the house. So I went into Sisi's house. I knew for certain of my daughter was in the house but I was afraid to go into any of the rooms because there were only the two of us in the house, him and myself, and I thought that he was very drunk.
>
> Q. What happened when you went into the house?
> A. When I went into the living room I saw that the rooms were locked.
>
> Q. How would you know the rooms were locked?
> A. The doors were closed and I was afraid so I went out of the house."

[6] Returning to her trip into town, the mother told the court that she arrived in Nuku'alofa about 12 noon and after the futile search for her daughter which she described, she caught another bus back to her village sometime after 5 p.m.. After making other enquiries in her area about her missing daughter, she took a bath and then went to report the matter at the Mu'a Police Station. Her evidence continued:

> "When I got to the police station, the officer asked me why was I there at the police station and I cried and said that I wanted to lodge a complaint about my daughter who had gone missing. The officer asked me why she was missing, where had she gone and I told him what I have stated here in court and I told the police I wanted them to come and search for my daughter at Sisi's house because I felt that my daughter was hidden by Sisi in his house. The officer apologised and explained that they had no vehicle at the time to go to Sisi's house but he asked if I could wait there and I remained there. I got to the police station at 7 p.m. and it was around 12 midnight and there was still no police vehicle available. The officer said he felt sorry for me and my grandchild. He apologised and said maybe we should go home because the vehicle had been tied up by an investigation regarding a cow. And then the officer told me to go home and get some rest and come back early the following morning. I told the officer I'm sorry, I can't go home until I see my daughter and it doesn't matter how long I have to wait for a vehicle. I insisted that my daughter was still at Sisi's house. I remained at the police station and then the vehicle arrived and in the vehicle came the officer in charge of Mu'a, Soane Naufahu."

[7] The witness was asked:

> Q. "What time did the vehicle arrive?"
> A. "Probably around midnight."

She then continued:

> "Then Soane came and asked me why I was there. I told him about my daughter. He asked me if I was certain she was at Sisi's house. I told him: "Yes, I was certain she is at Sisi's house but that Sisi was lying to me." He told me not to worry because two officers would go to Sisi's house looking for my daughter and the vehicle left and when the vehicle returned I saw my daughter in the vehicle."

[8] The complainant's mother said that she was quite shocked to see her daughter and she asked her whether she had seen her when she had come into Sisi's house and her daughter replied that she had seen her when she came around with the stick but the accused had told her to hide because her mother was coming around with a stick to beat her up. The complainant told her that her bra, pants and underwear were still at Sisi's house.

[9] A formal complaint was then made to the police. They returned to the accused's home and found the complainant's bra between the bed and the window in one of the bedrooms. The accused was also brought back to the police station. The complainant's mother said in evidence that when they arrived home she asked her daughter where she had gone. The complainant told her that at the function after the funeral a woman (her brother's first wife) told her to go and ask the accused for a cigarette (the accused had also attended the funeral). And that was why she climbed into his van. The complainant had also talked about bottles of alcohol. The accused drove her to the bush and offered her a drink of alcohol. The complainant told her mother how they had then returned to the accused's home and carried on drinking. She described the nature of the indecent assault that occurred and she said that they carried on drinking until she "passed out drunk".

[10] The 18-year-old complainant was called as the second witness for the prosecution. After being sworn in, she told the court her first name but when she was asked by Crown counsel for her surname she simply shrugged her shoulders. When she was then asked her age she replied, "4". After that rather inauspicious start to her evidence, she seemed to settle down in the witness box and I have no doubt that she was a competent witness within the meaning of section 118 of the Evidence Act (Cap 15).

[11] Referring to her initial contact with the accused, the complainant said that he showed her two bottles of alcohol and called her over to get into his van and go for a drink in the bush at his allotment. At the allotment the accused went and collected coconuts and the complainant remained in the van. While they were later driving back to the accused's home the accused told the complainant to hide because her brother was walking along the road. She did so by ducking down in her seat. The complainant then described to the court how, when they arrived at the accused's house, they continued drinking and then the accused kissed her on the mouth, took off her clothes as well as his own and sucked on her

breasts and licked her vagina. Those are the events making up the charge of indecent assault. The complainant was asked in examination-in-chief whether she consented and she replied, "No". She was asked why she did not consent and she shrugged her shoulders. When asked again, she replied: "because he was old."

The defence

[12] The complainant was not challenged on her evidence of the events making up the indecent assault charge. The accused did not deny the allegations but his defence was that she had consented to everything that had taken place and he had no idea at the time that she suffered from any form of mental disorder. The accused, as was his right, did not give or call evidence but the prosecution produced an unsworn statement he had made to the police in which he said that he and the complainant were celebrating. The statement continued:

> "Q. 8: What do you mean by celebrating?
> A: We agreed to lick and play with each other and she orgasimed twice and I once
>
> Q. 9: And how did you lick each other?
> A: She had her head at my feet and I had my head at her feet and she licked me and I her.
>
> Q.10: Who was on top and who was on the bottom?
> A: I was on the bottom and she was on top."

[13] Later in the interview the accused was asked by the police officer about his knowledge of the complainant's mental condition:

> "Q. 20: When you saw her face and actions, did you think that there was something wrong with her thinking?
> A: She was speech impaired and was cunning almost handicapped.
>
> . . . .
>
> Q. 35: So when you say (the complainant) is speech impaired, cunning and almost handicapped, do you think then that she is feebleminded?
> A: On closer inspection she is feebleminded.
>
> . . . .
>
> Q: 29: Did you know that it was an offence that you had committed against (the complainant)?
> A: I know today that she is feebleminded."

The law

[14] Putting to one side for the moment the case of a mentally retarded complainant, in order to establish a charge of indecent assault on a female under section 124 of the Criminal Offences Act, the Crown must 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 believe that she consented;
5. The complainant was aged 16 or over at the time.

Discussion

[15] Defence counsel accepted that the Crown had established all the above requirements apart from the fourth element. Mr Pouono stressed that the complainant had had ample opportunity to escape from the accused's van, had she so desired, while he was collecting coconuts in the bush. She could also have very easily called out to her mother when she

knew that her mother was in the living room of the accused's house. I accept the force of those submissions. The evidence highlighted by defence counsel certainly raises serious doubts about the issue of consent and the accused is entitled to the benefit of those doubts. My finding is that the accused honestly believed on reasonable grounds that the complainant did consent.

[16] That is not the end of the matter, however. My finding on the issue of consent then brings into play the provisions of subsection (3) of section 124 which, in essence, provide that a woman who is, "feebleminded, insane or an idiot or imbecile" cannot in law give any consent to an act which would otherwise be an indecent assault, but an accused will only be guilty if he "knew or had reason to suspect her to be feebleminded, insane or an idiot or imbecile."

[17] The Crown called expert evidence from Dr Mapa Puloka, a very experienced psychiatrist, who carried out an assessment of the complainant after the incident in question. Dr Puloka made the observation in his evidence that the terminology used in subsection (3), such as "feebleminded", "insane", "idiot" and "imbecile" is now "very much out of date" but his conclusion, which I accept, was that the complainant's condition could properly be described as "moderate mental retardation" which best equated with the terms "idiot or imbecile". Based on Dr Puloka's evidence, therefore, I am satisfied that the Crown has established that the complainant was unable to give any consent to the indecent assault because of the state of her mind. The sole remaining issue, therefore, is whether the Crown has been able to prove beyond reasonable doubt that the accused knew or had reason to suspect that the complainant was mentally retarded in the way described by Dr Puloka.

Submissions

[18] When the complainant's mother gave evidence, she was asked whether she thought that the accused would have known about her daughter's mental condition. The mother said that he would have known because she would often take her daughter to a Chinese shop which is situated on part of his allotment and the accused would sometimes be standing by the shop and he would greet them. The mother said that the accused lives in the same village and everyone in the village knew about her daughter's condition. She said that when she walks in the street with her daughter, young children will call out, "goodbye (daughter's name) you imbecile."

[19] Mr Pouono, in his submissions, highlighted the fact that the village in question is a large village and the accused lives on the opposite side of the village from the complainant. He said that the families do not socialise or go to the same church so the accused would have no way of knowing about the complainant's condition. In reference to the answers the accused had given in his statement to the police in relation to the girl's condition, Mr Pouono submitted that his answers were given after he had been told by the police officer that the girl was mentally retarded. Mr Pouono also highlighted one of the answers given by Dr Puloka. The doctor had been asked if a someone was to meet the complainant for the first time, how long would it take that person to recognise that the complainant was mentally retarded? The doctor answered that it was something that he (Dr Puloka) as a psychiatrist, could pick up within 10 to 20 minutes but for any untrained person, it could take two to three hours.

[20] Mr Sisifa submitted quite forcefully, however, that the accused was well aware all along that the complainant was mentally retarded. He asked rhetorically, if the accused had believed that the complainant was a normal 18-year-old, would he as a mature 74 year-old married man, have tried to tempt her to get into his van by showing her two bottles of alcohol and would he have told her to hide in the van when he saw her brother walking along the road. In a similar vein he highlighted the complainant's unchallenged evidence that the accused had told her to hide under the bed because her mother was coming with a stick to beat her up. Crown counsel submitted that all of these actions showed that the accused was treating the complainant, not as a mature 18-year-old young woman, but as a child and the only conclusion one can draw from that evidence is that he knew all along that the complainant was mentally retarded.

[21] Mr Sisifa also drew the court's attention to question and answer number 20 in the accused's statement to the police:

"Q.20: When you saw her face and actions, did you think there was something wrong with her thinking?
A: She was speech impaired and was cunning, almost handicapped."

The prosecutor submitted that the accused was being asked in that question about his perception of the girl when he first saw her and his admission is significant.

Conclusions

[22] I found the prosecutor's submissions compelling and they were consistent with my
280 own conclusions from the evidence. The fact that the accused told the complainant to get down and hide while they were travelling in the van when he saw her brother walking along the road is clear evidence that he was familiar, not only with the complainant, but also with her family.

[23] I am satisfied beyond reasonable doubt that the accused knew all along that the complainant was mentally retarded within the sense of one or more of the terms used in section 124(3) of the Act. The Crown has, therefore, succeeded in establishing all the necessary elements of the offence and the accused is convicted accordingly.

Funaki v Police

Supreme Court, Nuku'alofa
Ford CJ
AM 07/2006

16 October and 6 November 2006; 13 December 2006

Criminal law – obstruction of police officer – Magistrate's decision was sound – appeal dismissed

The two appellants appealed against their conviction in the Magistrate's Court at Nuku'alofa on 8 August 2006 on one charge of disobeying the lawful orders of a police officer contrary to section 35 (1) and (2) of the Police Act and one charge of obstructing a police officer acting in the execution of his duty contrary to section 113 (b) of the Criminal Offences Act. The charges arose out of a stand-off between police and marchers at the commencement of a large protest March in Nuku'alofa on 1 June 2006. There were two marches scheduled to be held on the day in question. First, a school children's march to celebrate the opening day of the 2006 Session of Parliament and secondly, a large march organised by the peoples representatives in the Legislative Assembly and the Public Service Association to present a petition seeking political reform to the King at the Royal Palace. Both marches were scheduled to follow a similar route along Taufa'ahau Road. The Minister of Police had given approval for the petitioners' march to commence at 2pm but the petitioners wanted to commence marching before 1pm. The police also discovered just prior to the petitioners' march that heavy vehicles would be participating including a motorcycle towing a "mobile mortuary". The police became concerned over the safety of the school children who were still participating in their march and the Acting Commander of Police gave directions to have the petitioners' march diverted from Taufa'ahau Road onto Fatafehi Road which would allow the petitioners to reach their destination without, however, passing through the main thoroughfare of Nuku'alofa. The charges arose out of the skirmishing which followed on from police attempts to enforce disorder. The grounds of appeal were (1) that the police prosecutor's opening address was prejudicial; (2) there was insufficient or no proper evidence to support the convictions; (3) the convictions were bad for duplicity and double jeopardy and (4) that the appellants' rights under clause 8 of the Constitution had been breached by the prosecution.

Held:

1. An opening speech in a summary trial was intended simply to allow the prosecutor to tell the magistrate what the case was all about and the nature of the evidence that will be produced in order to try and establish the defendant's guilt. It should be persuasive but not overtly argumentative. The prosecutor's opening statement was unusually and unnecessarily detailed and it fell into the trap of overstating the prosecution case. The appellants had been represented at the hearing, however, by a very experienced counsel and as he had not taken objection this ground of appeal was dismissed.
2. In relation to the second ground of appeal, an appellate court dealing with an appeal based on factual findings was not concerned with minutiae but only with the broader picture and with whether an appellant was able to demonstrate that the magistrate had in some material respect made such a basic error of principle that his decision could not be allowed to stand. There was proper and sufficient evidence for the learned magistrate to rely on in order to convict the appellants on both counts and this ground of appeal also failed.
3. The two charges were quite distinct and they involved the consideration of different essential elements which were required to be established in order to prove each offence. There was no double jeopardy because the offences were not legally the same.

4. The right of public assembly associated with the presentation of a petition pursuant to clause 8 of the Constitution was not an unfettered right. It was specifically expressed to be subject (relevantly) to the petitioners acting peaceably without disorder. Whether petitioners are meeting peaceably without disorder will largely be governed by the venue selected. There was no right of assembly on a public road. The petitioners had no right to march in complete disregard to orders given by supervising police officers.
5. The appeal was dismissed and the convictions in each case were allowed to stand.

Cases considered:
Fakaanga v Moala [2004] TOSC 6
Hopoi & Fusimalohi v Police [1997] Tonga LR 222
Lasolo v Palu (Supreme Court, C.App 855/98, 15 January 1999, Finnigan J)
McAra v Magistrates of Edinburgh [1913] SC 1059
Pearce v The Queen [1988] HCA 57
R v Sekope [2002] TOSC 25

Statutes considered:
Constitution Act (Cap 2)
Criminal Offences Act (Cap 18)
Dances Act (Cap 166)
Police Act (Cap 35)
Traffic Act (Cap 156)

Counsel for appellants : Mr Edwards
Counsel for respondent : Mr Kefu

Judgment

Background

[1] By agreement the two appellants have had their appeals dealt with together. Both were convicted in the Magistrates' Court at Nuku'alofa on 8 August 2006 on two charges each. The first charge was one of disobeying the lawful orders of a police officer contrary to section 35(1) and (2) of the Police Act (Cap 35). The second charge was one of obstructing a police officer acting in the execution of his duty, contrary to section 113(b) of the Criminal Offences Act (Cap 18). On the first charge each appellant was convicted and discharged. On the obstruction charge each appellant was convicted and fined $200. The appeals are against the convictions only.

[2] The cases arise out of what counsel for the respondent described as a "stand-off" between police and marchers at the commencement of a large protest march held in Nuku'alofa on 1 June 2006. The court was told that 34 other cases arising out of the same incident have been adjourned in the Magistrates' Court pending the outcome of this appeal.

[3] The first day of June was also the opening day of the 2006 Session of Parliament. Traditionally in recent years the opening of Parliament has taken place at Queen Salote Memorial Hall on Taufa'ahau Road at 10:30 a.m. and following the official opening by the King, or in this case the Princess Regent, there is a procession from the Memorial Hall along Taufa'ahau Road through the centre of Nuku'alofa to the Royal Palace. Schoolchildren from throughout Tongatapu participate in the procession. It is a joyous and colourful occasion watched by many spectators, including tourists.

[4] The other large march planned for the same day had been organised by the representatives of the people in the Legislative Assembly and the Executive Committee of the Public Service Association. This march was scheduled to follow a similar route to the school childrens' march except that it would commence at a sports stadium and other points along Taufa'ahau Road slightly further out from the central city than Queen Salote Memorial Hall.

[5] The people involved in this march were proposing to present a petition to His Majesty the King at the Royal Palace. The petition sought political reform. The appellants contend that the march itself was an exercise of their constitutional rights under clause 8 of The

Act of Constitution of Tonga and counsel for the respondent concedes that this was, indeed, the position. Clause 8 provides:

> "8. All people shall be free to send letters or petitions to the King or Legislative Assembly and to meet and consult concerning matters about which they think it right to petition the King or Legislative Assembly to pass or repeal enactments provided that they meet peaceably without arms and without disorder."

The factual scenario

[6] The record of evidence in the Magistrates' Court shows that, sometime prior to the day in question, the Acting Commander of Police, Mr Kainga Hia, had been instructed to oversee both the official opening of Parliament and the safety of the students involved in the schoolchildrens' march. Then on the day before the opening of Parliament he learned, for the first time, about the proposed petitioners' march which the Minister of Police had authorised to commence at 1400 hrs. The commencement time of 1400 hrs had been announced "repeatedly" over the television. It was anticipated that by then the school childrens' march would have been completed.

[7] It appears that what then happened on the day of the march was that the petitioners wished to commence their march prior to 1 p.m.. The police also discovered, for the first time, that heavy vehicles would be participating in the petitioners' march. One of the heavy vehicles that figured prominently in the evidence was a motorcycle towing a "mobile mortuary".

[8] The prosecution evidence was that the police became concerned over the safety of the school children who were still participating in their march at that time and over the inevitable congestion that would result in Taufa'ahau Road should the petitioners' march be allowed to proceed prior to the allotted time. The police endeavoured to stop the petitioners' march from proceeding prior to 2 p.m. but they were unsuccessful. The Acting Commander then gave directions to have the petitioners' march diverted from Taufa'ahau Road onto Fatafehi Road which would allow the petitioners to reach their destination without, however, passing through the main thoroughfare of Nuku'alofa.

[9] The charges of disobeying a lawful order given by a police officer and of obstructing a police officer in the execution of his duty arise out of the skirmishing which followed on from police attempts to enforce these orders.

Grounds of appeal

[10] The grounds of appeal are lengthy and unstructured. I am obliged, however, to counsel for the respondent for condensing them under four heads which appear to accurately reflect and summarise the issues raised. Those heads, essentially, are:

1. The opening address was prejudicial;
2. There was insufficient or no proper evidence to support the conviction;
3. The convictions were bad for duplicity and double jeopardy, and
4. The appellant's rights under clause 8 of the Constitution had been breached by the prosecution.

I will deal with each ground seriatim.

The first ground of appeal

[11] The first ground of appeal is that the police prosecutor's opening statement was prejudicial. No authority was cited in support of this ground of appeal but appellants' counsel submitted:

> "The opening submissions of the prosecutor were highly prejudicial and introduced evidence or background information which was not connected or relevant or applicable to the appellants' cases but nevertheless provided an unfavourable background which was likely to influence or did influence the decision to convict."

Mr Edwards later described the same submissions as, "chaotic, irrelevant and prejudicial."

[12] In response, Mr Kefu submitted that the magistrate was experienced enough to ignore any prejudicial comments made by the prosecutor in his opening statement and his decision was based on the evidence given in court, not on the prosecutor's opening address.

[13] An opening speech in a summary trial is intended simply to allow the prosecutor to tell the magistrate what the case is all about and the nature of the evidence that will be produced in order to try and establish the defendant's guilt. It should be persuasive but not overtly argumentative. The prosecutor's opening statement in the present case was unusually and unnecessarily detailed and it fell into the trap of overstating the prosecution case. The prosecutor, for example, purported to give verbatim quotations from the proposed Crown witnesses. For obvious reasons, that is always an unwise practice. More often than not, the witnesses simply do not come up to brief and the words quoted in the opening statement will end up either not being said at all or distorted beyond recognition. That is what happened in the present case.

[14] Having said that, the appellants were represented at the hearing by a very experienced counsel and it was always open to him to object if he considered that the prosecutor had overstepped the mark in any particular respect. He did not take objection, however, and, in any event, I am satisfied that the learned magistrate reached his decision on the merits without being unduly influenced by the prosecutor's opening statement. This particular ground of appeal is, therefore, dismissed.

The second ground of appeal

[15] The second ground of appeal is that there was insufficient or no proper evidence to support the conviction. This ground of appeal is essentially an attack on the magistrate's findings on the facts. In *Fakaanga v Moala* [2004] TOSC 6, I made the following observations in relation to an appeal against the factual findings of a magistrate:

> "It has often been said in this court that any litigant attempting to appeal a judgment of the Magistrates' Court on the facts alone faces a formidable task. Such an appeal will succeed only in the clearest of cases. This court will not interfere unless, in the language of Finnigan J in *Lasolo v Palu* (unreported) C.App 855/98, judgment dated 15 January 1999, it can be shown that the magistrate has "gone off the tracks." That general principle continues to apply."

[16] In *R v Sekope* [2002] TOSC 25, Ward C.J. said:

> "It is well established that an appellate court will only interfere with a lower court's findings of fact if it is satisfied that no reasonable court properly directed could have reached such a conclusion. It will not simply substitute its own opinion for that of the lower court."

[17] In a case like the present, where one of the appellants gave evidence thus raising issues of credibility, unless the appellants can point to some clear error of principle, the magistrate 's findings of fact will almost invariably be left alone.

[18] In support of this particular ground of appeal, the appellants have referred in some detail to what they describe as "conflicts and discrepancies" in the evidence and examples of such conflicts and discrepancies are itemised in counsel's submissions. But conflicts and discrepancies in one form or another abound in virtually every case based on oral evidence and it is the function of the presiding judge or magistrate to work through those conflicts and discrepancies and then reach his or her conclusions as to where the truth of the matter lies.

[19] An appellate court dealing with an appeal based on factual findings is not concerned with such minutiae. An appellate court is concerned only with the broader picture and with whether an appellant is able to demonstrate that the magistrate has in some material respect made such a basic error of principle that his decision cannot be allowed to stand. Nothing like that has been established in the present case. Mr Kefu submitted that there was proper and sufficient evidence for the learned magistrate to rely on in order to convict the appellants on both counts. I agree with that observation. This ground of appeal, therefore, also fails.

The third ground of appeal

[20] Another of the appellants' grounds of appeal is that the convictions are bad because of what they refer to as "duplicity and double jeopardy." The basis for this particular ground of appeal is said to be that the two charges faced by the appellants were based on the same factual circumstances. Counsel complained that the appellants had, thus, "been convicted twice for the same thing." No authority was cited in support of the submission.

[21] In response, Mr Kefu submitted that the two charges, one under the Police Act and the other under the Criminal Offences Act were intended to deal with two different situations. Under the Police Act, the charge was disobedience to a lawful order given by a police officer whereas the charge under the Criminal Offences Act was one of obstructing a police officer acting in the execution of his legal duty. Thus, submitted Crown counsel, there was no duplicity or double jeopardy.

[22] The expression "double jeopardy" when used in the context of the submission being put forward was considered by the High Court of Australia in *Pearce v The Queen* [1988] HCA 57. In that case, the appellant broke into the victim's home and beat him. He was convicted on two charges arising out of the single episode. The first count was maliciously inflicting grievous bodily harm and the second count was breaking and entering a dwelling house and while therein inflicting grievous bodily harm on the same victim. The appellant contended that at common law a person could not be convicted of different offences in respect of the same or substantially the same set of facts.

[23] The High Court held that although the facts giving rise to the charges were generally the same, there was a clear distinction in the essential elements required to be established in order to prove each offence. As Kirby J. expressed it at [125]: "There is jeopardy; but it is not double because the offences are not legally the same."

[24] In their joint judgment, McHugh, Hayne and Callinan said [30-31]:

> "The decision about what charges should be laid and prosecuted is for the prosecutors. Ordinarily, prosecuting authorities will seek to ensure that all offences that are to be charged as arising out of one event or series of events are preferred and dealt with at the one time. Nothing we say should be understood as detracting from that practice or from the equally important proposition that prosecuting authorities should not multiply charges unnecessarily. There was, however, no abuse of process in charging this appellant with both counts. The short answer to the contention that the charging of both counts was an abuse of process is that because the offences are different (and different in important respects) the laying of both charges could not be said to be vexatious or oppressive or for some improper or ulterior purpose. To hold otherwise would be to preclude the laying of charges that, together, reflect the whole criminality of the accused . . ."

[25] Those principles are of general application and they are equally applicable to the criminal law in the Kingdom. The two charges in the present case are quite distinct and they involve the consideration of different essential elements. The appellants themselves attempted to highlight the different elements required to be proved in relation to each charge in paragraphs 18 and 31 respectively of their submissions. There is no substance in this ground of appeal and it is, accordingly, dismissed.

The fourth ground of appeal

[26] The final ground of appeal alleges that the police action was in breach of the appellants' constitutional rights. The thrust of this ground of appeal appears to be, as Mr Kefu in response succinctly summed it up, the claim that, "the police had abrogated the rights of the appellants under clause 8 of the Constitution to petition the King by attempting to stop the vehicles from travelling down Taufa'ahau Road, and also limiting the petitioners to march at 2 p.m."

[27] Mr Edwards submitted that the petitioners, including the appellants, had a constitutional right, "to meet peacefully and to use the public road" and it was the actions of the police in disturbing and disrupting the march that created the confrontational situation.

[28] Mr Kefu accepted that a march to present a petition to the King or Legislative Assembly could be included in the wide meaning of the words, "to meet and consult" in

clause 8 of the Constitution but he stressed that the constitutional rights under clause 8 were subject to the overriding consideration that the meeting be peaceful and without disorder. Crown counsel submitted that the venue where petitioners decide to meet very much determines the standard to be applied in assessing whether the meeting (in this case the march) is peaceful and without disorder.

[29] Mr Kefu also accepted that public roads like public parks were common land which all members of the public had an unrestricted right to enjoy but he stressed that, in relation to public roads, different standards must necessarily apply in order to ensure public safety for all users of the road whether it be vehicular traffic, cyclists or pedestrians. Those standards, he continued, have been regulated by the Legislative Assembly in the form of the Traffic Act, the Police Act and the Criminal Offences Act and that legislation gives the police the authority they need to maintain and enforce those standards on public roads.

[30] Finally, Mr Kefu submitted that there was clear evidence in the present case that the police acted as they did in order to:

> "(i) protect the school children and other pedestrians on a congested Taufa'ahau Road;
> (ii) avoid any obstruction of the use of Taufa'ahau Road; and
> (iii) most importantly, maintain order on the road,"

and they had "not only statutory but also constitutional power" to so act.

[31] That submission could have been taken even further. The duties of a police officer arise by both the operation of statute and the common law. At common law there are positive general duties on a police officer which include a duty to enforce the law, to prevent an apprehended breach of the peace or harm to persons and property. The statutory duties include the positive specific duties imposed on every police officer under section 35 (1) of the Police Act to regulate and control traffic, divert traffic when it is in the public interest to do so, keep order on public roads and to prevent obstructions on the occasions of assemblies and processions.

[32] Mr Edwards submitted that the police officers were not "executing a lawful duty" and he relied in this regard on the decision of Hampton C.J. in *Hopoi & Fusimalohi v Police* [1997] Tonga LR 222. In that case it was held that the appellants had been wrongly convicted of obstructing police officers in breach of section 113(b) of the Criminal Offences Act because, in giving orders to stop a dance, the officers had not been executing their lawful duty. That finding, however, was based on the fact that under the Dances Act (Cap 166) a police officer only of the rank of first-class constable or above could take steps to stop a dance and the officers who gave the order to stop the dance were constables without any rank. Moreover, the case did not involve any apprehended breach of the peace. The constables were acting only to enforce the conditions of the dance licence. Those facts can be readily distinguished from the facts of the present case and I fail to see how the judgment can assist the appellants.

[33] The right of public assembly associated with the presentation of a petition pursuant to clause 8 of the Constitution is not an unfettered right. It is specifically expressed to be subject (relevantly) to the petitioners acting peaceably without disorder. Given the concession made by Crown counsel, it has not been necessary to hear argument as to whether or not the words "meet and consult" in clause 8 are broad enough to encompass a street march. Accepting that proposition, however, I have no difficulty with Mr Kefu's supplementary submission that the standard for determining whether the petitioners are meeting peaceably without disorder will largely be governed by the venue selected.

[34] Obviously, any form of public assembly on a street or highway is likely to result in obstruction. At common law there is no right of assembly on a public road. In *McAra v Magistrates of Edinburgh* [1913] SC 1059 at 1073, Lord Dunedin said:

> "The primary and overriding object for which streets exist is passage. The streets are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets . . . that does not necessarily mean that anyone is doing an illegal act if he is not at the moment passing along. It is quite clear that citizens may meet in the streets and may stop and speak to each other. The whole thing is a question of degree."

[35] Against that background, it is axiomatic that it behoved the petitioners, including the appellants, to cooperate fully with the orders given by the police in their attempts to keep the peace and maintain order. Only in this way could the appellants be said to be meeting peaceably without disorder. There was ample evidence before the magistrate, however, that the appellants decided, for whatever reason, to disobey the lawful orders of the police officers and to obstruct the officers in the execution of their duty. This court will not condone such behaviour. To submit, as the appellants apparently contend, that clause 8 of the Constitution gave them the right, in the context of the present case, to march in complete disregard of the orders given by supervising police officers is nothing short of
340 fanciful.

Conclusion

[36] For the reasons stated, this final ground of appeal, along with all the other grounds, is dismissed. The convictions in each case stand.

R v Likio

Supreme Court, Nuku'alofa
Ford CJ
CR 260/2005

7, 10, 13-15 November and 13 December 2006; 18 December 2006

Criminal law – charges were rape, indecent assault and housebreaking – question of identification – convicted

The accused faced one count of rape, one count of indecent assault and another of housebreaking. It was alleged that on 27 April 2005 he forcibly entered the home of the 15-year-old complainant, carried her to a bedroom, threatened her with a knife and subjected her to the acts of indecency and rape particularized in the indictment. The accused denied the charges. He gave evidence and called witnesses in support. He contended that he was home in bed sick on the day in question suffering from influenza, dengue fever and a boil on his right knee. He was critical of the police identification parade and contended that the complainant identified him at the instigation of the police inspector.

Held:

1. When identification was in issue the court must always take particular care because in the realm of the criminal law cases involving mistakes as to identification resulting in a miscarriage of justice were legendary. The approach taken to the problem of visual identification was that outlined in *R v Turnbull* [1977] QB 224.
2. It was undesirable for the police to do nothing about the question of identification until the accused was brought before a magistrate and a witness for the prosecution was then asked some questions such as "is that the man?". The correct procedure was for the police to hold an identification parade before the trial or preliminary examination, placing the accused with a sufficient number of other people, leaving the witness to pick him out if he or she can, without assistance.
3. Upon a consideration of all the evidence, the court held that the Crown had established all the necessary elements of each charge beyond reasonable doubt and the accused was convicted.

Cases considered:

R v Falemaka (Supreme Court, CR 208/06, 16 November 2006)
R v Lolohea (Supreme Court, CR 16/06, 5 April 2006)
R v Talanoa [2006] Tonga LR 101
R v Turnbull [1977] QB 224

Counsel for the Crown : Mr Sisifa
Counsel for the accused : Mr Kaufusi

Judgment

Introduction

[1] The accused is facing one count of rape, one of indecent assault and another of housebreaking. The incident giving rise to the charges is alleged to have taken place at Navutoka on 27 April 2005. There was also another count of common assault but during the course of the hearing it was pointed out to Crown counsel that such a charge presently falls within the exclusive jurisdiction of the Magistrates' Court.

The case for the prosecution

[2] The Crown case is that on the day in question the 15-year-old complainant, who suffers from what was described as "a mild physical disability affecting her speech and balance" was home alone minding her parents' one-year-old foster child. She heard a male voice calling out for her mother. She looked out the window and told the man that her mother had gone to town, he then asked for her father and the complainant said that he had gone to town also. The man asked how long they had been gone for and the complainant told him that it had been for a while. The man then asked if anyone else was at home and she told him that there was only herself and baby. The man then left and the complainant went into the kitchen to wash the dishes and clean up.

[3] Not long afterwards, the man returned and forcibly entered the house through the back door. The complainant attempted to run to the front door but the man caught her in the hallway and carried her to a bedroom where he proceeded to take off her clothes, threaten her with a knife and subject her to the acts of indecency and rape particularised in the indictment. The complainant fainted. Later she was awoken by the baby crying and she then realised that she was still naked. She dressed herself, grabbed the baby and ran to a neighbour and complained that she had been raped. When her parents returned, a formal complaint was made to the police.

The prosecution witnesses

[4] The first witness for the Crown was the complainant's 47-year-old mother. She explained that she and her husband ran a small shop at the front of their home. On the day in question her husband was travelling into Nuku'alofa and the complainant told her mother that she should also go to town with her father and she would stay at home and mind the child. The couple closed the shop and left for town at approximately 11 a.m.

[5] When they returned home at around 3 p.m., a neighbour was at home with their daughter and they explained what had happened. Everyone cried and the mother asked the daughter if she knew who the man was. According to the mother's evidence, the daughter replied that it was a baldheaded man who usually comes to the shop to buy things and she had seen him going to evening service at the Free Church of Tonga across the road from their home but she did not know his name. She also told her mother that when the man lifted her onto the bed she looked up and saw that it was the same man she had seen outside the living room window.

[6] The complainant's mother told the court how the matter had then been reported to the Mu'a police and later the complainant had been taken to hospital for examination. The mother also gave evidence about an identification parade that took place at the Mu'a Police Station the day after the incident. She said that there were eight other bald-headed men in a lineup with the accused and the officer in charge, Inspector Soane Naufahu, had asked her daughter to first walk straight to the end of the line and then to walk the line for a second time and on the second occasion she was to stop in front of the person who had come to her home and point him out. The mother said that when her daughter pointed the man out as the accused she (the mother) cried because he was her cousin from Manuka. The accused's father was her uncle.

[7] In cross examination the mother said that she was watching her daughter as she walked along the line-up on the first occasion and she saw her stop and look up at the accused and, at the same time, the accused rolled his eyes and looked up at the ceiling. She said the police officer then told all the men in the line-up to look straight ahead. When the complainant walked the line on the second occasion and pointed out the accused, the police photographer took a photograph capturing the moment and the photograph was produced as an exhibit.

[8] The police photographer also produced some helpful coloured photographs of the scene at the complainant's home taken shortly after the incident, which included a photograph of the bed on which the complainant was allegedly raped. The mother confirmed in cross examination that there were no bloodstains on the bed but she said that she had noticed a "little blood" on the complainant's underwear.

[9] The 15-year-old complainant gave evidence consistent with the Crown case as outlined by the prosecutor. She told the court that she knew the accused "very well" because she had seen him when he came to their shop and she had also seen him attending some evening services at the Free Church of Tonga across the road from her home. She

explained that when the man first called out for her mother he was standing outside one of the louvre windows in the living room. She walked over to the window, pulled the curtain to one side and was talking to him through the louvres (some of the louvre panes were missing). She could see the man clearly and she identified him as the accused in court although, at the time she saw him outside the window, she did not know his name. The accused has a very distinctive completely bald head. The complainant said in evidence that when she told him that her mother had gone to town the man asked for her father and she told him that her father had also gone to town. He asked how long they had been gone for and she replied, "for a while". The man then asked who was at home with her and she replied, "just me and baby." The man then walked away in the direction of the cemetery next door. At that stage he was wearing long "army coloured" pants and a black T-shirt. The complainant moved to the kitchen and began doing the dishes.

[10] A short time later the man returned to the house and he asked the complainant to open the back door but she refused. The only lock on the door was a bent nail holding it in a closed position and the man kicked it open and entered the house. The complainant said that at that stage he was wearing short pants, a black T-shirt and he had "something like a balaclava" over his head. The complainant described what then happened. She said that she tried to run to the front door of the house but the man caught up with her in the hallway. He lifted her up and carried her to the bedroom. He then took off her clothes and his own clothes and he sucked on her left breast. He then inserted his penis and she felt pain in her vagina and she called out, "go away". She said that the man then took out a small black handled knife and told her to keep quiet or he would stab her. In this same context, while giving evidence, the complainant used the words "kill you" but, because of her speech impediment, the translator was unable to incorporate those particular words into a coherent sentence. The complainant told the court that after that she could not remember anything else until she was later woken by the sound of the baby crying. At that point she realised that she was still naked and so she quickly got dressed, grabbed the baby and ran to her neighbour's house.

[11] The complainant said that when she later told her parents what had happened the neighbour was present and they all cried. Her father went outside and could not look her in the face but a man from the church then came over to their home and said a prayer for them all. The complainant described how a formal complaint was later made to the police and she gave the police a statement recording all that had happened. In reference to the subsequent police line-up, the complainant said that she had been told by the officer that on the first occasion she was to walk straight across to the other side of the line and then on the second occasion she was to walk the line again and point the man out. She said that, on the first occasion, when she came to the accused she stood and looked at him and he looked at her and then his eyes turned upwards. She said she stood looking at him but the police officer told her to keep walking to the other end of the line. On the second occasion she walked back and pointed out the accused.

[12] In cross-examination, the complainant was challenged as to how she could identify the man who assaulted her if his head had been covered. She said that she was still able to see his eyes. She said that she knew the man "very well" but she did not know his name. She had seen him at their shop and she had seen him attending evening service at the church over the road from her home. She also told the court that she recognised the voice of the man who threatened her with the knife as the voice of the man she had seen and had talked to through the living-room window. Mr Kaufusi asked her whether she was having her monthly period at the time and she replied that she did not know.

[13] The officer in charge of the Mu'a Police Station, Inspector Soane Naufahu, gave a slightly different account of the police identification parade to that given by the complainant and her mother. He said that when the complainant first entered the room where the nine bald-headed men were lined up she looked at them all and as soon as she saw the accused she cried. The officer said that he calmed her down and told her that on the first occasion she was to walk the line and just look at the men and then when she walked the line the second time she was to point the man out. He said that she did that and when she identified the accused, he was photographed.

[14] Inspector Naufahu produced an unsworn record of interview taken from the accused and other police documentation. The officer was cross examined closely as to why it was that, although the accused had been taken into custody on the night of 27 April 2005, the statement was not taken from him until 2 May 2005. The witness explained that the accused had been taken before a magistrate on 28 April 2005 and the magistrate had then

ordered that he be kept in custody until 3 May 2005 which was the date of the next sitting of the Magistrates' Court at Mu'a. Inspector Naufahu said that in the meantime they continued making inquiries into the case and interviewing other witnesses. There was no challenge on the voir dire to any of the police documentation.

[15] The next witness called for the Crown was nine year old Soane Maile. She said that she was related to the accused, who she described as "a bald-headed man", and she said that he often came to her home. She recalled the 27th of April 2005. She said that while she was walking home from school for lunch that day she saw the accused changing his clothing alongside "Nesi's grave" at the cemetery next door to the complainant's home. When the witness was first asked why she remembered the 27th of April, she replied, "because that was the day the accused "raped" (the complainant)." In cross-examination, the witness told the court that after the accused changed his clothing, she saw him walk towards the complainant's home and enter the house through the backdoor. In answer to a question from Mr Kaufusi, however, the little girl admitted that she had been told about the "rape" and about how the accused had entered the complainant's house by the complainant's mother on the Monday prior to her giving evidence. Given these admissions, the girls age and the highly prejudicial nature of her evidence, I have decided that it would be dangerous for the court to rely upon any part of what she told the court and I, therefore, put it all to one side.

[16] The Crown also called evidence from 35-year-old Lisimoni Finefeuiaki who was one of the complainant's immediate neighbours. She recalled that between 12 and and 1 p.m. on 27 April 2005, the complainant arrived at her place crying and carrying the baby and saying that a man had assaulted her, taken her to the bedroom and raped her. The witness said that she was not saying the word "rape" clearly. When asked by the court to explain what she meant by that remark, the witness said that the complainant kept saying the word "ohooho" whereas the Tongan word for rape is "tohotoho". The witness attributed the complainant's mispronunciation in leaving out the "T" sound to her speech impediment.

[17] Lisimoni said that the complainant told her that she did not know the man's name. For her part, she decided not to ask the complainant any more details about what had happened because she was crying and very upset. She took her back to her home and waited for her parents to return from town. When they eventually returned sometime between 2 p.m. and 3 p.m., they were told what had happened and the witness said that "everyone cried."

[18] Another witness called for the Crown was a former police officer, Latiume Fungavai. He told the court that he arrested the accused at his home around 8 p.m. on the 27th of April 2005. He also gave evidence about the identification parade carried out at the Mu'a Police Station the following day and about the unsworn statements later taken from the accused. The witness said, in relation to the record of interview, that Inspector Naufahu actually asked the questions, he (the witness) then wrote each question down but it was the accused himself who, in his own handwriting, supplied the answer to each question.

[19] In cross-examination the former police officer was asked whether the accused was sick at the time of his arrest. The witness replied that when he went to the accused's home, he met a child and he told the child to go and call the accused out of the house. The accused then came out but the witness said that he was not aware that he was sick. He was then asked whether he had noticed that the accused was limping and suffering from a boil. That evidence touched upon an important part of the accused's defence. The witness said that when the accused realised that he was being taken to the police station, he went back inside the house to change his clothing but at no point, at that stage, did he see him limping. On the way to the police station, however, the accused told the officer that he had a boil on his leg and the witness said that when the accused walked from the police vehicle into the police station he appeared to be limping. When they entered the light of the police station the witness noticed fresh "chewed up green leaves" from the Tongan medicine tree on one of the accused's knees (the accused was wearing shorts) but he said that he could see no swelling around the knee and he would have expected there to have been swelling if he was suffering from a boil.

[20] When Inspector Naufahu was in the witness box he was also asked in cross-examination if he had been told by the accused that he was suffering from a boil. The inspector said in response that the accused claimed to have a boil and the Inspector noticed the leaves on his leg but he said, "I asked him where was the boil and he pointed

to his knee but I couldn't see any boil and I did not see him limping once during the whole time he was held at the police station."

[21] The final witness for the Crown was Dr Makameone Taumoepeau. The 62-year-old doctor has been a gynaecologist at Vaiola Hospital for some 27 years. He carried out an examination of the complainant on 3 May 2005. His findings were that the hymen was still intact but there was an area of skin abrasion about 2 cm wide on the right wall of the entrance to the vagina where the skin had not completely closed and he said that such injury could have been caused by trying to insert a blunt instrument such as a penis into the vagina. The doctor's conclusion was that penetration had taken place on the day of the alleged rape in spite of the hymen being intact. He postulated that the most likely explanation for the hymen still being intact was that the male had ejaculated before breaking the hymen. The doctor told the court that given such a scenario, although the complainant was a virgin, he would not have expected to find an emission of blood.

The defence evidence

[22] The 39-year-old accused elected to give evidence. He described his occupation as, "looking after the family." He told the court that he was home in bed sick between the 15th and the 27th of April 2005 suffering from influenza and dengue fever. On the 27th he was also suffering from a boil on his right knee. He recalled the night of his arrest. He said that he was not told why he was being taken to the police station and on several occasions in the vehicle a police officer asked him if he knew why he was being taken to the police station and on each occasion he replied that he did not know.

[23] The accused told the court that he was placed in a cell overnight and the following day he took part in a police identification parade with eight other mainly bald men. He said that when the men were lined up, the police officer told them that "the Honourable Judge" was going to come. He said that the complainant was then brought into the room and told to walk to the end of the line-up. She did and then she started to walk back to the doorway but Inspector Naufahu told her to come back and have another look. The accused said that on the second occasion when the complainant reached him (the accused), Inspector Naufahu said to her, "point him out, is it him? Is it him?" And the girl then pointed to him. The accused said that if the Inspector had not said that to the girl then she would not have pointed him out. Earlier Mr Kaufusi had, quite properly, put that evidence in cross-examination to the Crown witnesses and they denied that anything like that had taken place.

[24] The accused said that after he was told what he was being arrested for, he told the police that it wasn't him but he was taken before a magistrate and kept in custody. He said that each day Inspector Naufahu would ask him how things were, or words to that effect, and he would deny that it was him and he would then be placed back in his cell. He said that in the end, he agreed to make his statement to the police because Inspector Naufahu had told him that if he insisted on lying then he would be locked up and, "I felt as if I was going to die."

[25] When asked about the complainant and her family, the accused said that although he had met the complainant's mother on many occasions at family gatherings, he had never been to their shop and he had never been to evening service at the Church across the road from their house. He said that he had never seen the complainant before the police identification parade and he did not know her. Referring to the alleged incident, the accused said that he was home sick at the time suffering from the illnesses he had described.

[26] The second witness called for the defence was 79-year-old Uili Manumu'a from Navutoka. He told the court that he recalled the 27th of April 2005 because at approximately 9 a.m. that day he took a bicycle tyre over to the accused's home at Manuka to get it repaired and the shopkeeper at a shop close to the accused's house told him that the accused was sick. When asked by the court how he knew that it was the same day, the witness replied that on that same evening the story came out that the accused had done something to the girl and that was the same day that he had taken the bicycle tyre over to the accused's place.

[27] The accused's 80-year-old father also gave evidence of alibi for the defence. He told the court that the accused was confined to his bed for 12 days from 16 April 2005. He said that he looked after him during that period and the only time that he did not know of his

whereabouts was when he (the witness) was asleep. He said that the first time that the accused had gone out of the house was on the evening of the 27th of April when he (the father) had suggested to him that he should go and stretch his legs with a volleyball game. The father said that when the police arrived for the accused that same evening, he and his late wife were not at home because they had gone down to the beach. He said that it was not until 10 p.m. or 11 p.m. on the 27th of April that he was awoken by his foster son and told how the police had and taken the accused. The father said that his reaction was that it was a good thing that the police had taken the accused because "maybe he had stolen something."

[28] The father said that after the accused had been released from police custody he came home and told his parents that he had lied to the police so he could be let out of custody. The father continued in cross-examination:

> "A. We burst out crying at what he had said.
>
> Q. What had he said?
> A. My dear parents. I thought if you were to tell the truth it would be something good but I had told the truth but that had led me to great difficulty. I felt as if I was going to die."

The father said he told the accused that it was alright if he lied because the good thing was that he was alive.

[29] The final witness for the defence was 15-year-old Haileni Likio who was the previous witness's foster son. He confirmed that the accused had been sick. He said that he was able to confirm that the accused was in bed at the time of the alleged rape because it was the school lunch break and his mother had prepared food for the accused and the witness said that he had taken the food into the accused's bedroom but the accused returned it because he was suffering from diarrhoea. In cross-examination the witness said that he had not gone to school that day because he also had been sick. The witness confirmed that the accused was also suffering from influenza, dengue fever and a boil.

The law

[30] There was no dispute over the essential elements the Crown is required to establish beyond reasonable doubt in order to make out a charge of rape, indecent assault or housebreaking. They have recently been considered by this Court in *R v Talanoa* [2006] Tonga LR 101; *R v Falemaka* (Supreme Court, CR 208/06, 16 November 2006), and *R v Lolohea* (Supreme Court, CR 16/06, 5 April 2006), respectively. I will not repeat them.

[31] When identification is in issue, the court must, of course, always take particular care because in the realm of the criminal law cases involving mistakes as to identification resulting in a miscarriage of justice are legendary. The approach taken to the problem of visual identification is that outlined in *R v Turnbull* [1977] QB 224.

Discussion

[32] Every point that could possibly be made on behalf of the accused was forcefully made by defence counsel in his closing submissions but at the end of the day the case falls to be determined on the issue of credibility. In relation to the alibi defence proffered by the accused, I did not find his explanation that he was at home sick in bed at the time of the alleged rape either convincing or credible. The accused's father struck me as being a shrewd and cunning person and I suspect that he orchestrated the alibi defence. Again, I did not find him a convincing or credible witness and the same goes for his 15-year-old foster son. The elderly man with the bicycle tyre requiring repairs appeared to be a convincing witness but his evidence about the accused being sick on the day of the incident was hearsay and there is other evidence from the accused's own witnesses which makes it clear that the witness must have been mistaken when he told the court that on the evening of 27 April the story had come out that the accused had done something to the complainant. I am satisfied that the story could not have circulated in the witness's village on the evening of the incident. The accused, for example, said that he had no idea why he was taken to the police station. The 15-year-old foster son told the court that he went to bed straight after the police took the accused away and the father obviously had no idea why the accused had been taken by the police. He told the court that he thought that his son may have "stolen something". Neither could the story have emanated from the complainant. She freely admitted that she did not know the name of her attacker.

[33] Having rejected the alibi defence, it is necessary for me to return to the Crown case because, before a conviction can be entered, the Crown must have proved every element of the charge beyond reasonable doubt. I found the young complainant a convincing and totally credible witness. After listening intently to all her evidence, including her answers to a lengthy and searching cross-examination, I have no doubt that what she told the court was the truth and that her attacker was indeed the accused. In spite of her speech impediment, I found the complainant an impressive witness in every sense of the term.

[34] The police are to be commended for organising an identification parade with eight other bald or partly-bald men. The learned authors of **Cross on Evidence** 4th Australian edition (1991) state [1360]:

> "It has been held to be undesirable for the police to do nothing about the question of identification until the accused is brought before the magistrate, and then asked a witness for the prosecution some such question as "Is that the man?". The correct procedure is for the police to hold an identification parade before the trial or preliminary examination, placing the accused with a sufficient number of other people, leaving the witness to pick him out if he can, without assistance."

Although there was a slight discrepancy in the prosecution evidence relating to the identification parade in the present case, I am satisfied that the correct procedure was followed and there was no miscarriage of justice. I specifically reject the accused's version of this event.

[35] Although corroboration is not an essential element in the charge of rape or indecent assault, I find ample corroboration in the accused's own statements to the police. In his record of interview he freely admitted entering the dwelling house and the subsequent indecent assault and rape. He was asked:

> "Q. Why had you carried out this rape during the day?
> A. It was convenient because she was by herself.
>
> Q. How did you know that (the complainant) was by herself?
> A. I asked her."

In other parts of the record of interview, the accused agreed that he held a knife to the girl's neck so she wouldn't say anything and when he had sex with her, she fainted. As already noted, there was no challenge on the voir dire to that statement and, in any event, I reject any suggestion of duress or coercion. I am satisfied that the record of interview was given voluntarily. The answer to each question was written by the accused in his own handwriting.

[36] Defence counsel submitted strongly that, in relation to the charge of rape, the doctor's finding that the complainant's hymen remained intact proved that there had, in fact, been no penetration. Mr Kaufusi described the accused as "a big strong man" and the complainant as "a little girl" and he submitted that, "if the complainant had been raped as she alleged, I have no doubt that the hymen would not be intact."

[37] The intentional penetration of the genitalia of a woman by the penis of a man is an essential issue in the offence of rape but the degree or extent of penetration is quite irrelevant. If there is any penetration at all, no matter how slight or for how short a time, it will be sufficient. There does not have to be a full act of intercourse in the sense of there being ejaculation by the male.

[38] In the present case, because of the delay in the complainant's medical examination, the doctor was unable to confirm whether or not there had been ejaculation. The doctor did explain, however, that the most likely explanation for the abrasion injury he described to the right wall of the entrance to the vagina was that the male had ejaculated before the hymen was broken.

[39] There is an unchallenged comment in the police record of interview that might lend support to the scenario described by the doctor. It is noted in the record that halfway through the accused's interview at the police station, he asked if he could be allowed to go to the toilet "because he had an erection." That observation would tend to suggest that perhaps the accused has problems controlling his basic sexual urges.

[40] It is equally conceivable, of course, that the accused decided to discontinue his violent attack on the complainant when she blacked out and lost consciousness. Whatever the explanation, the important point is that the Crown need only establish penetration, not ejaculation, and I am satisfied beyond doubt that penetration did occur.

400 **Conclusion**

[41] For the foregoing reasons, I find that the Crown has succeeded in establishing all the necessary elements of each charge beyond reasonable doubt and the accused is convicted accordingly.

Puloka anors v Kingdom of Tonga

Supreme Court, Nuku'alofa
Ford CJ
CV 965, 968, 970 /2006

19 December 2006; 20 December 2006

Practice and procedure – judicial review – strong case made out – but because of assurances from Solicitor General, no formal orders needed

Three cases were consolidated and dealt with under urgency. The plaintiffs alleged that they had been unjustly deprived of their basic rights of freedom because their names had been included on what was described as a "blacklist" drawn up pursuant to the Emergency Powers (Maintenance of Public Order) Regulations made pursuant to section 2 of the Emergency Powers Act (Cap 45) the day after the riots of 16 November 2006 which destroyed a large part of the centre of Nuku'alofa. It was claimed that in each case, military personnel, in reliance on the names included in the list, made orders prohibiting the plaintiffs' freedom of movement and travel. The plaintiffs challenged the legality of the list and the decisions made in reliance on it. The claim was treated as an application for judicial review. The Solicitor General contended that the action taken by Defence Service personnel was both lawful and reasonable given the state of emergency that existed in the Kingdom at the time.

Held:

1. The courts were reluctant to criticise or comment on the wisdom or expediency of steps taken by the authorities to deal with a perceived state of emergency situation. The courts, nevertheless, retain the power by way of the remedy of judicial review, to ensure that officials act within their legal powers and exercise any discretionary powers on reasonable grounds after following a proper process.
2. The issue was whether the particular decisions made by Defence Services personnel which resulted in the restrictions complained of by the plaintiffs were so outrageous in their defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at them. There was nothing unlawful in the Services having a list of persons who could probably be described as falling within a moderate to high risk category.
3. The restrictions placed on the rights of travel of the three plaintiffs appeared to be quite irrational. A strong prima facie case had been made out for judicial review and the plaintiffs were entitled to the interim relief

they sought but because of an assurance received from the Solicitor General, it was not necessary for the court to make any formal orders.

Case considered:
Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935

Statutes considered:
Emergency Powers Act (Cap 45)
Public Order (Preservation) Act (Cap 38)

Regulations considered:
Emergency Powers (Maintenance of Public Order) Regulations

Counsel for plaintiffs : Mr Edwards
Counsel for defendant : Solicitor General

Interim judgment

Introduction

[1] There are occasions, albeit rare, when the court must act swiftly in order to avoid injustice and on such occasions strict adherence to the rules of practice and procedure cannot always be complied with. This is such an occasion. The three cases before the court were filed on Monday 18 December. The court closes for the Christmas vacation today and does not reopen until 4 January 2007. The cases call for urgent consideration and urgency was duly accorded. The court is obliged to counsel for co-operating at such short notice. I have included the three cases in the one judgment.

[2] The plaintiffs claim that they have been unjustly deprived by the defendant of their basic rights of freedom because their names have been included on what was described in the pleadings as a "secret list of persons who are blacklisted or prohibited from going to certain areas of Tonga or leaving the country" ("the list"). The list was drawn up by the defendant pursuant to the Emergency Powers (Maintenance of Public Order) Regulations ("the regulations") which in turn were made pursuant to section 2 of the Emergency Powers Act (Cap 45). It is claimed that in each case, military personnel, in reliance on the names included in the list, have made orders prohibiting the plaintiffs' freedom of movement and travel.

[3] The plaintiffs challenge the legality of the list and the decisions made in reliance on it. Although they commenced their actions by writ and statement of claim, counsel accepts that they should properly have proceeded by way of application for judicial review based on the recognised grounds applicable to review applications. I met with counsel in chambers on the day the first writ was filed and agreed to treat each case as an application for review and I granted leave to proceed on that basis. An interim injunction is the immediate remedy sought in each case.

Background

[4] The regulations were issued on 17 November 2006, the day after the infamous riots which left a large part of the centre of Nuku'alofa destroyed. They were initially in force for 30 days but on 12 December 2006 it was publicly announced that the emergency powers had been extended for another month until 16 January 2007.

[5] The regulations extend significant powers to any person authorised by Cabinet and every member of the Tonga Police Force and the Tonga Defence Service to act "for the purposes of preserving public order and securing the public safety." It is those powers which the defendant relies upon for imposing the restrictions on the movements of the plaintiffs.

The plaintiffs' case

CV 965/06 --- 'Aivi Puloka

[6] The plaintiff in this action, 'Aivi Puloka, is a medical practitioner employed in the Ministry of Health at Viola Hospital. Her husband is also a doctor employed by the Secretary of the Pacific Community based in Noumea, New Caledonia. They have four children aged between 16 and seven years. The plaintiff is also the President of the Public Service Association.

[7] The family planned to fly out from Tonga on 13 December 2006 to attend a get-together at the plaintiff's mother's home in Auckland and then spend the Christmas and New Year period in Nouméa. On or about 5 December 2006 the plaintiff was made aware, from an article in the Taimi newspaper that the army held the list and she was one of the persons named in the list. She checked the matter out and wrote to the Police Commander requesting his assistance in having her name removed.

[8] On 12 December 2006, the Police Commander, Sinilau Kolokihakaufisi, wrote to the Commander of the Tonga Defence Services as follows:

> "Dear Sir,
>
> Re: Approval for overseas travel -- Mrs 'Aivi Puloka
>
> I hereby inform that there is no reason to hinder the travel of Mrs 'Aivi Puloka from Tongatapu to New Caledonia.
>
> Your consideration and appropriate action is respectfully sought.
>
> S. Kolokihakaufisi
>
> POLICE COMMANDER"

The Police Commander also wrote to the Manager of the New Zealand Immigration Service on the same day certifying that the plaintiff had no security or criminal record.

[9] On the morning of Wednesday 13 December the plaintiff and her family travelled to Fua'amotu Airport to catch the Air New Zealand flight leaving at 11 a.m. They were stopped by Army soldiers at a roadblock outside the airport and the plaintiff was told that her husband and children could proceed to the airport and travel to New

Zealand but she could not do so. In the end, the children travelled alone on the flight to New Zealand. Mr Puloka stayed in Tonga with his wife. They have consequently lost their air fares.

[10] The plaintiff deposed in a supporting affidavit:

> "19. I have never been or likely to be involved in any subversive activities against the government nor did I counsel or insight anyone to commit the offences which took place on 16 November 2006.
>
> 20. That I have not and do not consort or associate with criminals or people planning to break the peace, public safety or public order."

CV 968/06 -- Mele Teusivi 'Amanaki

[11] The plaintiff in this action, Mele 'Amanaki, is a solo mother with two daughters aged nine and six. They reside at Tu'i Road, Kolofo'ou with a dependent aunty aged 65 and a housemaid. The plaintiff is a Principal Food Technologist in the Ministry of Agriculture, Food, Forests and Fisheries. She is also the interim Secretary of the Public Service Association and Secretary of a Government Committee responsible for advising Cabinet on food safety and consumer protection.

[12] Up to the fifth day of December 2006 the plaintiff resided at her Kolofo'ou home with her family. Each day she would check in at the military checkpoint at Vaha'akolo Road to go to and from her work. As she was returning home on the 5th of December the soldiers at the checkpoint advised her that she was prohibited from going past the checkpoint to her home as her name was on the list of prohibited persons. She then telephoned a senior officer in the army who spoke to the soldiers on the checkpoint and she was able to return home that night but on the 6th of December she was stopped again and she has not been able to return to her home since then. She deposed that her two little girls miss her very much and they can only see her when they are brought to her on weekends.

[13] The plaintiff says that she has suffered greatly in a number aways and she does not understand why she has been treated like a criminal as she has never committed a criminal offence or been party to any unlawful offence and she was still working in a senior position in the Ministry. Through her lawyer she wrote to a senior Cabinet member asking for her situation to be reviewed and pointing out that she was the only resident on her street excluded by the officers at the checkpoint. She received no response to that letter.

CV 970/06 -- Malakai Lomu aka Viliami Lafu Sika

[14] The plaintiff in this action is a company director and owner of Five Star Finance Limited. He is 69 years of age, married with nine adult children. In early 2006 he was diagnosed with suspected prostrate cancer. He has had regular medical appointments with a specialist in Auckland since then and had another appointment booked with his

specialist for 12 December 2006. His wife flew to Auckland on 3 December and the plaintiff was booked to depart on 7 December. He deposed:

> "11. I went through the checkpoint outside Fua'amotu Airport after they checked my passport and air ticket. When I was inside the Terminal Building to check in my luggage and ticketing two soldiers from the Tonga Defence Force (Ministry of Defence) approached me to check my papers again.
>
> 12. Whilst the two soldiers were looking at my passport and air ticket, one of them said that my name was on the list of the "kau hia" (criminals). They told me that I cannot leave the country and escorted me out.
>
> 13. I was very upset, and felt sick, humiliated and highly embarrassed when the soldiers said I was on the list of criminals as well as being escorted out."
>
> [15] The plaintiff further stated: "I have not been involved in any criminal activities or associated with the looting of burning of the town on the 16 November 2006. I and my sons have a catering business, construction business and finance business operated under the name of Five Star Finance Ltd."

The defence

[16] The list in question is said to have been compiled pursuant to regulation 4 (VIII) which reads:

> "4. Any person authorised by Cabinet, and every member of the Tonga Police Force and the Tonga Defence Service, shall for the **purposes of preserving public order and securing the public safety**, have power to:
>
> (I) . . .
>
> (VIII) prohibited person or class of persons from entering a place or building."
>
> (emphasis added)

[17] In an affidavit filed on behalf of the defendant in the Puloka case, Lieutenant-Colonel Aleamotu'a case stated that after the events of 16 November 2006, the Tonga Defence Services were given power under the regulations to work for the purposes of preserving public order and securing the public safety. The officer went on to depose:

> "2. THAT we have analysed videotapes of speeches, correspondence and footages from these tapes which have confirmed to us active participants who incited or encouraged people on 16 November 2006 and prior to this date to carry out destructive work on 16th November, or directly carried out damages or destruction to property in Nuku'alofa and other places.

3. THAT the plaintiff in this matter is one of the active participants in inciting and encouraging through speeches, people who supported the pro-democracy movement and the destruction of the 16 November 2006.

4. THAT the plaintiff as an active participant at Pangaisi'i prior and after the riots, has not denounced the violence that was used to destroy properties in Nuku'alofa and the loss of lives during the 16th of November 2006.

5. THAT criminal investigation pertaining to people who were involved directly or indirectly in the events of 16th of November and the lead up to that date is not final yet.

6. THAT the national security risk is still high up to today according to evidence that we have received and assessed to be accurate.

7. THAT in consideration of national security and our endeavour to preserve public order and secure public safety we have secured and control (sic) the public entry to six National vital installations, which included the Fua'amotu International and Domestic Airport.

8. THAT the control of people from entry to these National vital installations is to ensure that the destruction which occurred on 16th November, will not occur again and destroy these National vital installations.

9. THAT the control of people from entry to the Fua'amotu International Airport is also to ensure that the security of the airport is guaranteed to the international carriers, thus ensuring that they maintain their services to the Kingdom.

10. THAT the Services received a letter from the Commander of Police on the 12th of December advising that there is no reason to hinder the plaintiff's travel to New Caledonia.

11. THAT after the letter was received on the 12th of December, the plaintiff was also informed by phone on the same day that her travelling overseas is not prohibited by the Defence Services, and however her participation in Pangaisi'i prior to the breakout of violence and after the violence prohibited her from entering any National Vital Installation for security reasons.

12. THAT the only concern showed by the plaintiff on receiving the Defence Services advice, is (sic) to ask when the Emergency will end.

13. THAT the plaintiff on the 13th December tried to enter the Fua'amotu International Airport and was denied entry through the military checkpoint.

14. THAT the Defence Services have not received any contacts or request from the plaintiff to reconsider her security status up to this date.

15. THAT we consider each case individually and regularly and we use this discretion generously.

16. THAT we have not considered the plaintiff's case and we have not made a decision on this matter.

17. THAT all the contents of this affidavit are true and correct."

[18] The Solicitor General confirmed that the thrust of what is deposed to in this affidavit would apply also, with appropriate modifications, to the case of each other plaintiff. Specifically, she confirmed that the Services had no objection to Mrs Puloka and Mr Sika travelling overseas but the reality was that, for the reasons stated in the affidavit, the military checkpoint close to Fua'amotu Airport denied them entry to the airport terminal. Referring specifically to the letter issued by the Police Commander dated 12 December 2006, relating to Mrs Puloka, the Solicitor General submitted that no weight should be given to the letter because it did not address the fact that ongoing criminal investigations are, at this date, still being carried out.

Submissions

[19] Mr Edwards challenged the validity of the regulations and claimed that they were ultra vires. The basis of his submission was that the powers set out in paragraphs (I) two (XVI) of the regulations are not authorised powers under section 2 of the Emergency Powers Act. He also contended that they were powers which the Governing Authority already held under the Public Order (Preservation) Act (Cap 38).

[20] The Solicitor General responded that the latter Act dealt with threats to the public order and the need to restore public order but it did not deal specifically with the need to provide regulations securing the public safety which is one of the stated objectives of the Emergency Powers Act. She also relied on the general provisions at the end of section 2(3) of the Emergency Powers Act which authorise the making of, "such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the said regulations.

[21] The other matter touched upon in submissions was the allegation by the plaintiffs that the decisions in question were unreasonable because they were not based on any security risk to the public safety or public order. In response, the Solicitor General drew attention to, and relied upon, paragraphs 15 and 16 of Lieutenant Colonel Aleamotu'a affidavit.

Comment

[22] At that point in her submissions, the court interrupted the Solicitor General and asked how long it would take the Services to make a decision on these three cases. The reply was, "two to three days." For the reasons stated at the outset of this judgment, that timeframe was unacceptable and the court ordered that the Services were to make a decision and advise the court accordingly by 4 p.m. yesterday. At 4 p.m. the Registrar was informed that the Services would allow Mr Sika to travel to New Zealand but they sought an extension of time until 9 a.m. this morning to make a decision in relation to the other two plaintiffs. Mr Edwards agreed to that request and so it was granted. I will come back to this aspect of the case.

The law

[23] A cursory examination of the authorities, in the short time available, indicates that the courts are reluctant to criticise or comment on the wisdom or expediency of steps taken by the authorities to deal with a perceived state of emergency situation. The courts, nevertheless, retain the power by way of the remedy of judicial review, to ensure that officials act within their legal powers and exercise any discretionary powers on reasonable grounds after following a proper process.

[24] In the present cases, the court is concerned to ensure that any authorised person exercising one or other of the extraordinary powers granted under the regulations holds a genuine belief based on reasonable grounds that the circumstances require the invocation of the particular emergency power relied upon. If the court concludes that the decision under challenge is such that no person properly directing himself on the

relevant law and acting reasonably could have reached, then it will, pursuant to its judicial review powers, quash that decision.

[25] The Solicitor General in helpful written submissions referred to a passage from Lord Diplock's judgment in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, 951 where his Lordship referred to certain decision-making discretionary powers of the executive which need to be weighed against one another, and commented, "a balancing exercise which judges by their upbringing and experience are ill-qualified to perform." I agree with that observation and it would have particular application, of course, to a decision such as whether, in a given factual situation, a state of emergency did exist. I am not concerned with that type of decision in the present cases, however. The issue before me is whether the particular decisions made by Defence Services personnel which resulted in the restrictions complained of were "so outrageous in their defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." In relation to that scenario, Lord Diplock in the same case (951) said:

> "Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

Conclusions

[26] These conclusions are necessarily interim conclusions. Apart from the injunctions, other relief is claimed in each case including damages and so at some stage there will need to be a full substantive hearing. In the meantime, however, I am not persuaded that the ultra vires argument advanced by the plaintiffs is sound. It seems to me that the Executive, for obvious reasons, does have extensive powers for dealing with emergency situations by way of regulation and the regulations in question clearly fall within the ambit of those powers. They can be seen as a supplement to the existing statutory powers provided for in the Public Order (Preservation) Act.

[27] Similarly, I see nothing unlawful in the Services having a list of persons who could probably be described as falling within a moderate to high risk category. It is how that list is administered, as evidenced in the present cases, which gives rise to concern. It seems quite irrational to conclude that a professional woman travelling to the airport with her husband and children intending to leave the country on a Christmas vacation could seriously be seen as a threat to public order or public safety. It seems difficult to reconcile the Services, on the one hand, having no objection to her flying out of the country and yet, on the other hand, denying her access past the military roadblock to enable her to enter the International terminal, meaning effectively that she has no way of catching an outgoing flight. The same observations apply to Mr Sika's situation.

[28] Likewise, in relation to Mele 'Amanaki, the decision to restrict her from travelling to her home and being with her two small daughters, whilst at the same time allowing her to carry on working in a senior government post appears, on the surface, to be quite irrational. If, as the affidavit filed on behalf of the Services, would

suggest, the decision to restrict Ms 'Amanaki's freedom of movement was made without any close consideration of her personal situation but simply because she was a name on the list, then that merely aggravates the situation and reinforces the irrationality and unreasonableness of the preemptory decision.

[29] The Defence Services deny (paragraph 16 of the affidavit) that they had considered the case of the respective plaintiffs or that they had made a decision but the reality is that they had indeed made a decision in each case which restricted the plaintiffs' freedom of movement or travel but, on their own admission, that decision had been made without any consideration of the case before it. In plain terms, a decision made on that basis can properly be described as unreasonable and irrational.

[30] The plaintiffs have made out a strong prima facie case for judicial review and, in the circumstances, they are entitled to the interim relief they seek. This morning at 9 a.m. the court was informed by the Solicitor General that the Defence Services had agreed to allow Mrs Puloka to go to New Zealand but further time was required for the Army Commander to meet with Mele 'Amanaki. The Solicitor General added that she was sure that Ms 'Amanaki would also be free to go. The court is grateful for that advice and, given the final observation made by the Solicitor General, it will not be necessary for me to make any formal orders.

[31] The court is mindful, however, that the emergency regulations and the list are going to remain in place over the Christmas/New Year holiday period when the court office will be closed. Therefore, notwithstanding the fact that I do not propose to make any formal orders in these particular cases, I am nevertheless taking the opportunity of releasing this interim judgment. It is important that those officials charged with administering the extraordinary powers provided for in the regulations should have a proper appreciation of what the law demands and expects.