TONGA
LAW REPORTS
2005

TONGA
LAW REPORTS
2005

Editor: Ms Janine Ford LLB

A publication of the Ministry of Justice,
Nuku'alofa, Kingdom of Tonga

Printed by
Craigs Design & Print
Invercargill
New Zealand

Court of Appeal

President: Hon Robin Webster, Chief Justice
Hon Justice James Burchett
Hon Justice Sir David Tompkins
Hon Justice Peter Salmon

Supreme Court

Hon Robin Webster, Chief Justice
Hon Justice Anthony Ford
Hon Justice Ian Thomas (from 9 March 2005 until 10 June 2005)

Land Court

Hon Robin Webster, Chief Justice
Hon Justice Anthony Ford
Hon Justice Ian Thomas (from 9 March 2005 until 10 June 2005)

Magistrates' Court

Chief Magistrate:
Mr Samiu Palu

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

Senior Magistrates:
Mr Paula Tatafu
Mr Latu Mohenoa

Magistrates:
Mr Vaha'i Foliaki
Mr Masao Paasi

Attorney General

Mr Siaosi Taimani 'Aho

Solicitor General

Mrs 'Alisi Taumoepeau

MODE OF CITATION

The mode of citation of this volume is [2005] Tonga LR

TABLE OF CASES REPORTED

'Ahio v Tilini (SC)	22
Cauchi v Air Fiji anor (SC)	154
Chief Commissioner of Inland Revenue v Lafi Motors anors (SC)	131
Fainga'a v Lelea (SC)	8
Fonua v Tonga Communications Corporation Ltd (SC)	55
Fu v Giant Turtle Investments Ltd (LC)	38
Gough Finance Ltd v Westpac Bank of Tonga (SC)	302
Gough Finance Ltd v Westpac Bank of Tonga (SC)	390
Helu anors v National Pacific Insurance (SC)	439
Kasimili v Muller (SC)	1
Kingdom of Tonga v Allianz Australia Insurance Ltd (SC)	196
Lita Trading Enterprises Ltd v Moala (CA)	324
MBf Bank Ltd v Filipe (SC)	218
MBf Bank Ltd v Fonua anor (LC)	25
MBf Bank Ltd v Mangisi (SC)	396
R v 'Ake (SC)	424
R v Aumua (SC)	214
R v Fanua anor (SC)	264
R v Fatani (SC)	470
R v Funaki anors (SC)	239
R v Holani (SC)	18
R v Kengike (SC)	400
R v Mafi (SC)	47
R v Makafilia (SC)	448
R v Makahununiu (SC)	41
R v Malu (SC)	226
R v Pohahau (SC)	12
R v Pohahau anors (SC)	363
R v Savieti (SC)	473

R v Tau anors (SC) 418
R v Taufa (SC) 456
R v Taufa (SC) 466
R v Taufalele anor (SC) 495
R v Tohifolau (SC) 31
R v Tongia (SC) 478
R v Tsay anor (SC) 413
R v Valu (SC) 274
R v Vi (SC) 278
R v Vola (SC) 404
Sefo anor v R (CA) 335
Sefo anor v R (SC) 485
Sevele v Saulala (SC) 250
Skeen v Sovaleni anor (LC) 298
South Pacific Produce Ltd v Procorp Company Ltd (CA) 319
Taione anors v Kingdom of Tonga (SC) 62
Taione anors v Kingdom of Tonga (SC) 67
Takataka anor v Hurrell anors (CA) 359
Taufa v R (CA) 134
Taufa v R (CA) 330
Tonga v Halapua (SC) 35
Tonga v Halapua (SC) 59
Tonga v Tonga (CA) 312
Tonga Communications Corporation Ltd v Fonua (CA) 315
Tui International Ltd v Nasilai (SC) 270
Tu'ivai v Lokotui (SC) 178
Tu'itavake v R (CA) 348
Tukuafu v Latu anors (LC) 141
Tukuafu v Latu anor (CA) 346
Wiebenga v 'Uta'atu (CA) 354
Y v Y (SC) 305

INDEX OF SUBJECT MATTER

CIVIL PROCEDURE

application for security for costs – by plaintiff – application refused

MBf Bank Ltd v Fonua anor (LC) **25**

application to call further evidence – no new evidence – application denied

Takataka anor v Hurrell anors (CA) **359**

evidence lacking – discovery ordered

Fonua v Tonga Communications Corporation Ltd (SC) **55**

orders sought regarding proceedings – timetabling orders made

Taione anors v Kingdom of Tonga (SC) **62**

security for costs – factors to take into account – order refused

Fainga'a v Lelea (SC) **8**

CONSTITUTIONAL LAW

constitutional damages – restriction on availability – void

Taione anors v Kingdom of Tonga (SC) **67**

freedom of expression – Acts too restrictive – void

Taione anors v Kingdom of Tonga (SC) **67**

validity of legislation – three Acts declared void

Taione anors v Kingdom of Tonga (SC) **67**

CONTRACT LAW

construction of term – context to be considered – appeal dismissed

Wiebenga v 'Uta'atu (CA) **354**

duty to mitigate dames – no breach of duty proved

Lita Trading Enterprises Ltd v Moala (CA) **324**

loan agreement – company loan not personal loan

MBf Bank Ltd v Filipe (SC) **218**

special terms claimed – counterclaim – appeal allowed to set aside orders below

South Pacific Produce Ltd v Procorp Company Ltd (CA) 319

undisclosed principal doctrine – no relevance

Lita Trading Enterprises Ltd v Moala [CA) 324

unpaid invoices – defendant liable to pay

Tui International Ltd v Nasilai (SC) 270

COSTS

plaintiff failed to provide all evidence in timely manner – awarded against defendant on a three-quarters basis

Tui International Ltd v Nasilai (SC) 270

taxation of costs – overseas lawyers – not registered in Tonga – costs not recoverable

Gough Finance Ltd v Westpac Bank of Tonga (SC) 302

Gough Finance Ltd v Westpac Bank of Tonga (SC) 390

CRIMINAL LAW

alibi evidence brought – not sufficient – accused convicted

R v Tongia (SC) 478

causing bodily harm – self defence pleaded – excessive retaliation

R v Makafilia (SC) 448

charge of abetment – not proved – all principals – not guilty

R v Funaki anors (SC) 239

charge of bodily harm – wound needed - discharged

R v Aumua (SC) 214

charge of theft – continuous offence - guilty

R v Funaki anors (SC) 239

display of tobacco advertisement – penal Act - not all elements proved - acquitted

R v Tsay anor (SC) 413

drug possession and cultivation charges – question as to admissibility of confession – admissible and convicted

R v Mafi (SC) 47

false pretences – operating on mind of deceived – not established

R v Makahununiu (SC) **41**

fraud and forgery – appeal against conviction on Judge's summing up – appeal dismissed

Sefo anor v R (CA) **335**

grievous bodily harm – defence of insanity - failed

R v Taufa (SC) **456**

grievous bodily harm – meaning of "severe wound" – acquitted

R v Fanua anor (SC) **264**

grievous bodily harm – self defence - acquitted

R v Fanua anor (SC) **264**

housebreaking and assault – trespass not proved – acquitted on housebreaking charge

R v Taufalele anor (SC) **495**

housebreaking, theft, and receiving – some guilty findings

R v Pohahau anors (SC) **363**

importing hemp – facilitated importation into Tonga – guilty

R v Malu (SC) **226**

manslaughter – cause of death – guilty

R v Vi (SC) **278**

manslaughter by negligence – duty of care to road users – guilty

R v Holani (SC) **18**

murder – provocation – murder proved

R v 'Ake (SC) **424**

possession of drugs – not proved beyond reasonable doubt – not guilty

R v Tau anors (SC) **418**

possession of drugs – not proved to be same substance as was taken from house – acquitted

R v Pohahau (SC) **12**

question of identity – Court had no doubt

R v Valu (SC) **274**

theft – dishonest intent must be at time of taking - acquitted

R v Makahununiu (SC) **41**

CRIMINAL PROCEDURE

application for bail pending hearing of appeal – had to have reasonable prospect of success

Sefo anor v R (SC) **485**

inaccurate indictment – convicted of parts proved and stated in indictment

R v Tohifolau (SC) **31**

CUSTOMS AND EXCISE

short levy on customs duties – understatement of value of cars – judgment for plaintiff

Chief Commissioner of Inland Revenue v Lafi Motors anors (SC) **131**

DISSOLUTION OF MARRIAGE

appeal against assessment of maintenance – appeal dismissed

Tonga v Tonga (CA) **312**

both parties need to intend to renew marital relations – only one party in this case – decree nisi granted

Tonga v Halapua (SC) **35**

EMPLOYMENT LAW

pension scheme – not attained age of eligibility – appeal allowed

Tonga Communications Corporation Ltd v Fonua (CA) **315**

EVIDENCE

confession given under duress – limited admissibility

R v Pohahau anors (SC) **363**

FAMILY LAW

application for return of children to Australia – granted

Y v Y (SC) **305**

FAMILY PROCEEDINGS

maintenance assessment – insufficient evidence to determine appeal in full – remitted to Magistrates' Court

'Ahio v Tilini (SC) **22**

INSURANCE

maritime insurance – query whether ship was insured – not insured

Kingdom of Tonga v Allianz Australia Insurance Ltd (SC) **196**

questioned validity of licence – rejected defence – claim allowed

Helu anors v National Pacific Insurance (SC) **439**

LAND LAW

purported grant of allotment – Royal Estate – not valid grant

Tukuafu v Latu anors (LC) **141**

question of entitlement to tax allotment – appeal allowed

Tukuafu v Latu anor (CA) **346**

LANDLORD AND TENANT

whether air conditioning unit was fixture – ruled that it was fixture

Fu v Giant Turtle Investments Ltd (LC) **38**

LAW PRACTITIONERS

disciplinary committee – deliberately mislead committee – appeal allowed

Kasimili v Muller (SC) **1**

MAGISTRATES' POWERS

adjournment – judicial review of decision – Magistrate's decision upheld

Tu'ivai v Lokotui (SC) **178**

MATRIMONIAL PROPERTY

determination of financial provision – orders made

Tonga v Halapua (SC) **59**

PRACTICE AND PROCEDURE

admissibility of document – not public document and hearsay – not admissible

Cauchi v Air Fiji anor (SC) **154**

application for judicial review and certiorari - refused

Tu'ivai v Lokotui (SC) **178**

application to set aside default judgment – dismissed

MBf Bank Ltd v Mangisi (SC) **396**

application to stay writ of execution – stay issued

MBf Bank Ltd v Mangisi (SC) **396**

interlocutory applications – application to strike out action against one defendant – struck out

Cauchi v Air Fiji anor (SC) **154**

interlocutory applications – application to strike out cause of action – Convention was comprehensive code – action struck out

Cauchi v Air Fiji anor (SC) **154**

strike out application – opportunity to amend pleadings

Skeen v Sovaleni anor (LC) **298**

verbal settlement of action claimed – not proved

Sevele v Saulala (SC) **250**

SENTENCE

appeal against sentence

sentence not excessive – appeal dismissed

Taufa v R (CA) **330**

appeal against sentence

earlier offending taken into account – appeal allowed

Sefo anor v R (CA) **335**

appeal against sentence

high degree of provocation – appeal allowed

Tu'itavake v R (CA) **348**

application for stay of sentence and bail pending appeal – application refused

Taufa v R (CA) **134**

guilty of bodily harm on wife – sentence of imprisonment as deterrent

R v Fatani (SC) **470**

indecent assault on child – imprisonment imposed for public safety and as deterrent

R v Savieti (SC) **473**

mental illness – mitigating factor

R v Taufa (SC) **466**

murder conviction – life imprisonment

R v Vola (SC) **404**

theft of goods – activation of suspended sentence for previous offence – "special circumstances"

R v Kengike (SC) **400**

INDEX OF CASES CONSIDERED

Abrams v United States (1919) 250 US 616
Taione anors v Kingdom of Tonga (SC) **67**
'Akau'ola & Kingdom of Tonga v Pohiva [1990] Tonga LR 159 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
'Akau'ola v Attorney General [1997] Tonga LR 36 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Alesana v Samoa Observer Co Ltd [1998] WSSC 1
Taione anors v Kingdom of Tonga (SC) **67**
Allison v KPMG Peat Marwick (1994) 8 PRNZ 128
Sevele v Saulala (SC) **250**
Andrews v DPP [1937] 2 All ER 552,554-5 (HL)
R v Vi (SC) **278**
Application under cl 85 of the Constitution, Re [1908-1959] Vol 1 Tongan LR 9
Cauchi v Air Fiji anor (SC) **154**
Armstrong v Budd (1969) 71 SR (NSW) 386
Taione anors v Kingdom of Tonga (SC) **67**
Arnold v King-Emperor (1914) 83 LJPC 300
Taione anors v Kingdom of Tonga (SC) **67**
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223
Tu'ivai v Lokotui (SC) **178**
Attorney-General v BBC [1980] 3 All ER 161 (HL)
Taione anors v Kingdom of Tonga (SC) **67**
Attorney-General v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545 (HL)
Taione anors v Kingdom of Tonga (SC) **67**
Attorney-General v Observer (Times Law Report, 22 December 1987)
Taione anors v Kingdom of Tonga (SC) **67**
Attorney-General v Trethowan [1932] AC 526 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Attorney General for Alberta v Attorney General for Canada [1947] AC 503 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Attorney General for Australia v R & Boilermakers' Society of Australia [1957] 2 All ER 45 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Attorney General for Ontario v Reciprocal Insurers [1924] AC 328 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Attorney-General of the Gambia v Momodu Jobe [1984] AC 689 (PC)
Taione anors v Kingdom of Tonga (SC) **67**

Attorney-General of Trinidad & Tobago v Whiteman [1991] 2 AC 240, 247 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Attorney-General's Reference (No 3 of 1994) [1997] 3 WLR 421,436-7,441-4 (HL), [1998] 1 Cr App R 91
R v Vi (SC) **278**
Bachan Singh v State of Punjab [1980] 2 SCC 475, [1980] AIR 890
R v Vola (SC) **404**
Bank of New South Wales v The Commonwealth (1948) 76 CLR 1
Taione anors v Kingdom of Tonga (SC) **67**
Beatty, In the Estate of [1919] VLR 81
Cauchi v Air Fiji anor (SC) **154**
Boaler Re Vexatious Actions Act 1896, Re [1914-15] All ER Rep 1022 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Bribery Commissioner v Ranasinghe [1964] 2 All ER 785 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Caines (deceased), Re [1978] 2 All ER 1, [1978] 1 WLR 540
Cauchi v Air Fiji anor (SC) **154**
CCSU Minister for the Civil Service [1984] 3 All ER 935
Tu'ivai v Lokotui (SC) **178**
Chavunduka v Minister of Home Affairs [2000] 4 LRC 561
Taione anors v Kingdom of Tonga (SC) **67**
Clayton v Chief Constable of Norfolk [1983] 1 All ER 984 (HL)
Tu'ivai v Lokotui (SC) **178**
Clayton v Heffron (1960) 105 CLR 214
Taione anors v Kingdom of Tonga (SC) **67**
Commissioners of Customs & Excise v Harz & Power [1967] 1 All ER 177 (HL)
R v Pohahau anors (SC) **363**
Commissioner of Taxation of the Commonwealth of Australia v Lutovi Investments Proprietary Limited (1978) 140 CLR 434
Taione anors v Kingdom of Tonga (SC) **67**
Cormack v Cope [(1974) 131 CLR 432
Taione anors v Kingdom of Tonga (SC) **67**
Crabtree v Hinchliffe (Inspector of Taxes) [1971] 3 All ER 967
R v Kengike (SC) **400**
Currie v Tokoroa Earthmovers Ltd [1966] 1 NZLR 611
MBf Bank Ltd v Mangisi (SC) **396**
Derbyshire CC v Times Newspapers Ltd [1993] 1 All ER 1011 (HL)
Taione anors v Kingdom of Tonga (SC) **67**
Desjarlais, Re [1989] 3 FCR 605 FCA (Canada)
Taione anors v Kingdom of Tonga (SC) **67**
DPP v Camplin [1978] 2 All ER 168,180 (HL)
R v 'Ake (SC) **424**
DPP v Newbury [1976] 2 All ER 365,367 (HL)
R v Vi (SC) **278**
E (an infant), Re [1967] 1 All ER 329 (ChD)
Y v Y (SC) **305**

Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14
Tu'ivai v Lokotui (SC) **178**
Ellen St Estates Ltd v Minister of Health [1934] 1 KB 590 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
'Etika v Tonga Law Society [2002] Tonga LR 75
Kasimili v Muller (SC) **1**
Evans v Bartlam [1937] AC 473; [1937] 2 All ER 646
MBf Bank Ltd v Mangisi (SC) **396**
Fainga'a v Lelea & Ors (CV 38/03, 6 January 2005)
R v Pohahau anors (SC) **363**
Fie'eiki v Fifita [1995] Tonga LR 184 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Finau v 'Alafoki & anor [1989] Tonga LR 66
Taione anors v Kingdom of Tonga (SC) **67**
Fonua v MBf Bank Ltd [2000] TOCA 13; [2000] Tonga LR 319 (CA)
Tui International Ltd v Nasilai (SC) **270**
Fotofili v Siale [1987] TOPC 2; [1987] SPLR 339 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Franklin Mint v Transworld Airlines Inc [1984] 1 Lloyd's Rep 220 (CA)
Cauchi v Air Fiji anor (SC) **154**
Fuko v Vaikona [1990] Tonga LR 148 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Fulivai v Kaianuanu Tonga LR (1923-1962) Vol II, 178
Cauchi v Air Fiji anor (SC) **154**
Furman v State of Georgia 408 US 238 (1972)
R v Vola (SC) **404**
Garton v Hunter [1969] 1 All ER 451, [1969] 2 QB 37 (CA)
Cauchi v Air Fiji anor (SC) **154**
General Reinsurance Corp v Fennia Patria [1982] 1QB 1022 (CA)
Kingdom of Tonga v Allianz Australia Insurance Ltd (SC) **196**
George v R (16 May 1996), CA 550/95
R v Malu (SC) **226**
Giordano, Application by 6 A.Crim. R 397
Sefo anor v R (SC) **485**
Gorce v Miller [2003] TOSC 50
Y v Y (SC) **305**
Graham v R (Court of Appeal, CA 391/96, 27 February 1997, judgment of the Court delivered by Heron J)
R v Taufa (SC) **456**
H (infants), Re [1965] 3 All ER 906 (ChD); [1966] 1 All ER 886 (CA)
Y v Y (SC) **305**
Harmelin v State of Michigan 501 US 957 (1991)
R v Vola (SC) **404**
Harrington v Roots [1984] 2 All ER 474 (HL)
Tu'ivai v Lokotui (SC) **178**
Hector v Attorney-General of Antigua [1990] 2 All ER 103 (PC)

Taione anors v Kingdom of Tonga (SC) **67**
Hector v Attorney-General of Antigua and Barbuda [1990] 2 WLR 606
Taione anors v Kingdom of Tonga (SC) **67**
Hinds v The Queen [1976] 1 All ER 353 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
HK (an infant), In re [1967] 1 All ER 226 (DC)
Tu'ivai v Lokotui (SC) **178**
Humble v Hunter (1848) 12 QB 310
Lita Trading Enterprises Ltd v Moala [CA) **324**
Ioannou v Demetriou [1952] 1 All ER 179, [1952] AC 84 (PC)
Cauchi v Air Fiji anor (SC) **154**
Ingraham v McEwan [2003] 4 LRC 270 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Inland Revenue v National Federation [1982] AC 617
Taione anors v Kingdom of Tonga (SC) **62**
James v Commonwealth (1936) 55 CLR 1, [1936] 2 All ER 1449 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
James v R (New Zealand Court of Appeal, 10 August 1998, CA 140/98)
R v Fanua anor (SC) **264**
JJC (a minor) v Eisenhower [1983] 3 All ER 230 (CA)
R v Aumua (SC) **214**
Jewett Cameron South Pacific Ltd v Tu'uholoaki [1999] Tonga LR 51
MBf Bank Ltd v Mangisi (SC) **396**
Kafoa v R (App No 347,348,743/1996, 20 June 1997, Court of Appeal)
Sefo anor v R (SC) **485**
Taufa v R (CA) **134**
Kalaniuvalu (Noble) v Minister of Lands (1937) Tonga LR 11
Tukuafu v Latu anors (LC) **141**
Kanda v Government of Malaya [1962] AC 322 (PC)
Tu'ivai v Lokotui (SC) **178**
Kariapper v Wijesinha [1967] 3 All ER 485 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Kielley v Carson [1842] 4 Moore PC 63 at 91 (13 EH 225 at 236)
Taione anors v Kingdom of Tonga (SC) **67**
Kingdom of Tonga v Pohiva [1993] Tonga LR 25
Taione anors v Kingdom of Tonga (SC) **67**
Kuruma Son of Kaniu v Reginam [1955] 1 All ER 236 (PC)
R v Pohahau anors (SC) **363**
Ladd v Marshall [1954] 1 WLR 1489
Takataka anor v Hurrell anors (CA) **359**
Lali Media Group Ltd & 'Akau'ola v 'Utoikamanu & The Kingdom of Tonga [2003] Tonga LR 186
Taione anors v Kingdom of Tonga (SC) **67**
Lali Media & Others v Prince 'Ulukalala Lavaka Ata & Others & The Kingdom of Tonga [2003] Tonga LR 117
Taione anors v Kingdom of Tonga (SC) **67**

Lane v Holloway [1967] 3 All ER 129
R v Fanua anor (SC) **264**
Langford v The State [2005] UKPC 20
R v Valu (SC) **274**
Li v R (New Zealand Court of Appeal, 28 June 2000, CA 140/00)
R v Fanua anor (SC) **264**
Lickiss v Milestone [1966] 2 All ER 972
Helu anors v National Pacific Insurance (SC) **439**
Lim Laboratories Ltd v Evans [1984] 2 All ER 417 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Lyon v Daily Telegraph [1943] 1 KB 753
Taione anors v Kingdom of Tonga (SC) **67**
Lyon v Wilcox [1994] 3 NZLR 422 (CA)
R v Kengike (SC) **400**
M, Re [1993] NZFLR 74
R v Kengike (SC) **400**
Maamakalafi anor v Finau [2004] Tonga LR 218 (CA)
Helu anors v National Pacific Insurance (SC) **439**
McCawley v The King [1920] AC 691 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Machent v Quinn [1970] 2 All ER 255
R v Funaki anors (SC) **239**
Mahera, ex parte [1986] 1 Qd R 303
Sefo anor v R (SC) **485**
Mahon v Air New Zealand Ltd [1984] 3 All ER 201 (PC)
Tu'ivai v Lokotui (SC) **178**
Marek v C.G.A. Fire & Accident Insurance Co Ltd (1985) 3 ANZ Ins Cas 60-665
Helu anors v National Pacific Insurance (SC) **439**
Matadeen v Pointu [1999] 1 AC 98 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Minister of Lands v Manase Kamoto (1923-1962) 11 Tonga LR 132
Tukuafu v Latu anors (LC) **141**
Minister of Lands v Pangia (Scott J unreported 1932)
Taione anors v Kingdom of Tonga (SC) **67**
Minister of Police v Moala [1997] Tonga LR 210 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Moananui v R (1984) 1 CRNZ 231
Sefo anor v R (SC) **485**
Moriarty v Brooks (1834) 6 C & P 684
R v Fanua anor (SC) **264**
Morris v KLM Royal Dutch Airlines [2002] 2 All ER 565, [2002] 2 AC 628
Cauchi v Air Fiji anor (SC) **154**
Mo'unga v R [1998] Tonga LR 154 (CA)
R v Kengike (SC) **400**
Murcott v Police (High Court, Wellington, AP102/03, 18 June 2003, Goddard J)
R v Taufa (SC) **456**

Murdoch v New Zealand Milk Board (1982) 2 NZLR 108
Tu'ivai v Lokotui (SC) **178**
Murphy v Rae [1967] NZLR 103
Lita Trading Enterprises Ltd v Moala [CA) **324**
Na'ati v Motu'apuaka (Supreme Court, 2 March 1998, No L3/91, Lewis CJ)
Tukuafu v Latu anors (LC) **141**
New York Times Co v United States 403 US 713, 91 SCt 2140, 29 L Ed 2d 822 (1971)
Taione anors v Kingdom of Tonga (SC) **67**
Nugent v Michael Goss Aviation [2000] 2 Lloyd's Rep 222, [2000] 2 WLR 222
Cauchi v Air Fiji anor (SC) **154**
Olivier v Buttigieg [1966] 2 All ER 459 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Ontario v Canada [1896] AC 348
Taione anors v Kingdom of Tonga (SC) **67**
Peninsula Watchdog Group (Inc) v Minister of Energy [1996] 2 NZLR 529 (CA)
R v Kengike (SC) **400**
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42 (HL)
Taione anors v Kingdom of Tonga (SC) **67**
Petition of The Earl of Antrim & 11 Other Irish Peers [1967] 1 AC 691
Taione anors v Kingdom of Tonga (SC) **67**
Phillips v Britannia Hygienic Laundry Co Ltd [1923] All ER Rep 127 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Pillai v Mudanayake [1955] 2 All ER 833 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Pinder v The Queen [2003] AC 620 (PC)
Taione anors v Kingdom of Tonga (SC) **67**
Pohiva v Prime Minister and Kingdom of Tonga [1988] LRC (Const) 949
Taione anors v Kingdom of Tonga (SC) **67**
Polynesian Airlines v Kingdom of Tonga [2000] Tonga LR 145
Gough Finance Ltd v Westpac Bank of Tonga (SC) **390**
Porzelack KG v Porzelack (UK) Ltd [1987] 1 WLR 420
Fainga'a v Lelea (SC) **8**
Practice Direction 02/92
Gough Finance Ltd v Westpac Bank of Tonga (SC) **302**
Practice Direction No 1 of 1993
MBf Bank Ltd v Mangisi (SC) **396**
Practice Direction No. 1/2004
Tui International Ltd v Nasilai (SC) **270**
President & Trustees of Tonga Ma'a Tonga Kautaha, Ex Parte [1908-1959] Tonga LR Vol 1 (1911) 9
Taione anors v Kingdom of Tonga (SC) **67**
Public Prosecutor v Ooi Kee Saik [1971] 2 MLJ 108
Taione anors v Kingdom of Tonga (SC) **67**
Pyx Granite Co v Ministry of Housing [1959] 3 All ER 1 (HL)
Taione anors v Kingdom of Tonga (SC) **67**

R v Atias (No 2) (High Court, Auckland, T025837, Harrison J, 26 September 2003)
R v Malu (SC) **226**
R v Baillie [1995] 2 Cr App R 31, 38 [1995] Crim LR 739 (CA)
R v 'Ake (SC) **424**
R v Bleasdale (1848) 2 C&K 675
R v Funaki anors (SC) **239**
R v Bowe [2003] TOSC 8
R v Pohahau anors (SC) **363**
R v Brown [1972] 2 All ER 1328, 56 Crim App R 564 (CA)
R v 'Ake (SC) **424**
R v Canterbury and St Augustine's Justices, ex p Klisiak [1981] 2 All ER 129 (QBD)
Tu'ivai v Lokotui (SC) **178**
R v Canterbury and St Augustine's Justices, ex p Turner (1983) Crim LR 478
Tu'ivai v Lokotui (SC) **178**
R v Central Independent Television plc [1994] 3 All ER 641
Taione anors v Kingdom of Tonga (SC) **67**
R v Collins [1972] 2 All ER 1105
R v Taufalele anor (SC) **495**
R v Duffy [1949] 1 All ER 932 (CCA)
R v 'Ake (SC) **424**
R v Fa'aoso [1996] Tonga LR 36
R v Aumua (SC) **214**
R v Fanua anor (SC) **264**
R v Malu (SC) **226**
R v Fainga'anuku [1989] TOSC 1
R v Pohahau anors (SC) **363**
R v Filimoehala [1997] Tonga LR 140
Tu'ivai v Lokotui (SC) **178**
R v Firth (1869) LR 1 CCR 172
R v Funaki anors (SC) **239**
R v Graham (New Zealand Court of Appeal, CA 391/96, 27 February 1997)
Taufa v R (CA) **330**
R v Halliday [1917] AC 260
Taione anors v Kingdom of Tonga (SC) **67**
R v Hancox [1989] 3 NZLR 60 (CA)
R v Malu (SC) **226**
R v Hennigan [1971] 3 All ER 133 (CA)
R v 'Ake (SC) **424**
R v Vi (SC) **278**
R v Henwood (1870) 11 Cox 526
R v Funaki anors (SC) **239**
R v Home Secretary ex p Simms [1999] 3 All ER 400 (HL)
Taione anors v Kingdom of Tonga (SC) **67**
R v Home Secretary ex p Zamir [1980] 2 All ER 768 (HL)
Tu'ivai v Lokotui (SC) **178**
R v Hughes [2002] 2 AC 259 (PC)

Taione anors v Kingdom of Tonga (SC) **67**
R v Ithell [1969] 2 All ER 449 (CA)
R v Kengike (SC) **400**
R v Jones [1976] 3All ER 54
R v Taufalele anor (SC) **495**
R v Kulitapa (Supreme Court, CR 416/03, McElrea J, 8 October 2004)
R v Vi (SC) **278**
R v Lamb [1967] 2 All ER 1282 (CA)
R v Vi (SC) **278**
R v Lambie [1981] 3 WLR 88
R v Makahununiu (SC) **41**
R v Larkin [1943] 1 All ER 217,219 (CA)
R v Vi (SC) **278**
R v Laverty [1970] 54 Cr App R 495
R v Makahununiu (SC) **41**
R v Leitch [1998] 1 NZLR 420 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
R v McCabe [1992] Crim LR 885
R v Funaki anors (SC) **239**
R v McCarthy, 38 Cr App R 74, 80-82 (CCA)
R v 'Ake (SC) **424**
R v Mafi (CR 69/00, 18 March 2005)
R v Pohahau anors (SC) **363**
R v Makahununiu [2001] Tonga LR 127
R v Funaki anors (SC) **239**
R v Malu (SC) **226**
R v Misinale (Court of Appeal, CA 13/99, 23 July 1999)
Sefo anor v R (CA) **335**
Taufa v R (CA) **134**
R v Owino [1996] 2 Cr App R 128 (CA); [1995] Crim LR 743
R v Vi (SC) **278**
R v Pailate [1989] Tonga LR 109
R v Pohahau anors (SC) **363**
R v Pohiva (Case No 11/87, 15 January 1988)
Taione anors v Kingdom of Tonga (SC) **67**
R v Roads [1967] 2 All ER 84
Sefo anor v R (SC) **485**
R v Rowson and others [1985] 2 All ER 539
R v Fanua anor (SC) **264**
R v Saafi [2004] Tonga LR 242
R v Funaki anors (SC) **239**
R v Sang [1979] 2 All ER 1222 (HL)
R v Pohahau anors (SC) **363**
R v Scarlett [1993] 4 All ER 629 (CA)
R v Vi (SC) **278**

R v Sheppard (1868) 11 Cox 234
R v Funaki anors (SC) **239**
R v Shipley, 21 St Tr 847
Taione anors v Kingdom of Tonga (SC) **67**
R v Smith [1959] 2 All ER 193
R v 'Ake (SC) **424**
R v Pohahau anors (SC) **363**
R v Vi (SC) **278**
R v Smith (Morgan) [2001] AC 146; [2000] 4 All ER 289 (HL); [2000] UKHL
R v 'Ake (SC) **424**
R v Sutton Justices ex p DPP [1992] 2 All ER 129
Tu'ivai v Lokotui (SC) **178**
R v Tangata'iloa (Supreme Court, CR 99/00, 3 May 2001)
Sefo anor v R (CA) **335**
R v Tau'aika (unreported)
R v Fanua anor (SC) **264**
R v Telford Justices ex p Badhan [1991] 2 All ER 854 (QBD)
Tu'ivai v Lokotui (SC) **178**
R v Thornton 96 Crim App R 112 (CA)
R v 'Ake (SC) **424**
R v Tirado [1974] 59 Cr App R 80
R v Makahununiu (SC) **41**
R v Tongatu'a [2005] TOSC 30
R v Tau anors (SC) **418**
R v Turnbull [1977] Q B 224 (PC)
R v Valu (SC) **274**
R v Vaiangina [1990] Tonga LR 118
Tu'ivai v Lokotui (SC) **178**
R v Valu [2004] Tonga LR 257
R v Aumua (SC) **214**
R v Waters [1979] 1 NZLR 375 (CA)
R v Fanua anor (SC) **264**
R v Watson [1989] 2 All ER 865 (CA)
R v Vi (SC) **278**
R v Whitfield (1976) 63 Cr App R 39 (CA)
R v 'Ake (SC) **424**
R v Whyte [1987] 3 All ER 416 (CA)
R v Makafilia (SC) **448**
R v Wickremasinghe 21 August 2003, CA 137/03
R v Malu (SC) **226**
R v Williams [1987] 3 All ER 411 (CA)
R v Vi (SC) **278**
R v Wood (1830) 1 Mood CC 278;
R v Fanua anor (SC) **264**
Read v Croydon Corporation [1938] 4 All ER 631
Taione anors v Kingdom of Tonga (SC) **67**

Reyes v The Queen [2002] 2 AC 235 (PC)
R v Vola (SC) **404**
Taione anors v Kingdom of Tonga (SC) **67**
Ridge v Baldwin [1963] 2 All ER 66 (HL)
Tu'ivai v Lokotui (SC) **178**
Robati v Privileges Standing Committee of the Parliament of the Cook Islands [2001] NZAR 282 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Russell v Duke of Norfolk [1949] 1 All ER 109,118 (CA)
Tu'ivai v Lokotui (SC) **178**
Sanft v Fotofili [1987] TOPC 1; [1987] SPLR 354
Taione anors v Kingdom of Tonga (SC) **67**
Saumi v Air Fiji Ltd (29 October 2003, No HBC0500 of 2000S, unreported)
Cauchi v Air Fiji anor (SC) **154**
Saxton v Police [1981] 2 NZLR 186 (CA)
R v Malu (SC) **226**
Schenck v United States, 249 US 47, 39 SCt 247, 63 Led2d (1919)
Taione anors v Kingdom of Tonga (SC) **67**
Sefo & Tu'ipulotu v R [2004] Tonga LR 366
Taufa v R (CA) **134**
Shaw (Norman) v The Queen [2001] UKPC 26; [2001] 1 WLR 1519; [2002] 1 Cr App R 77; [2002] Crim LR 140 (PC)
R v Vi (SC) **278**
Sidhu v British Airways plc [1997] 2 LRC 149, [1997] 1 All ER 193, [1997] AC 430
Cauchi v Air Fiji anor (SC) **154**
Silkin v Beaverbrook Newspaper [1958] 1 WLR 743
Taione anors v Kingdom of Tonga (SC) **67**
Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Sir Lindsay Parkinson and Co Ltd v Triplan [1973] QB 609
Fainga'a v Lelea (SC) **8**
Solomon Beckford v The Queen [1988] 1 AC 130
R v Fanua anor (SC) **264**
South Pacific Air Motive Pty Ltd v Magnus (1998) 87 FCR 301, 157 ALR 443
Cauchi v Air Fiji anor (SC) **154**
South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282 (CA)
Cauchi v Air Fiji anor (SC) **154**
SS Pharmaceutical Co Ltd v Qantas Airways Ltd [1989] 1 Lloyd's Rep 319
Cauchi v Air Fiji anor (SC) **154**
State v Makwanyane 1995 (3) SA 391 (South Africa)
R v Vola (SC) **404**
State v Nkwanyana 1990 (4) SA 735 at 743E-745G
R v Vola (SC) **404**
State v Zuma 1995 (4) BCLR 401
Taione anors v Kingdom of Tonga (SC) **67**

Stevenson v United Road Transport Union [1977] 2 All ER 941 (CA)
Tu'ivai v Lokotui (SC) **178**
Stollery, Weir, Re v Treasury Solicitor [1926] Ch 284, [1926] All ER Rep 67 (CA)
Cauchi v Air Fiji anor (SC) **154**
Sturla v Freccia (1880) 5 App Cas 623, [1874-1880] All ER Rep 657 (HL)
Cauchi v Air Fiji anor (SC) **154**
T & T Newspaper Publishing Group Ltd v Central Bank of Trinidad & Tobago [1990] LRC (Const) 391
Taione anors v Kingdom of Tonga (SC) **67**
Tarr v Tarr [1972] 2 All ER 295 (HL)
Taione anors v Kingdom of Tonga (SC) **67**
Te Runanga o Muriwhenua Inc v A-G [1990] 2 NZLR 641 (CA)
Cauchi v Air Fiji anor (SC) **154**
The State v Petrus [1985] LRC (Const) 699
Taione anors v Kingdom of Tonga (SC) **67**
Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd [1955] 2 All ER 657 (HL)
Taione anors v Kingdom of Tonga (SC) **67**
Toronto v Virgo [1896] AC 88
Taione anors v Kingdom of Tonga (SC) **67**
Touliki Trading Enterprises Ltd v Fakafanua [1995] Tonga LR 8
Taione anors v Kingdom of Tonga (SC) **67**
Touliki Trading v Fakafanua & Kingdom of Tonga (No 2) [1996] Tonga LR 145 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Tu'itavake v Porter [1989] Tonga LR 14
Taione anors v Kingdom of Tonga (SC) **67**
Tukuafu v Tupoumalohi [2002] Tonga LR 268
Skeen v Sovaleni anor (LC) **298**
'Utoikamanu v Lali Media Group Ltd [2003] Tonga LR 218 (CA)
Taione anors v Kingdom of Tonga (SC) **67**
Vaea v Minister of Lands and Fetu'ufuka [1974-80] Tongan LR 13
Tukuafu v Latu anors (LC) **141**
Vaikona v Fuko (No 2) [1990] Tonga LR 68
Taione anors v Kingdom of Tonga (SC) **67**
Vauxhall Estates Ltd v Liverpool Corporation [1932] 1 KB 733 (KBD)
Taione anors v Kingdom of Tonga (SC) **67**
Veikoso v Dateline Shipping and ors [2004] Tonga LR 56
Fonua v Tonga Communications Corporation Ltd (SC) **55**
Wall v R (Supreme Court, CR 31/2000, 27 July 2002)
Sefo anor v R (CA) **335**
Wilson v Read [1956] Crim LR 418
R v Funaki anors (SC) **239**
Wilton & Co v Phillips (1903) 19 TLR 390
Cauchi v Air Fiji anor (SC) **154**

INDEX OF STATUTES CONSIDERED

Act of Constitution of Tonga (Amendment) Act 2003
Taione anors v Kingdom of Tonga (SC) **67**
Bail Act 1990
Sefo anor v R (SC) **485**
Taufa v R (CA) **134**
Broadcasting Act 1989
Taione anors v Kingdom of Tonga (SC) **67**
Carriage by Air Act 1991
Cauchi v Air Fiji anor (SC) **154**
Carriage by Air Currency Equivalent Order 2003
Cauchi v Air Fiji anor (SC) **154**
Civil Aviation (Carriers Liability) Act 1959 (Australia)
Cauchi v Air Fiji anor (SC) **154**
Civil Evidence Act 2002 (Fiji)
Cauchi v Air Fiji anor (SC) **154**
Civil Law Act (Cap 25)
Taione anors v Kingdom of Tonga (SC) **67**
Civil Law (Amendment) Act 2003
Taione anors v Kingdom of Tonga (SC) **67**
Communications Act 2000
Taione anors v Kingdom of Tonga (SC) **67**
Companies Act (UK)
Fainga'a v Lelea (SC) **8**
Constitution of Tonga 1875
Cauchi v Air Fiji anor (SC) **154**
Tukuafu v Latu anors (LC) **141**
Constitution of Tonga (Cap 2)
R v Aumua (SC) **214**
R v Funaki anors (SC) **239**
Taione anors v Kingdom of Tonga (SC) **67**
Tukuafu v Latu anors (LC) **141**
Constitution of Tonga (Amendment) Act 2003
Taione anors v Kingdom of Tonga (SC) **62**
Court of Appeal Act (Cap 9)
Taufa v R (CA) **134**

Criminal Offences Act (Cap 18)
R v 'Ake (SC) **424**
R v Aumua (SC) **214**
R v Fanua anor (SC) **264**
R v Fatani (SC) **470**
R v Funaki anors (SC) **239**
R v Holani (SC) **18**
R v Kengike (SC) **400**
R v Makafilia (SC) **448**
R v Makahununiu (SC) **41**
R v Pohahau anors (SC) **363**
R v Savieti (SC) **473**
R v Taufa (SC) **456**
R v Taufalele anor (SC) **495**
R v Vi (SC) **278**
R v Vola (SC) **404**
Sefo anor v R (SC) **485**
Tu'itavake v R (CA) **348**
Customs and Excise Act (Cap 67)
Chief Commissioner of Inland Revenue v Lafi Motors anors (SC) **131**
R v Malu (SC) **226**
Customs and Excise Management Act (UK)
R v Malu (SC) **226**
Divorce Act (Cap 29)
Tonga v Halapua (SC) **35**
Tonga v Tonga (CA) **312**
Drugs and Poisons Act (Cap 79)
R v Mafi (SC) **47**
R v Malu (SC) **226**
R v Pohahau (SC) **12**
R v Tohifolau (SC) **31**
Evidence Act (Cap 15)
Cauchi v Air Fiji anor (SC) **154**
R v Pohahau anors (SC) **363**
R v Tongia (SC) **478**
Sefo anor v R (SC) **485**
Tui International Ltd v Nasilai (SC) **270**

Illicit Drugs Act 2003
R v Mafi (SC) **47**
Illicit Drugs Control Act 2003
R v Tau anors (SC) **418**
Interpretation Act (Cap 1)
Taione anors v Kingdom of Tonga (SC) **67**
Land Act (Cap 132)
Skeen v Sovaleni anor (LC) **298**
Taione anors v Kingdom of Tonga (SC) **67**
Tukuafu v Latu anors (LC) **141**
Land Act 1882
Tukuafu v Latu anors (LC) **141**
Land Act 1903
Tukuafu v Latu anors (LC) **141**
Land Act 1927
Tukuafu v Latu anors (LC) **141**
Larceny Act 1916 (UK)
R v Makahununiu (SC) **41**
Law Practitioners Act 1989
Gough Finance Ltd v Westpac Bank of Tonga (SC) **302**
Gough Finance Ltd v Westpac Bank of Tonga (SC) **390**
Marine Insurance Act (Cap 144)
Kingdom of Tonga v Allianz Australia Insurance Ltd (SC) **196**
Media Operators Act 2003
Taione anors v Kingdom of Tonga (SC) **62**
Taione anors v Kingdom of Tonga (SC) **67**
Media Operators Ordinance 2003
Taione anors v Kingdom of Tonga (SC) **67**
Misuse of Drugs Act 1975 (NZ)
R v Malu (SC) **226**
Nationality Act (Cap 59)
Y v Y (SC) **305**
Newspaper Act 2003
Taione anors v Kingdom of Tonga (SC) **62**
Taione anors v Kingdom of Tonga (SC) **67**
Order in Public Places Act (Cap 37)
R v Vi (SC) **278**
Pension Act (Cap 8)
Fonua v Tonga Communications Corporation Ltd (SC) **55**
Tonga Communications Corporation Ltd v Fonua (CA) **315**
Personal Property Securities Act 1999 (NZ)
Gough Finance Ltd v Westpac Bank of Tonga (SC) **390**
Police Act (Cap 35)
R v Vi (SC) **278**

Police & Criminal Evidence Act 1984 (UK)
R v Pohahau anors (SC) **363**
Ports and Services Tax Act (Cap 71)
Chief Commissioner of Inland Revenue v Lafi Motors anors (SC) **131**
Powers of Criminal Courts Act 1973 (UK)
R v Kengike (SC) **400**
Prohibited Publications Act (Cap 54)
Taione anors v Kingdom of Tonga (SC) **67**
Supreme Court Act (Cap 10)
Sefo anor v R (SC) **485**
Theft Act 1968 (UK)
R v Taufalele anor (SC) **495**
Tobacco Control Act 2000
R v Tsay anor (SC) **413**
Tonga Communications Corporation Act 2000
Tonga Communications Corporation Ltd v Fonua (CA) **315**
Traffic Act (Cap 156)
Helu anors v National Pacific Insurance (SC) **439**
R v Holani (SC) **18**

RULES CONSIDERED

Land Court Rules 1991
MBf Bank Ltd v Fonua anor (LC) 25
Supreme Court Rules 1991
Fainga'a v Lelea (SC) 8
Gough Finance Ltd v Westpac Bank of Tonga (SC) 302
Gough Finance Ltd v Westpac Bank of Tonga (SC) 390
MBf Bank Ltd v Fonua anor (LC) 25
MBf Bank Ltd v Mangisi (SC) 396
Skeen v Sovaleni anor (LC) 298
European Convention of Human Rights
Taione anors v Kingdom of Tonga (SC) 67

Kasimili v Muller

Supreme Court, Nuku'alofa
Ward CJ
C App 16/02

18 September 2003, and 19 November 2003; 14 January 2004

Law practitioners – disciplinary committee – deliberately mislead committee – appeal allowed

The appellant was the plaintiff in an action against his former employer by whom he had been summarily dismissed. He claimed damages as compensation for his dismissal and for lost commission on earnings. He was successful in his claim but received damages in a sum very much lower than that claimed. He was dismissed in early 1998 and the claim was filed in early 2000. At the hearing before Ford J, the appellant represented himself but, in the early stages, had instructed the respondent, an enrolled law practitioner. A trial date was fixed for 5 and 6 February 2001 with a pre-trial conference on 31 January 2001. The respondent did not appear for the pre-trial conference or for the hearing and the case was struck out. That order was subsequently set aside and the trial proceeded. The appellant lodged a complaint to the Tonga Law Society relating to the respondent's failure to attend court on 5 February 2001. The respondent asserted that he attended on 31 January and as he had not received any instruction he sought and was granted leave to withdraw. The Law Society dismissed the complaint. The appellant appealed that decision.

Held:

1. The Court found that there was no appearance by the respondent on 31 January 2001 and that the claim was struck out.
2. The respondent made a statement which he must have known was untrue on two occasions to the Law Society in the knowledge that it would be used in the disciplinary proceedings against him. That statement was made to avoid the consequences of his failure to represent his client's interests and resulted in the complaint being rejected at that time. It was clear that the Disciplinary Committee were deceived by this falsehood and it was the major basis of its finding that the respondent had not acted unprofessionally.
3. The failure to appear and represent his client was unprofessional conduct. His attempt to avoid this by untrue statements was a serious aggravation. The fact that on one occasion the statement was made to mislead the Court was particularly disgraceful misconduct.

4. The appeal was allowed and the matter was remitted to the Disciplinary Committee of the Law Society to determine the appropriate recommendation for the instances of professional misconduct.

Case considered:
'Etika v Tonga Law Society [2002] Tonga LR 75

Appellant in person
Respondent in person

Judgment

This is an appeal from a decision of the Disciplinary Committee of the Tonga Law Society delivered on 24 September 2002.

The appellant had been the plaintiff in an action against his former employer by whom he had been summarily dismissed. He claimed damages as compensation for his dismissal and for lost commission on earnings.

He was successful in his claim but received damages in a sum very much lower than that claimed. He was dismissed in early 1998 and the claim was filed in early 2000. At the hearing before Ford J, the appellant represented himself but, in the early stages, had instructed the respondent, an enrolled law practitioner. A trial date was fixed for 5 and 6 February 2001 with a pre-trial conference on 31 January 2001. The respondent did not appear for the pre-trial conference or for the hearing and the case was struck out.

That order was subsequently set aside and the trial proceeded. In his judgment, Ford J in the first of two references to the conduct of the respondent, stated:

> "Mr Kasimili has not been well served by the lawyer he initially instructed, Mr Paul Muller. Mr Muller issued the proceedings. A trial date was set for 5 and 6 February 2001 and a pre-trial conference was set for 31 January 2001. Mr Muller did not appear on the pre-trial conference nor did he appear on 5 February when the case was called for trial. The claim was, therefore, struck out."

The original claim was for a total of $2,727.25 commission and $10,000.00 for the dismissal. He was given judgment in the total sum of $457.92 and, as he had not been represented by counsel, no order for costs. Ford J continued:

> "I would add this. Even if the plaintiff had been represented by counsel, I would have been reluctant to make an order as to costs having regard to the modest amount recovered in relation to the sum claimed. This is another area where the plaintiff does not appear to have been well served by his former solicitor, Mr Muller. Mr Muller should have made it clear to the plaintiff at the outset that, even if he was successful in establishing his claim of wrongful dismissal, his entitlement to damages at common law is severely limited and the most that he could have expected to recover, putting to one side the question of commission, would have been his

> loss of wages for the two week notice period. The claim of $10,000.00 is quite preposterous and such a figure would have done nothing to encourage a sensible settlement of the case at an early stage of the litigation."

That judgment was delivered by Ford J on 10 July 2002. By that time, the appellant had lodged his complaint to the Tonga Law Society and the hearing by the Disciplinary Committee had taken place although the decision was not to be delivered until some months later.

The complaint to the Law Society was in the form of letter and related to the respondent's failure to attend court on 5 February 2001. He stated:

> "I have already paid [Muller] an amount of money which he needed to get the case on. Everything was ready and dated to be held on February the 5th, 2001. We met one week before the dated day and he told me everything is ready, and we need to meet before the court case started. I went to his office at Mailetaha but he was already gone to New Zealand. I couldn't go to court alone without my lawyer so I stayed."

At the hearing by the Disciplinary Committee, the appellant gave evidence and was examined at length by the members of the Committee. The respondent failed to attend but the Committee considered a number of documents including a detailed answer by the respondent to the allegations by the appellant. The major part of their decision was devoted to resolving the various factual discrepancies between the claims of the appellant and the respondent. Having found that some of the critical assertions of the appellant, in particular his claim that he and the respondent had met on 1 February 2001, were not credible and having considered the standard of proof in such cases as described by Ford J in the case of *'Etika v Tonga Law Society*, they concluded:

> "We have already found that the evidence of the complaint about meeting with the respondent on 1 February 2001 is not convincing, and he had failed to satisfy the Committee to the high standard of proof set by Ford J.
>
> As to professional misconduct his Honour in page 6 of his Decision stated: 'the cases indicate that professional misconduct should only be found where the conduct could reasonably be regarded as disgraceful or dishonourable or inexcusable negligence... which is such as to be regarded as deplorable by his fellows in the profession.
>
> Applying the standard of proof set out by Ford J in this Decision and the meaning of professional misconduct we dismiss the complaint by the complainant."

The appellant's grounds of appeal take the form of a letter, dated 18 November 2002 and addressed to the 'Chief Judge'. I do not set it out. He challenges various findings of fact by the Committee and the conclusions they have based on those findings. As in all appeals, the appellate court will rarely interfere with findings of fact made by the tribunal which heard the evidence. They had the advantage, not shared by this

court, of seeing the appellant and hearing his oral evidence. In such a case, if there is evidence upon which that lower tribunal could have reached the conclusion it did, the appellate court will not interfere on those grounds alone.

However, one matter gave me cause for concern and resulted in my seeking further evidence. The only live evidence the Committee heard was from the appellant. As has been stated, the respondent was advised of the hearing and did not attend yet the Committee considered a letter written by him to the Law Society on 12 July 2001 referred to by the Committee as document 'C' (incorrectly described in the decision as from the complainant).

It is not clear what status the Committee gave to that document. It was not in the form of an affidavit and therefore not on oath in contrast to the evidence given by the appellant. I would question the probative value of the facts stated in it and the Committee gave no indication of how they regarded its contents or their relative weight against the sworn evidence of the appellant.

However, the decision on fact that the Committee found to be critical to its final decision related to the allegation of the appellant that he and the respondent had met on 1 February 2001. The Committee's decision on that was, I consider, reached by a consideration only of the evidence of the appellant. They simply did not believe his evidence having considered the documents the appellant produced to substantiate his claim. Had that been the only issue, I would not have interfered; but it was not.

The essence of the appellant's complaint was that the respondent had failed to appear on his behalf. His case was struck out because of the failure to appear at the pre-trial conference on 31 January 2001 and on the date fixed for the hearing, 5 February 2001.

The appellant could not give direct evidence of the events in chambers on 31 January 2001 because he was not there. However, the respondent in his letter of 12 July 2001 made the following assertion:

> "7. No further instructions received over the last quarter of 2000 from Mr Kasimili. In January 2001 I awaited further instructions from Mr Kasimili regarding the hearing set for February. Without a contact address I was unable to reach Mr Kasimili. On the 31st of January 2001 pre-trial conference leave was granted by the court to withdraw from the matter on the grounds that no further instructions had been received."

Later in the same letter in reference to a letter to the Law Society by Kasimili he also stated:

> "8.4 My records do not indicate any further instructions from Mr Kasimili before the pre-trial conference on the 31st of January 2001. Subsequently, the court granted leave to counsel to withdraw on the grounds that no further instructions had been received from Mr Kasimili."

Although it was not given on oath, that point appears to have been accepted by the Committee as a finding of fact. It was stated in the decision at page 4:

> "In his oral evidence the Complainant states that he forgot to meet the [Respondent] in his office to go to the pre-trial

> conference. In document 'C' the Respondent states in paragraph 7, among others, that without a contact address he was unable to reach the complainant and on the 31 January 2001 pre-trial conference leave was granted by the court for the Respondent to withdraw from the matter on the grounds that no further instructions had been received."

Later, at p 7 it continued:

> "In respect of the complaint by the complainant the Committee finds that the complainant's case was struck out by the Court because of the complainant's failure to meet with the respondent on 31 January 2001 to confirm instructions before they attend the pre-trial conference. Having received no instructions or heard from the Complainant for more than 8 months the Respondent in the Committee's view was entitled to advise the court that he has not received any further instructions and the appropriate thing for him to do was to seek leave to withdraw."

At the hearing of the appeal Mr Muller appeared in person. He did not give evidence on oath but his submissions to the Court included many assertions of fact. He explained how he had many meetings with the appellant and how he often came simply to discuss the case as opposed to giving further instructions. My note of the relevant parts of the submission continues:

> "[Our] agreement was he would come to my office for further instructions and preparation for the meeting. To go through documents and prepare him for witness box.
>
> He gave me no contact details at any stage. He had no fixed abode and I was unsure of where he lived. We agreed a time to come.
>
> At final meeting in May [2001], pre-trial conference was 31 January and I suggested he come a few weeks before, in early January so we could discuss case. I explained nature of pre-trial conference and that it would be the last chance to confirm we were ready to proceed.
>
> That was how we communicated. At that time I had no 'phone in the office – he had my home 'phone and fax number. There was no other arrangement. Not set times. I suggested the time he should come to my office.
>
> During January, I confirmed with Court that I had no contact with him prior to 31 January and I was present on that date before Ford J.
>
> On 31 January it was called and I came early and checked both courts. Looked around and could not locate him. At pre-

> trial conference I asked for leave to withdraw on grounds I had had no contact. I received leave. ...
>
> I was in Tonga prior to the hearing on 5 February and had no further contact"

Later he added;

> "I have read Finding of [Disciplinary] Committee. I have no disputes or matters to add. ... I felt the correct path was to seek to withdraw. I am aware of obligation to client and to Court. Whilst I went out of my way to assist him, I also have an obligation to the Court to present as well as possible. On 31 January, I felt I could not."

After the appeal hearing, when I was considering the case, I felt the first of the passages from Ford J's judgment quoted above suggested that particular conclusion of the Committee and the assertions of the respondent might not have been correct. This was not raised by the parties at the hearing of the appeal but, as the appellant was not represented and on the accepted facts was not present on 31 January and so could not have commented on the events in chambers, I considered it was a matter the Court should properly explore and so I sought further evidence on the point.

In consequence, I wrote a note to Ford J on 17 November 2003 (wrongly dated 3 February 2003) and he replied on 18 November 2003 as follows:

> "The entry in my Chambers Bench Book for 31 January 2001 reads as follows:
>
> > 'C.99/00 Kasimili v Vava'u Press (Foliaki)
> > No appearance
> > Case struck out
> > Costs to defendant to be taxed.'
>
> It is quite clear, in other words, that there was no appearance before me on that day by Mr Muller or anyone else on behalf of the plaintiff, Mr Kasimili."

I consider this revealed a serious situation and so, on 19 November 2003, the date fixed for delivery of the judgment, I explained the position and gave both parties 21 days to file any further written submissions and/or affidavit evidence. I had advised Mr Muller at the hearing that he need not appear for the judgment and on that day he was represented by counsel. Both the appellant and counsel for the respondent were given copies of my note to Ford J and of his reply and a copy of my Order was also faxed to Mr Muller in Auckland.

Understandably, as he was not, and had never claimed to be, present on 31 January 2001, the appellant filed no further submissions. Surprisingly, Mr Muller also has filed nothing.

As I have stated this reveals a serious situation. The respondent has made a statement which he must have known was untrue on two occasions to the Law Society in the knowledge that it would be used in the disciplinary proceedings against him. That statement was made to avoid the consequences of his failure to represent his client's interests and resulted in the complaint being rejected at that time. It is

clear that the Disciplinary Committee were deceived by this falsehood and, indeed, it was the major basis of its finding that the respondent had not acted unprofessionally.

During the appeal, the respondent repeated and embellished the untrue account, again with the clear purpose of misleading the Court.

The failure to appear and represent his client was unprofessional conduct. His attempt to avoid this by untrue statements is a serious aggravation. The fact that, on one occasion the statement was made to mislead the Court is particularly disgraceful misconduct.

In the circumstances, the appeal is allowed and the matter is remitted to the Disciplinary Committee of the Law Society to determine the appropriate recommendation for the following instances of professional misconduct:

1. the practitioner's failure to attend at the chambers hearing on 31 January 2001 and represent his client;
2. the practitioner's deliberate misstatement of fact in his letter to the Law Society of 12 July 2001 (document C); and
3. the practitioner's deliberate misstatement of fact to the Court during the appeal hearing on 18 September 2003

The Disciplinary Committee shall report to me within 28 days.

Fainga'a v Lelea

Supreme Court, Nuku'alofa
Ward CJ
C 38/03

22 January 2004; 22 January 2004

Civil procedure – security for costs – factors to take into account – order refused

The plaintiff, a married woman, first brought a claim for damages for unlawful arrest and imprisonment against three individual police officers, the Ministry of Police and the Kingdom of Tonga. After defences had been filed, the plaintiff applied to amend the claim by the addition of another police officer as the fourth defendant. The application was granted on 13 May, 2003 but the plaintiff was ordered to pay the costs incurred by the first, second, fifth and sixth defendants in drafting the defences to the original claim. The parties agreed costs of $400 and agreed that they should be paid in instalments of $50 per week. By 15 December, the plaintiff had only paid $150 and the defendants filed an application for security for costs on the basis that, if the plaintiff was unable to find this small sum, it was unlikely she would ever be able to pay the costs of a full trial. The plaintiff opposed that application and her counsel advised the court that a pig worth $300 was offered in settlement of $150 of the costs but counsel for the defendants did not respond to the offer.

Held:

1. Once the court determined that one of the factors in O17 r 1 was present, it must then decide whether to exercise its discretion to order security. It must, in so doing, have regard to all the circumstances and then decide whether it would be just to do so. That was a two-edged test as justice applied to both sides in an action.
2. Whilst the likelihood of the success of the claim was an important consideration, the court should not undertake an exhaustive analysis of the claim but take a broad view of the possibility of success.
3. Counsel appearing for the government should not, too readily, seek security for costs. The financial resources of many members of the public were such that even a modest order for security would be sufficient to prevent the case proceeding. The government, on the other hand, had far deeper resources and, in the general interest of allowing a matter of concern to be properly ventilated in the courts, could more easily bear the risk of not recovering its costs. In particular, where there were allegations

against the police arising from an arrest or other interference with the liberty of the individual, the court should always consider that the justice of the case in those circumstances would point strongly to allowing the case to proceed to trial.

4. The court refused the application for security for costs.

Cases considered:

Porzelack KG v Porzelack (UK) Ltd [1987] 1 WLR 420
Sir Lindsay Parkinson and Co Ltd v Triplan [1973] QB 609

Statute considered:

Companies Act (UK)

Rules considered:

Supreme Court Rules

Ruling

This is a claim for damages for unlawful arrest and imprisonment.

The plaintiff, a married woman, first brought this action against three individual police officers, the Ministry of Police and the Kingdom of Tonga.

After defences had been filed, the plaintiff applied to amend the claim by the addition of another police officer as the fourth defendant. The application was granted on 13th May, 2003 but the plaintiff was ordered to pay the costs incurred by the first, second, fifth and sixth defendants in drafting the defences to the original claim.

It appears the parties agreed costs of $400.00 and that they should be paid in instalments of $50.00 per week. By 15 December, the plaintiff had only paid $150.00 and the defendants filed application for security for costs on the basis that, if the plaintiff is unable to find this small sum, it is unlikely she will ever be able to pay the costs of a full trial.

The plaintiff opposes that application and her counsel advises the court that a pig worth $300.00 was offered in settlement of $150.00 of the costs but counsel for the defendants did not respond to the offer.

I set the matter for hearing in chambers today. Counsel for the plaintiff appeared but counsel for the defendants did not. Miss Guttenbeil from Crown Law, on hearing the case called, attended out of courtesy but was not instructed and could not argue the case.

I refused the application for security for costs and feel it may be helpful if I give brief reasons for the decision.

Order 17 rule 1 gives the court power to order that an action be stayed unless the plaintiff gives security for costs if it appears to the court on application by the defendants that:

> "(i) the plaintiff is ordinarily resident out of the jurisdiction, or
> (ii) the plaintiff may be unable to pay the costs of the defendant if ordered to do so, or
> (iii) the plaintiff has not disclosed his true address to the court."

The rule provides that the court may make such an order if, having regard to all the circumstances of the case, it thinks it is just to do so.

The rule sets out the only grounds upon which security may be ordered. Clearly the defendants' application here is based on rule 1 (ii), a ground, it should be noted, which is not found in the equivalent English rule; O 23 r 1(1).

The general principle is that costs follow the event and so any order for costs is not usually made until the action is finally disposed of. However, Order 17 recognises the fact that, in some cases, there is a significant risk that the defendant may have to defend an action with no real prospect of being able to recover the costs if he is successful. Security for costs may be granted in such cases to avoid what would otherwise be an injustice.

Once the court has determined that one of the factors in O17 r 1 is present, it must decide whether to exercise its discretion to order security. It must, in so doing, have regard to all the circumstances and then decide whether it would be just to do so. That is, of course, a two edged test as justice applies to both sides in an action.

In the case of *Sir Lindsay Parkinson and Co Ltd v Triplan* [1973] QB 609, which related to the likelihood of a company being able to meet an order for costs under a provision of the English Companies Act, Lord Denning MR mentioned, at 626, some of the matters the court might consider:

> "There seems to have been some misapprehension on the matter in the past. The sooner it is put right the better. If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Mr. Levy helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was payment into court of a substantial sum of money (not merely payment into court to get rid of a nuisance claim), that, too, would count. The court might also consider whether the application for security was being used oppressively – so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work."

Although this was under section 726 of the English Act, the principles are the same and have been applied in relation to O 23.

Whilst the likelihood of the success of the claim is an important consideration, the court should not undertake an exhaustive analysis of the claim but take a broad view of the possibility of success.

It was pointed out in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420:

> "I have had a major hearing on security for costs ... in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without hearing any evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time."

Even in a case where it is not clear whether the plaintiff will succeed or fail, the court should be very wary of making an order, which may have the effect of preventing the plaintiff from pursuing his claim. In such circumstances, the court may decline to order security or may order it in a reduced sum.

In a case such as this, where the plaintiff is alleging improper conduct by public officers, I consider the court should take a much more liberal view of the plaintiff's chances of success. It is in the public interest to have such complaints heard. Therefore, where the claim is based on an allegation of malpractice by a public official, the court should be cautious about making an order which might have the effect of stifling a genuine case. Whilst the court must always be conscious of the possibility that the claim is a sham or brought solely for reasons of malice, if it appears otherwise and is founded on a good cause of action, the court should only order security where it is clear there is no chance of success.

As a result, counsel appearing for the government should not, too readily, seek security for costs in such cases. The financial resources of many members of the public are such that even a modest order for security will be sufficient to prevent the case proceeding. The government, on the other hand, has far deeper resources and, in the general interest of allowing a matter of concern to be properly ventilated in the courts, can more easily bear the risk of not recovering its costs. In particular, where there are allegations against the police arising from an arrest or other interference with the liberty of the individual, the court should always consider that the justice of the case in those circumstances will point strongly to allowing the case to proceed to trial.

R v Pohahau

Supreme Court, Nuku'alofa
Ward CJ
CR 20/2002

26 and 27 January 2004; 30 January 2004

Criminal law – possession of drugs – not proved to be same substance as was taken from house – acquitted

On Monday 24 December 2001 the police executed a search warrant on a house in Vaini belonging to one Moto Makahununiu. The premises consisted, at that time of a small timber fale and, behind it and about 10 feet away, a partly built concrete European style house. The information upon which the search warrant was issued was that the accused was possessing and selling Indian hemp from the premises. The police searched the small house first and took possession of six large sacks of unpounded kava. They then proceeded to search the concrete house and the garden. In the garden, on a shelf attached to the trunk of a Tava tree, was a kerosene stove. It was found to contain a plastic bag concealed under the burner unit. That bag contained a small quantity, 3.5 gms, of dried Indian hemp and a number of small plastic bags. A number of similar plastic bags were found on the frame of a window of the incomplete house. Later a police dog was brought to the premises and alerted the police to another plastic bag of Indian hemp buried under the gravel of the unconcreted floor of the bathroom of the new house. That bag was found to contain 31.73 gms of dried Indian hemp. The seized items were taken to the police station and were later delivered to the government analyst. He examined them and confirmed that the plant material in both plastic bags was Indian hemp. The accused was arrested subsequently by the police and interviewed. He was asked a series of questions by the police officers and replied to them all that he had been advised by his lawyer to say nothing. He was entitled to take that course and the interview has no evidential value. The accused was charged with one count of possession of Indian hemp on 24 December 2001, contrary to section 36(b) of the Drugs and Poisons Act.

Held:

1. The prosecution proved that the drugs were found in the premises used and occupied by the accused and his de facto wife. That was prima facie evidence of possession by him and was the prosecution case. There was no evidence from the defence one way or the other. The Court must assess the evidence it had of the place where, and manner in which, the drugs were found.

2. The Court was satisfied that the presence of the bags on the window frame demonstrated that the occupier of the premises was using those bags with his drugs. On the evidence as a whole, the Court was satisfied beyond reasonable doubt that the drugs found by the police belonged to the accused and were hidden by him.
3. The Court could only convict if it was satisfied that the evidence presented to it proved beyond reasonable doubt that the material in the possession of the accused was Indian hemp. The only proof that it was Indian hemp depended on the analyst and the Court must be satisfied that there was no real doubt that the substance he identified as Indian hemp was the actual, unaltered material taken from the possession of the accused. The evidence of the place it was kept was inconsistent with the evidence of other police officers in the same office. It was clear the nature of the packaging of the exhibits meant that any unauthorised interference could occur without leaving any visible change to the packaging.
4. The Court could not be satisfied to the criminal standard that it was the same substance as that taken from the possession of the accused. That doubt must also attach to the other exhibit which had been kept together with it.
5. The accused must be acquitted.

Statute considered:
Drugs and Poisons Act (Cap 79)

Counsel for prosecution : Ms Guttenbeil
Counsel for the accused : Mr Tu'utafaiva

Judgment

The accused is charged with one count of possession of Indian hemp on 24 December 2001, contrary to section 36(b) of the Drugs and Poisons Act.

The prosecution case is that, on Monday, 24 December 2001, the police executed a search warrant on a house in Vaini belonging to one Moto Makahununiu. The premises consisted, at that time of a small timber fale and, behind it and about 10 feet away, a partly built concrete European style house. The information upon which the search warrant was issued was that the accused was possessing and selling Indian hemp from the premises.

When the search party arrived, the only person on the premises was a young man, Nasili Lapale. He was on the veranda of the partly constructed house at the rear. He told the police that he had come to see the accused that day and was waiting for the accused who had told him was going into town and would be back. He was present during the search and was arrested and charged with possession of the Indian hemp found on the premises. The case against him was subsequently withdrawn.

Nasili was called by the prosecution and, in cross-examination, altered his account considerably. He agreed that he had, in fact, been at the 'api since the Saturday night and said he was staying to look after it whilst the accused went to 'Eua. I did not consider he was a truthful witness and attach no weight to his evidence.

The police searched the small house first and took possession of six large sacks of unpounded kava, which are nothing to do with this case. They then proceeded to search the concrete house and the garden.

In the garden, on a shelf attached to the trunk of a Tava tree, was a kerosene stove. It was found to contain a plastic bag concealed under the burner unit. That bag contained a small quantity, 3.5 gms, of dried Indian hemp and a number of small plastic bags.

A number of similar plastic bags were found on the frame of a window of the incomplete house. Later a police dog was brought to the premises and alerted the police to another plastic bag of Indian hemp buried under the gravel of the unconcreted floor of the bathroom of the new house. That bag was found to contain 31.73 gms of dried Indian hemp.

The seized items were taken to the police station and were later delivered to the government analyst. He examined them and confirmed that the plant material in both plastic bags was Indian hemp.

The accused was arrested subsequently by the police and interviewed. He was asked a series of questions by the police officers and replied to them all that he had been advised by his lawyer to say nothing. He was entitled to take that course and the interview has no evidential value.

In court, he chose to stand mute and called no evidence.

The burden is on the prosecution and defence counsel submits it has failed to prove its case beyond reasonable doubt in three ways.

The first is that the prosecution has not proved that the accused was in possession of the drugs that were found during the search.

Mr Tu'utafaiva first points to the wording of the Particulars of Offence in the indictment, which charges the accused with possession of 2 plastic bags which "you had in your possession at the house you were residing at in the village of Vaini". He points out the house the accused was actually residing in was the small house and not the partly built house. Moreover, it shows, he contends, that the police information was about that house. I find no merit in either of those contentions. The nature or reliability of the information upon which the search warrant was obtained is no part of the evidence and cannot be considered. The fact that the indictment is worded in the way it is also has no bearing. It was drafted after the drugs had been found and the accused had been committed from the Magistrates' Court. By that stage the prosecution case was that the drugs were found in the garden and the incomplete house. Even if 'the house in which he was residing' should be restricted to the actual house in which he slept, the prosecution knew that the drugs were found outside it. Careless drafting it may be but the particulars sufficiently disclose the case the accused has to face and it adds no more to the submission on the first ground.

I do not, in any event, accept that residence refers solely to a house. It applies to the whole of the property upon which the house is situated. In this case, I am satisfied beyond any doubt that the accused was residing on Moto's 'api which included both buildings and the garden in which they stood.

There is far more substance in the question of whether the prosecution has proved that the drugs hidden in the stove in the garden and buried in the concrete house were in the possession of the accused. Mr Tu'utafaiva elicited in cross-examination that the house was visited by some family visitors and that at least two visitors sometimes stayed overnight or longer. It was also clear that the accused was

living in the house with his de facto wife, Fuiva, although, at the time of the search, she was in 'Eua.

Moto's sister gave evidence and agreed the fence of the whole premises was low enough for anyone to step over without difficulty. The witness Nasili, as has already been stated, told the court that he had been in the house for the whole of the day before the search and on the Monday up to the arrival of the police officers. The evidence was that he was certainly present when the police officers arrived.

How, counsel asks, can it be considered that the prosecution has proved possession by the accused to the required standard? Anyone could have left the drugs there. The police agreed they had received the information which led to the warrant more than two weeks before. During that time, the drugs could, counsel submits, have been 'planted' there.

I remind myself that the accused was entitled to decline to say anything to the police and to remain silent in court. His silence can, in no manner, be taken as an admission of guilt or as evidence against him. I also note, of course, that it means the court must decide the case on the prosecution evidence only.

The prosecution called two civilian witnesses, in addition to Nasili, who gave evidence of the occupation of the house by the accused and his de facto wife. The first was Moto's sister, a relative by marriage of the accused. She told how the accused lived with her for some time but, when Fuiva also moved in, she suggested that the accused and Fuiva should live in Moto's 'api. It was unoccupied and she was responsible for looking after it. They moved in about June 2001 and she occasionally visited them there. She told the court that sometimes Fuiva was away in 'Eua and sometimes Moto's son, Sitaleki, who normally lived with her, would stay at Moto's house with the accused.

The other civilian witness lived in the house next door. She told the court that the accused lived in the small house but how she saw frequent visitors arriving and leaving and how they would stay and wait on the veranda of the concrete house and see the accused there. Most visitors stayed a few minutes only but one person in particular, 'Isikeli, was a more frequent visitor and often stayed the night.

Mr Tu'utafaiva asks the court to find that the drugs could have belonged to any of these people and so the prosecution has failed to prove possession by the accused as opposed to anyone else to the required standard.

It is clear on the evidence that that accused had a number of visitors and at least two sometimes stayed overnight. Neither Sitaleki nor 'Isikeli was called. I am satisfied beyond any doubt that the prosecution evidence establishes that the accused was the occupier of those premises. He was sleeping in the small house but it is equally clear that he used the whole premises including the incomplete house. Counsel's submission suggests that, in any case where drugs are found in premises but there is no admission of possession, the court will be unable to find beyond reasonable doubt that the occupier was in possession in any case where other people have visited or stayed at the premises.

I do not accept that is correct. It is a matter to be determined on the evidence as a whole. In this case, the prosecution has proved that the drugs were found in the premises used and occupied by the accused and his de facto wife. That is prima facie evidence of possession by him and is the prosecution case. There is no evidence from the defence one way or the other. The court must assess the evidence it has of the place where, and manner in which, the drugs were found.

One container of the drugs was found concealed in the partly built house. There is no evidence that they were placed there by a stranger or a visitor without the knowledge of the accused. Similarly the manner in which the drugs were concealed in the stove in the garden suggests that they were placed there by the occupant of the premises. Any stranger using the accused's dwelling to hide his drugs there would be running a very high chance of discovery. It should also be noted that each separate bag of drugs contained some small plastic bags. They were of the same type as those found on the window frame in the house. If the drugs were concealed there by a stranger, would he have left similar bags in such an obvious place? I am satisfied the presence of those bags on the window frame demonstrates that the occupier of the premises was using those bags with his drugs. On the evidence as a whole, I am satisfied beyond reasonable doubt that the drugs found by the police belonged to the accused and were hidden by him.

I would add that the suggestion the drugs were planted by someone deliberately between the receipt of information and application for a search warrant was first raised in counsel's final submissions. Such a suggestion should have been put clearly to the witnesses. There is no evidence to support such conjecture.

The second aspect raised by the defence refers to the evidence of the analyst. He referred to having conducted a botanical examination of the plant material. He agreed that such an examination would require the use of a microscope with a X10 objective lens. His written report makes no mention of that. Mr Tu'utafaiva suggests that it means the court cannot be satisfied to the criminal standard that the drug was properly examined and identified.

The witness told the court that although the use of the expression 'botanical examination' must in itself convey that information, he would normally make specific mention of the fact. The omission in this report must have been an error that he overlooked when checking the typed report. He told the court that, in this case, he certainly did use such a microscope. I accept his evidence.

The last point raised by the defence is that the material examined and identified as Indian hemp by the analyst has not been proved to the necessary standard to be the material seized from the premises in Vaini. It is correct, as Mr Tu'utafaiva points out, that this must be proved strictly. The prosecution has proved the chain of continuity in this case and I am satisfied that the exhibits found in the accused's premises were proved to have been delivered to the analyst.

However, counsel's point is that the evidence of those events showed there may have been an opportunity for them to have been tampered with between the seizure and the delivery to the analyst and that is supported by evidence that the nature of the substance seized differed materially from the substance examined by the analyst.

The prosecution evidence was that the exhibits were simply placed in larger plastic bags of the type, which can be closed by pressing together a thickened strip. No attempt was made to seal the bags with any form of police seal which would have to be broken by any person trying to interfere with the exhibits. That is unfortunate and will always leave it open to challenge as to the possibility of the exhibit having been tampered with before the analyst can examine them. The police would be wise to consider instituting such a procedure.

However, I must consider the evidence in this case and decide whether it reveals that the manner in which they were kept by the police may have given an opportunity

for some unauthorised access. Mr Tu'utafaiva points to two matters of evidence in addition to the failure to seal the exhibits.

First, the analyst described the plant material he received from the police as "leaves". In court he looked at the exhibits and agreed they were the material he examined and that they were undoubtedly leaves and nothing else. No seeds or other plant material was present. However, the Drugs Squad officer who received the drugs at the scene, PC Tu'ifua, had described the material in the bag concealed in the stove as consisting of leaves, seeds and branches or buds. As the officer responsible for the custody of the exhibit at the scene, he would have reason to look at it carefully and, as a Drugs Squad officer, he would know the significance of what he saw. Counsel suggests that, if they had seeds and branches then, the absence of those parts later suggests the material delivered to the analyst had been changed. If that exhibit has been interfered with or altered in any way, the court cannot be satisfied that the other exhibits, which the officer told that court were kept with it, were not also altered.

Secondly, Mr Tu'utafaiva points out that the same officer had sole custody of the exhibits after their seizure until he passed them, three days later, to another officer to take to the hospital. He told the court that he kept them locked in his own personal cabinet in the Drugs Squad office. However, the other witnesses from the Drugs Squad told the court that there are no separate cabinets in the office. There is only one cabinet which is used in all such cases and the officer whose exhibit it is will hold one of only two keys as long as his exhibit is kept in there. The other key remains with the head of the Drugs Squad. The officer was questioned about the cabinet by defence counsel and given full opportunity to correct his evidence if he wished but he insisted that he had his own cabinet and kept the drugs in it under lock.

If his evidence is not correct, as the other police witnesses suggest is the case, the court has no reliable evidence of the security of the exhibits. Without that the court must consider whether the prosecution has proved beyond reasonable doubt that the drugs Dr Pakalani analysed had been kept free from interference.

These are very unfortunate discrepancies. The court can only convict if it is satisfied that the evidence presented to it proves beyond reasonable doubt that the material in the possession of the accused was Indian hemp. The only proof that it is Indian hemp depends on the analyst and the court must be satisfied that there is no real doubt that the substance he identified as Indian hemp is the actual, unaltered material taken from the possession of the accused. In this case, the evidence of the place it was kept is inconsistent with the evidence of other police officers in the same office. It is clear the nature of the packaging of the exhibits means that any unauthorised interference could occur without leaving any visible change to the packaging.

Neither of those would, in themselves, necessarily be fatal to the prosecution case without some evidence that there had, in fact, been interference. In this case there is such evidence. The prosecution witnesses themselves have told the court that the substance found in the case of one exhibit was materially different from that delivered to the analyst.

In those circumstances the court cannot be satisfied to the criminal standard that it was the same substance as that taken from the possession of the accused. That doubt must also attach to the other exhibit which had been kept together with it.

The accused must be acquitted.

R v Holani

Supreme Court, Nuku'alofa
Ward CJ
Cr 158/2002

18 and 19 February 2004; 26 February 2004

Criminal law – manslaughter by negligence – duty of care to road users – guilty

The accused was driving a three tonne truck along the Taufa'ahau road heading towards town. The accused overtook two vehicles. Shortly before that, those vehicles had also been overtaken by a red minibus driven by the deceased. She had then indicated left, pulled in to the side of the road almost opposite the entrance to the Golf Club at 'Atele and stopped. As the accused completed overtaking but before he had regained the left side of the road, the red minibus pulled out. As she crossed in front of the truck, the truck ran into the front right side of the minibus. The deceased was thrown out onto the road and her vehicle continued driverless a short way along the road and then crashed through the Golf Club fence and into some bushes before it stopped. The accused was able to stop his truck very shortly on the right side of the road. A passing vehicle took the deceased to hospital where she was pronounced dead shortly after her arrival. There was no dispute that the accident caused the death and that the accused, as a driver of a motor vehicle, owed a duty of care to all other road users. It was a question, therefore, of whether the accused failed to exercise the duty of care he owed others and the degree of that failure and the sole issue for the court was whether the manner in which the accused drove amounted to gross negligence.

Held:

1. In cases of manslaughter by negligence the prosecution must satisfy the court beyond reasonable doubt before there could be a conviction that there was a very high degree of negligence. It needed to prove that the manner in which the accused drove showed a disregard for the life and safety of others.
2. The Court found that the accused was driving a relatively heavy vehicle too fast for that section of the road, he overtook two vehicles at the same time so he was not able to regain his correct side of the road and was therefore unable to take sufficient steps to prevent the collision. Confronted with such a situation he pulled the wrong way thus increasing the chance of a collision. The Court was satisfied that he was driving recklessly and, in so driving, failed in his duty to other road users.

3. The Court was satisfied the manner of his driving taken as a whole amounted to a very high degree of negligence and he was convicted of manslaughter by negligence.

Statutes considered:
Criminal Offences Act (Cap 18)
Traffic Act (Cap 156)

Counsel for prosecution	:	Mr Kefu
Counsel for accused	:	Mr V Foliaki

Judgment

The accused is charged with alternative counts of manslaughter by negligence and reckless driving, contrary to section 92 of the Criminal Offences Act and section 25(2)(a) of the Traffic Act respectively. Both offences relate to the events surrounding a road accident on 7 October 2002 at 'Atele which resulted in the death of Pauline Fatongi Fineanganofo.

The prosecution case is that the accused was driving a three tonne truck along the Taufa'ahau road. He had turned out from the road leading to the Bird Park in Veitongo and was heading towards town. In the truck were two friends and they were all sitting in the front cab.

As they approached the USP Centre, the accused overtook two vehicles. Shortly before that, those vehicles had also been overtaken by a red minibus driven by the deceased. She had then indicated left, pulled in to the side of the road almost opposite the entrance to the Golf Club at 'Atele and stopped.

As the accused completed overtaking but before he had regained the left side of the road, the red minibus pulled out. One of the passengers in the truck gave evidence for the prosecution and told the court that the deceased appeared to be making a U-turn and, as she crossed in front of them, the truck ran into the front right side of the minibus.

The deceased was thrown out onto the road and her vehicle continued driverless a short way along the road and then crashed through the Golf Club fence and into some bushes before it stopped. The accused was able to stop his truck very shortly on the right side of the road.

The accused and his passengers got out of the truck and found the deceased lying on the road obviously alive but grievously injured. A passing vehicle took her to hospital where she was pronounced dead shortly after her arrival. She had died from multiple fractures of the skull including a basal fracture and associated haemorrhaging. There is no dispute that she died as a result of the injuries from the accident.

The truck was damaged on the front left side and the red minibus was damaged on the driver's door and at the rear on the same side.

The prosecution called the driver of one of the vehicles the deceased and the accused had overtaken. She described how the red minibus had overtaken her vehicle and a white car in front at the same time and she then noticed it pulling in at 'Atele. She then noticed there was a white minibus behind her. She was next aware of a blue truck overtaking her car and the car in front of her. It was still on the right hand side

of the road when the red minibus started to pull out and the accident occurred. She had not seen the blue truck until it was actually overtaking her but she was uncertain whether it had overtaken the vehicle behind her at the same time as it overtook her. She was driving at 40-45 kph and estimated that, as it overtook her, the truck was driving at 60 kph.

The accused was interviewed by the police later the same day. He told how he noticed the red minibus at the side of the road parked well onto the grass. As he was about 40 feet away, he noticed it start to move onto the road. He told the police he changed down and drove to the middle of the road to drive past it. However, the van did a U-turn and he saw the driver was a woman. He was, by that time, on the right hand side of the road and his truck struck the minibus on the driver's door. He also said that, at the time he was passing the red minibus, he was doing about 60 kph. He made no mention of the fact he had overtaken the other vehicles. In his written statement he said, "I do feel for what has happened and the death of the woman but I did not expect the van to do a U-turn and I crashed into it."

The accused gave evidence to similar effect. He told the court he had overtaken the other two vehicles but that had occurred by USP and he had regained his correct side of the road by the time he noticed the red minibus start to move. He was 30 feet away at that time and estimated his speed to be 55-60 kph.

As the minibus turned in front of him he saw the lady driving and noticed she was holding a 'phone' to her ear. That had also been noticed by his passenger. He pulled to the right to avoid hitting the minibus but they collided.

On the evidence as a whole I am satisfied beyond reasonable doubt that the accused did overtake two vehicles and was still on the right side of the road when the red minibus started to move. He was driving at 60 kph and that section of the road is limited to a speed of 40 kph.

The damage to the vehicles is puzzling. It is clear that the driver's door of the red minibus took a substantial blow and it is clear it must have been from the left front side of the accused's truck. Viewed in isolation, that could be accounted for by the accused pulling to his right, as he described but it is difficult to account for the substantial damage to the rear of the minibus when only the left front of the accused's truck was involved. I consider that could suggest that the red minibus, once it came onto the road, was driving in the same direction as the accused. In that case, if the truck's left front struck the rear of the minibus at speed by pulling in too quickly, it could have swung the minibus round and deflected the truck to the right sufficiently for the left front to have impacted with the driver's door also.

However, I do not consider that is a clear enough conclusion and I am not sure whether the deceased was simply pulling out into the road or whether she was attempting a U-turn. I therefore take it in the accused's favour that she was making such a turn in front of him. I do not accept that this occurred when the red minibus was only 40 feet away. The accused has told the court that he had time to change down and to brake before the collision occurred. I am satisfied beyond reasonable doubt that, at 60 kph, that would have required a longer distance than 40 feet.

In view of my finding that the deceased may have made a U-turn, it matters little but I did not believe the evidence of the accused and his passenger that she was using a mobile 'phone' and am satisfied beyond reasonable doubt she was not.

As a prudent driver, the accused should not have overtaken when he knew there was a side road. There is no doubt that he would have started his overtaking before

the road to the right by the Jehovah's Witness building and he agreed that the entrance to the Golf Club is as busy as many side roads. The fact he did so overtake did not contribute to this accident but it is evidence of his general standard of driving at the time.

Once the other vehicle pulled out in front of him and started to make a U-turn, he should have pulled to his left. Instead he pulled right and thus turned the way the other vehicle was driving.

As has been stated, there is no dispute that the accident caused the death of this lady and that the accused as a driver of a motor vehicle owes a duty of care to all other road users. It is a question, therefore, of whether the accused failed to exercise the duty of care he owes others and the degree of that failure and the sole issue for the court is whether the manner in which the accused drove amounted to gross negligence.

In cases of manslaughter by negligence the prosecution must satisfy the court beyond reasonable doubt before there can be a conviction that there was a very high degree of negligence. It needs to prove that the manner in which the accused drove showed a disregard for the life and safety of others.

The evidence is such that the court must take it in the accused's favour that he was confronted with a vehicle making a U-turn in front of him when he was very close. If that had occurred when he was driving properly, there would be no question of negligence and the accident may have been prevented entirely. However, in this case, the accused was driving a relatively heavy vehicle too fast for that section of the road, he overtook two vehicles at the same time so he was not able to regain his correct side of the road and was therefore unable to take sufficient steps to prevent the collision. Confronted with such a situation he pulled the wrong way thus increasing the chance of a collision. I am satisfied that he was driving recklessly and, in so driving, failed in his duty to other road users. I am satisfied the manner of his driving taken as a whole amounted to a very high degree of negligence and he is convicted of manslaughter by negligence.

The charge of reckless driving was an alternative count and I therefore give no verdict.

'Ahio v Tilini

Supreme Court, Nuku'alofa
Ward CJ
CApp 13/00

4 March 2004; 5 March 2004

Family proceedings – maintenance assessment – insufficient evidence to determine appeal in full – remitted to Magistrates' Court

In February 2000, the respondent brought an action in the Magistrates' Court and sought $50 per week maintenance for her illegitimate son. The child was born on 8 July 1998 and both parties had attended at the registration of the birth. The case was heard on 19 May 2000 and a maintenance order was made. An appeal was lodged by the father on 30 May 2000. After the appeal was filed in the Supreme Court, the court file was mislaid in the registry and only came to light three months later. There had been no communication with counsel in the case and so it was ordered that the file should be held until the Court heard from the parties or counsel. Nothing happened until the respondent mother came to the registry on 23 January 2004 and asked what had happened to the case. A date was set for chambers and the case proceeded. The appellant submitted that the maintenance was too high because he was unemployed. There was no evidence as to the means of the parties.

Held:

1. The Court was not willing to set aside the order for payment of maintenance for three months but considered the case must proceed as it should have done three months later. The case was remitted to the magistrate to hear evidence of the means of both parties and then to determine the level of maintenance for the future. If the arrears of $180 were not paid by the time of the hearing, the magistrate should also determine and order the appropriate means of enforcement.
2. The Court had a responsibility to 'drive' the case. The previous practice of leaving it entirely to the parties or their lawyers to take any necessary initiative frequently denied the parties justice, as clearly occurred in the present case. It would certainly leave the public with the unfortunate impression that court orders meant little and could be ignored without any serious consequence.
3. The appeal was allowed in part. The case was remitted to the Magistrate to hear evidence of the means of both parties, to determine and order

appropriate maintenance, and to order enforcement of any arrears of the $180 ordered at the previous hearing.

Counsel for plaintiff	:	Mr Fakahua
Counsel for second defendant	:	Mr Niu

Judgment

In February 2000, the respondent brought an action in the Magistrates' Court seeking $50.00 per week maintenance for her illegitimate son. The child had been born on 8 July 1998 and both parties had attended at the registration of the birth. The case was heard on 19 May 2000 and a maintenance order was made. An appeal was lodged on 30 May 2000.

After the appeal was filed in the Supreme Court, the court file was mislaid in the registry and only came to light three months later. There had been no communication with counsel in the case and so it was ordered that the file should be held until the Court heard from the parties or counsel.

Nothing happened until the respondent came to the registry on 23 January 2004 and asked what had happened to the case. A date was set for chambers and the case proceeded.

Although the original claim appeared to be seeking to establish the paternity of the child, it was clear at the hearing that the appellant accepted he was the father. The evidence was that he had initially assisted but stopped giving anything to support the child following rumours that it was not his. Thus, the whole issue at the trial was whether he should pay maintenance and how much that should be.

The appellant's occupation had been a tractor driver but he told the court he had been in involved in an accident and he produced to the court a doctor's letter dated 8 March 2000 stating that he was unfit for that occupation. The letter concluded:

> "He has therefore been advised to refrain from operating tractors to assess the effect of this on his lower back pain.
>
> He will be reviewed in three months time and further recommendations made then".

In his judgment, the learned magistrate confirmed that the appellant was the father and continued:

> "The court accepts that there was an accident but the letter does not have any weight because the doctor did not appear in court to be cross-examined. The court believes that a little work could be done to maintain this son.
>
> Therefore the past maintenance is not accepted. $15 per week to be paid for three months starting Friday (26/5/2000) and to be reviewed."

The sole ground pursued at the appeal was that the maintenance was too high because the appellant was unemployed.

It must be stated at the outset that the parties in this case have not been well served by their lawyers. The evidence called at the Magistrates Court was inadequate

for the claim being made and both counsel gave the impression at the appeal that they had given the papers no more than a cursory glance in preparation for the hearing.

At the Magistrates' Court the respondent gave no evidence of her personal circumstances or those of the child. The respondent produced the doctor's letter but gave no further evidence of the respondent's circumstances except to state that he had married shortly after the birth of this child and had other children.

Since the hearing, the appellant has simply ignored the maintenance order and the respondent has clearly not been advised how to enforce it. Neither party has sought to have the case listed for the review mentioned in the judgment.

At the appeal, neither counsel referred to the means of their clients in their initial submissions. It was only on questioning of counsel by the court that it was ascertained that the maintenance had not been paid, that the respondent has other children and is paying for their schooling and that the child in this case is largely being supported by her parents. Similarly, it only appeared from that questioning that the appellant has not returned to driving a tractor (although it is not known whether that is following further medical review), that he has not attempted to obtain any other employment and that his wife now runs a business exporting mats to American Samoa. As I have pointed out, the trial magistrate was faced with a similar paucity of evidence. With respect, he should either have rejected the claim for that reason or adjourned it with a direction that the parties provide evidence of means. Having rejected the doctor's letter, he was not entitled simply to hazard a guess that the appellant was fit enough for some form of work.

I do not understand his admission of the letter and then his apparent rejection of its contents especially as the terms of his order would suggest the review after three months was based on the doctor's intention to have a medical review after a similar period. However, the letter had been written more than two months before the hearing and so the choice of three months may have arisen for some other undisclosed cause.

I am not willing to set aside the order for payment of maintenance for three months but I consider the case must proceed as it should have done three months later. I remit the case to the magistrate to hear evidence of the means of both parties and then to determine the level of maintenance for the future. If the arrears of $180.00 are not paid by the time of the hearing, the magistrate should also determine and order the appropriate means of enforcement.

Finally I would remind all magistrates that in all such cases where an order is made which requires a subsequent hearing, such as the review in this case, he should fix the date of the adjourned hearing at the same time. Experience shows that, all too often, the lawyers fail to follow up the order if it is left to them to make the arrangements.

It is increasingly recognised that the court has a responsibility to 'drive' the case. The previous practice of leaving it entirely to the parties or their lawyers to take any necessary initiative frequently denies the parties justice, as clearly occurred in the present case. It will certainly leave the public with the unfortunate impression that court orders mean little and can be ignored without any serious consequence.

Appeal allowed in part. Case remitted to the Magistrate to hear evidence of the means of both parties, to determine and order appropriate maintenance and to order enforcement of any arrears of the $180.00 ordered at the previous hearing.

I make no order for the costs of this appeal but I order that the lawyers shall charge no further fees for the hearing of the remitted case or its preparation.

MBf Bank Ltd v Fonua anor

Land Court, Nuku'alofa
Ward CJ
LA 11/2003

26 February 2004; 25 March 2004

Civil procedure – application for security for costs – by plaintiff – application refused

The plaintiff sought a declaration of its right to land in respect of which it held a mortgage. The mortgagor defaulted and absconded so the plaintiffs took action to obtain possession of the property. However, the first defendant claimed to be the present lessee of the land and took possession of it thereby prompting the need for action. The plaintiff applied for security for costs against the first defendant. Counsel for the plaintiff accepted it was unusual for the plaintiff to make such an application but suggested the court may properly make such an order in circumstances such as are found in this case. He suggested that, although the Bank was the plaintiff, it was forced to defend its position in relation to the leased property by the unlawful acts of the defendant and therefore found itself in the position of a reluctant plaintiff. The defendant submitted that the rule limited such an order to payment by a plaintiff of the likely costs of the defendant.

Held:

1. It may well be that the actions of the first defendant forced the plaintiff to protect its interests by bringing this action but that did not place it in the position of a defendant. Many actions that sought civil remedies in court were based on an alleged infringement of the rights of the party that brought the action and were brought as the only way to protect those rights. If the plaintiff's argument in this case was correct, anyone who brought such a case could claim to have been forced into the position of a plaintiff thus allowing him to seek security as if he was a defendant.
2. An intended plaintiff must take the defendant as he found him and must determine the value of pursuing him before bringing the action. The application was refused with costs to the first defendant in any event.

Rules considered:

Land Court Rules 1991
Supreme Court Rules 1991

Counsel for plaintiff : Mr Afeaki
Counsel for defendants : Mr Niu

Ruling

The plaintiff seeks a declaration of its right to land in respect of which it held a mortgage. The mortgagor defaulted and absconded so the plaintiffs took action to obtain possession of the property. However, the first defendant claims to be the present lessee of the land and has taken possession of it thereby prompting the need for this action.

The plaintiff has now applied for security for costs against the first defendant.

Counsel for the plaintiff accepts it is unusual for the plaintiff to make such an application but suggests the court may properly make such an order in circumstances such as are found in this case. He suggests that, although the Bank is the plaintiff, it has been forced to defend its position in relation to the leased property by the unlawful acts of the defendant and therefore finds itself in the position of a reluctant plaintiff.

The Land Court Rules 1991, make no provision for payment of security for costs but, by Order 2 rule 2, the procedure set out in the Supreme Court Rules shall apply.

The circumstances in which such an order may be made under the latter Rules are set out in Order 17, rule 1:

> "Rule 1. Where on the application of a defendant to any proceeding it appears to the Court that:
>
> (i) the plaintiff is ordinarily resident out of the jurisdiction, or
> (ii) the plaintiff may be unable to pay the costs of the defendant if ordered to do so, or
> (iii) the plaintiff has not disclosed his true address to the Court,
>
> the Court may, if having regard to all the circumstances of the case it thinks just to do so, order that the action be stayed until the plaintiff gives security for the defendant's costs of the action in such sum and in such manner as the Court may determine."

Rule 2 provides only for variation of an order once made.

The wording of that rule clearly limits such an order to payment by a plaintiff of the likely costs of the defendant. Mr Niu, for the first defendant, submits that is an end of the matter in this case.

Mr Afeaki, for the plaintiff, submits that the plaintiff is de facto acting as a defendant. It had no choice but to act by filing a claim because the first defendant had taken the law into his own hands and unlawfully entered into possession of the land. The plaintiff was, he suggests, forced to use the sword of the law as a shield to protect its rights.

When the original application was lodged it was supported by an affidavit from the Head of Credit Operations from the plaintiff bank in which she deposed to her

belief that the first defendant was resident in New Zealand and that it was not he who was occupying the property but his relatives.

When the application for security for costs was first filed, the court set a chambers hearing for 20 February 2004 but that was altered to 26 February when counsel for the plaintiff, who is normally resident in New Zealand, was in difficulty over the first date as the result of a clash of fixtures.

On 19 February 2004, the first defendant filed written submissions in opposition and the application was heard in chambers. I reserved my ruling on the application until 18 March 2004 but, on 11 March 2004 the plaintiff filed further submissions in support of its application. No formal application for leave was made but the submissions requested leave in these terms:

> "3. Counsel was somewhat surprised that at Chambers, His Honour called for submissions on the matter of the present application. This is because Counsel had filed a Notice of Motion for a hearing in the belief that His Honour was going to set the matter down for a hearing with evidence and cross-examination if necessary of the Plaintiff's witness, Mrs Hala'api'api, and of any other witnesses, such as the First Defendant.
>
> 4. ....
>
> 5. Counsel also notes that His Honour believed that some further investigation of the matter was warranted and therefore deferred ruling on the matter until 18 March 2004.
>
> 6. Therefore in the circumstances at Chambers on 26 February, Counsel was not prepared to make full submissions and therefore seeks the Court's leave to accept these supplementary submissions in support of the Application and the Affidavit to be filed in support hereof."

I find this a remarkable statement. This was an interlocutory application and the opposition of the first defendant was based on a submission of law. It would only be in a most exceptional case that the court would seek to hear live evidence on such a matter. Counsel's duty is to attend any court hearing prepared to deal with the case in whatever manner the court wishes. The date of this hearing had been changed to allow counsel to attend from New Zealand, as he did. If he considered that the chambers hearing was simply to set a date to hear evidence, it was surprising that he should have considered it necessary or justified to attend in person. I find it equally remarkable what when the court stated that the ruling would be reserved, it was interpreted by counsel as demonstrating a belief that the court felt some further investigation of the factual matter was warranted.

If counsel is not properly prepared for a hearing, the court will not usually allow further time. However, in view of counsel's frank admission that he had misunderstood the procedures here in Tonga, I have read his further submission and the further affidavit in support. I have not sought further submissions from Mr Niu as I regard this decision as one of law and it is clear Mr Niu fully understood the basis of that submission by the plaintiff and was prepared to answer it on 26 February.

Mr Afeaki submits that the affidavits filed by the plaintiff show that, in terms of O17 r 1, the plaintiff has demonstrated that the first defendant has fallen foul of paragraphs (i) and (iii). In terms of paragraph (iii), Mr Afeaki submits that the first defendant "has not disclosed his true address to the Court, and appears to maintain that he is of Nuku'alofa, Kingdom of Tonga".

I find it difficult to understand how he can place the responsibility for that on the first defendant. The statement of claim described the first defendant in the title as "Paula Fonua of Nuku'alofa, Kingdom of Tonga" and, in paragraph 2, stated, "the first defendant is Mr Paula Fonua of Nuku'alofa". The defence continued, properly, to use the same title for the action and went on to admit the second paragraph. Presumably, at the time the writ was filed, the plaintiff intended to prove that fact if it had not been admitted by the first defendant.

Yet the plaintiff's second submissions for security for costs has an altered title in which the first defendant is described as "Paula Fonua of Auckland, New Zealand". There has been no application to make such an amendment and it is a most unfortunate step for counsel to have taken without leave especially when it relates directly to one of the matters in dispute.

However, as I have already stated, the determination of this application is one of law first and foremost. It is only if I find that the Rules give me the power to accede to the plaintiffs application that I shall need to consider the evidence of the first defendant's circumstances or the merits of the claim - with which the second submission deals in some detail and which is not a matter for this stage in the proceedings.

Mr Afeaki frankly admits that the wording of O17 r 1 only gives the right to apply for security for costs to a defendant but he submits that the terms of O23 of the English Rules in force prior to 1998 should apply. Our O 17 is expressed in similar terms and was clearly derived from it. It is appropriate to set it out O 23 rr 1 and 2 in full:

> "1. (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court –
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction, or
>
> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or
>
> (c) subject to paragraph (2) that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or
>
> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,
>
> then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give

such security for the defendant's costs of the action or other proceeding as it thinks just.

(2) The Court shall not require a plaintiff to give security by reason only of paragraph (1) (c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

2. Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time, and on such terms (if any) as the Court may direct."

By O 2 r 2 (2) of the Supreme Court Rules in Tonga:

"(2) Where there is no provision in these rules the rules of procedure for the time being in England shall apply."

The rules of procedure in England for the time being are the 1998 Civil Procedure Rules where security for costs is dealt with in rr 25.12 – 21.15. Much of the procedure there is similar to the previous order but there is no equivalent to O 23 r 1 (3).

However, Mr Afeaki relies on the terms of O 23 rule 1 (3) and not the present English rules although, surprisingly perhaps, he asks the court, when interpreting O 23, to apply the principles stated in r 1.1 of the 1998 rules under the heading "The overriding objective".

He states that his researches have not revealed why or when the wording of O 17 was changed from the original English O 23 and asks the court to accept that O 23 r 1 (3) should therefore apply.

I disagree. It is perfectly clear that the Tongan Rules were drafted in 1991 and, as has been stated, were based on the English rules. O 2 r 2 (2) is a saving provision to cover any area where our Rules are silent. A comparison of the wording of the English O23 and the Tongan O17 shows that the wording was modified presumably to suit the conditions here. As part of such a redrafting, I have no doubt the omission of r 1 (3) was deliberate. There is provision in our rules for security for costs and there is no reason therefore to invoke the saving of O 2 r 2 (2).

At the same time, it is always open to the court here to consider the rules from which the Tongan Rules were derived in order to decide the meaning or application of our rules and I have considered the English authorities relating to O 23 r 1 (3). I only add that, had I considered r 1 (3) did apply in Tonga, I would still have refused this application as the English authorities do not support the granting of an order in a case such as this

The thrust of the plaintiff's application is that this is a case in which the plaintiff is effectively the defendant but was forced into the position of plaintiff in order to preserve its rights to the property in question. It may well be that the actions of the

first defendant forced the plaintiff to protect its interests by bringing this action but that does not place it in the position of a defendant. Many and possibly the majority of actions seeking civil remedies in court are based on an alleged infringement of the rights of the party bringing the action and are brought as the only way to protect those rights. If the plaintiff's argument in this case is correct, anyone bringing such a case could claim to have been forced into the position of a plaintiff thus allowing him to seek security as if he was a defendant.

Any person contemplating pursuing an action in court must consider the means and substance of the person he is suing. He takes the defendant as he finds him and must determine the value of pursuing him before bringing the action.

The application is refused with costs to the first defendant in any event.

R v Tohifolau

Supreme Court, Nuku'alofa
Ward CJ
Cr 15/2002

21 and 22 January 2004; 26 March 2004

Criminal procedure – inaccurate indictment – convicted of parts proved and stated in indictment

In November the police searched the house that the accused was living in with his mother. Indian hemp (leaves and seeds) was found and empty plastic bags. The accused was interviewed by the police on 19 November 2001. He agreed that a pack of marijuana leaves and seeds were found under the bed and that they were his. The various items found in the search were then shown to him and he confirmed they had been found then. He described them, at the request of the interviewing officer, as marijuana seeds, 2 plastic bags of marijuana leaves, the half smoked marijuana roll, plastic bags which were left at home by kids. He also agreed that the seeds and the marijuana were his. The accused was charged with one count of possession of Indian hemp contrary to the Drugs and Poisons Act. The prosecution evidence described the discovery of Indian hemp during the execution of a search warrant, but it did not match the circumstances as set out in the particulars. The defence submitted that the variation was so substantial that the prosecution could not be found to have proved the offence charged.

Held:

1. The indictment was carelessly and inaccurately drafted. Counsel for the prosecution had a responsibility to ensure that the indictment stated the offence and the grounds for the charge as accurately as possible in relation to the evidence that was to be adduced. Counsel clearly failed to do so. The result was that the accused could well have misunderstood the actual nature of the charge he faced.
2. If on the evidence produced at the trial, the Court was satisfied to the criminal standard that some of the matters alleged in the particulars of charge were proved but not others, it was entitled to convict on the limited basis of those items actually proved. The Court did not accept that, in any case where the evidence failed to prove every detail of the particulars, the Court must acquit and could not convict of such parts as were proved.
3. The Court was satisfied beyond any doubt that the accused was in possession of 38 Indian hemp seeds on the date of the search and he was

convicted of that possession. The evidence clearly established that only three were in plastic bags and they were certainly not in 55 bags but that does not alter the fact that the accused was in possession of those seeds. He was convicted accordingly.

Statute considered:
Drugs and Poisons Act (Cap 79)

Counsel for plaintiff	:	Mr Fakahua
Counsel for second defendant	:	Mr Niu

Judgment

The accused is charged with one count of possession of Indian hemp contrary to section 36 (b) of the Drugs and Poisons Act. The particulars of offence state:

> "Ngalu Tohifolau, on or about 16th November 2001, at Tofoa, was found in possession of 55 small plastic bags containing Indian hemp leaves and 40 Indian hemp seeds."

Although the prosecution evidence described the discovery of Indian hemp during the execution of a search warrant, it did not match the circumstances as set out in the particulars. The defence has submitted that the variation is so substantial that the prosecution cannot be found to have proved the offence charged.

The Indian hemp was found during the search of the house where the accused was living with his mother. The accused was present throughout and the officers searched his room first. In a drawer in that room one of the officers found 55 empty plastic bags and, under some clothes, a single bag containing a small quantity of leaves. In the same place was an ashtray upon which was a single cigarette butt. Another officer found a further bag of leaves under the mattress. A third officer, who was not called, was said by other officers to have found "about 20" loose seeds under the bed and a small plastic bag containing two seeds.

At the time, the accused said the butt was simply from a cigarette made from Port Royal and the plastic bags had been found in the market but he admitted that the leaves and seeds were marijuana and were for his use.

The search then moved to the veranda where 14 more empty bags were found on a table. On the same table were 15 loose seeds. On a windowsill was a bongo pipe with some leaves in it and a further bag containing 1 seed was found on a washing machine nearby.

In another room of the house, one witness stated "various plastic bags" were found and one bag contained 2 seeds.

A search list was kept at the time. That list includes the 14 bags found on the veranda but describes them as containing 15 seeds. The evidence, as has been stated, was that they did not. Besides the 14 plastic bags it also includes another item stated to be, "2 empty large plastic bags, 4 empty medium plastic bags, 1 medium plastic containing 2 seeds and marijuana leaves, 1 medium bag containing 73 small bags".

The accused was interviewed by the police on 19 November 2001. He agreed that a pack of marijuana leaves and seeds were found under the bed and that they were his. The various items found in the search were then shown to him and he

confirmed they had been found then. He described them, at the request of the interviewing officer, as marijuana seeds, 2 plastic bags of marijuana leaves, the half smoked marijuana roll, plastic bags which were left at home by kids. He also agreed that the seeds and the marijuana were his.

The items were taken for examination by the forensic scientist on 22 November 2001. He examined a bag containing two cigarette butts and found them to be positive for Indian hemp although there was no explanation of the origin of the second one. He also confirmed that the leaves in two plastic bags and the fragments in the bongo were also Indian hemp and similarly he examined a total of 38 seeds all of which were Indian hemp.

The accused did not give evidence or call witnesses.

Mr Tu'utafaiva for the accused asks the court to consider that the variations in the evidence of the materials examined and the wording of the indictment are so extreme that the prosecution cannot be said to have proved the case as stated in the indictment.

The case was adjourned for further submissions.

Mr Tu'utafaiva refers to clause 11 of the Constitution which includes the requirement that the indictment upon which any person is to be tried "shall clearly state the offence charged against him and the grounds for the charge". He also points out that clause 13, under a marginal heading "Charge cannot be altered", provides that "no one shall be tried on any charge but that which appears on the indictment ... for which he is being brought to trial". The clause then sets out the four main exceptions to that provision none of which are relevant to the present case.

Defence counsel submits that our law contains no specific power to amend an indictment corresponding to the provisions of the Indictments Act in England. By the terms of the recent Civil Law (Amendment) Act, the English Act can no longer apply to Tonga and the provisions of clause 11 and 13 prevent the court from considering or allowing any such amendment.

With respect to counsel, this case does not involve amendment of the indictment or an application to do so. The interesting question of whether or not there is such a power must await another day.

What is in issue here is whether, in a case where the indictment seriously misstates the allegation, it is possible for the court to convict.

There is no doubt that the indictment in this case was carelessly and inaccurately drafted. Counsel for the prosecution has a responsibility to ensure that the indictment states the offence and the grounds for the charge as accurately as possible in relation to the evidence that is to be adduced. In this case, counsel clearly failed to do so. The result is that the accused could well have misunderstood the actual nature of the charge he faced. Had counsel for the accused sought an adjournment of the hearing because the nature of the evidence as it unfolded had taken him unawares, it would have been a proper request and would, in circumstances as clear as this case, have been granted.

However, the indictment does clearly state the offence as possession of Indian hemp and the relevant statutory provision. There can be no complaint with that. The particulars also certainly refer to the possession of 40 Indian hemp seeds. The serious inaccuracies occur in relation to the circumstances in which they were found; namely, that they were packed in the 55 bags and that there were 40 seeds when only 38 were proved to have been found.

If on the evidence produced at the trial, the court is satisfied to the criminal standard that some of the matters alleged in the particulars of charge have been proved but not others, it is entitled to convict on the limited basis of those items actually proved. I cannot accept that, in any case where the evidence fails to prove every detail of the particulars, the court must acquit and cannot convict of such parts as are proved.

That is the case here. The prosecution evidence related to an additional quantity of Indian hemp which was not mentioned in the indictment. If the court finds it proved that the part charged was in the accused's possession, it has the power to convict of that. It does not, whatever the evidence reveals as to any additional Indian hemp, have any right to convict of possession of that. In this case, so far as the difference relates to the quantity, the court can convict of the quantity charged.

The remaining details were undoubtedly misleading but they were additional information and it was not necessary to include them in the particulars of charge at all. I assume they were added to give the accused a clearer idea of the case the prosecution was presenting against him. If so, they unfortunately failed. The suggestion in the particulars of offence that the seeds were all packed in small bags is of considerable significance in relation to the possibility that the accused was dealing in the drug but the evidence does not support those particulars.

The alternative submission by counsel for the defence is that, if the court has the power to amend the indictment, it is discretionary and it should only be done where the justice of the case requires it. My finding means that, in this case, it is not necessary to amend the indictment in order to be able to convict and so it is not necessary to determine this submission.

I rule, therefore, that the case can proceed on the charge in the indictment.

On the evidence as a whole, I am satisfied beyond any doubt that the accused was in possession of 38 Indian hemp seeds on the date of the search and he is convicted of that possession. The evidence clearly establishes that only three were in plastic bags and they were certainly not in 55 bags but that does not alter the fact that the accused was in possession of those seeds.

He is convicted accordingly.

Tonga v Halapua

Supreme Court, Nuku'alofa
Ward CJ
FD 107/02

19 March 2004; 14 April 2004

Dissolution of marriage – both parties need to intend to renew marital relations – only one party in this case – decree nisi granted

The petitioner married his wife on 24 May 1969 in the Anglican Church in Nuku'alofa. There were three children from the marriage all of whom were over 25 years of age. There was no dispute that the petitioner left the respondent in October 2000. He went to live with another woman in 'Eua by whom he had a child. After the petitioner left the respondent, the latter spoke to the petitioner by telephone and travelled across to 'Eua a number of times to see him. It was apparent that she has hoped by such contacts to restore their relationship. She told the court that she would like to have him back home and that the children share that wish. He, on the other hand, was adamant that he would never go back. This was a contested petition for divorce on the ground of separation for more than two years.

Held:

1. If separation for the requisite period was proved, proof that one of the parties to the marriage had not maintained or intended to maintain or renew normal relations was sufficient whatever the wish or intention of the other party.
2. The Court found that there was no dispute about the period of separation. It was clear that the petitioner had not maintained and had no intention to maintain or renew normal marital relations with the respondent and held that position since he left.
3. The decree nisi was granted.

Statute considered:
Divorce Act (Cap 29)

Counsel for petitioner : Mr Piukala
Counsel for respondent : Mr Foliaki

Judgment

This is a contested petition for divorce on the ground, under section 3(1)(f) of the Divorce Act (Cap 29), of separation for more than two years.

The petitioner married his wife on 24 May 1969 in the Anglican Church in Nuku'alofa. There were three children from the marriage all of whom are now over 25 years of age.

There is no dispute that the petitioner left the respondent in October 2000. He went to live with another woman in 'Eua with whom he still lives and by whom he has had a child.

The respondent is living on her deceased father's 'api to which her brother is the heir. The two unmarried oldest children of the marriage, a daughter and a son, live with her. The youngest daughter is married and at the University of the South Pacific in Fiji.

The petitioner's house is let and the rent is paid to the respondent. There are financial issues to be decided but they will be dealt with on affidavits in chambers. The hearing in court was devoted solely to the question of the dissolution of the marriage.

It is clear on the evidence that, since the petitioner left the respondent, the latter has spoken to her husband on the telephone and has been across to 'Eua a number of times. It is apparent that she has hoped by such contacts to restore their relationship. She told the court that she would like to have him back home and that the children share that wish. He, on the other hand, is adamant that he will never go back.

Both parties gave evidence and there is no doubt both were truthful.

The petitioner seeks a divorce because he has started a new home and family. He told the court repeatedly that he has no intention of returning to the respondent and that has been the position ever since he left in October 2000. At that time he took a decision to abandon his previous marriage and to start another relationship and he intends to continue with it. He has made arrangements to support his wife and there appears to be no intention to resile from that obligation.

The respondent wishes to preserve the marriage for two reasons both of which I accept are genuine and deeply felt. She still loves the petitioner. She knew nothing of his affair until the moment he left. It was a great shock and to a large extent she is still trying to pick up the pieces. Despite his actions over the last three years or so, she believes she could still have him back as her husband. That belief is strengthened by her religious objection to divorce.

She is an Anglican. Her father was a bishop in that persuasion and she was brought up in a devout Anglican home. She believes that the marriage vow is a binding commitment for life. She made it in that belief and cannot accept that, if she is divorced, she can ever hold the same position in the church again. There can be little doubt that, in this case, she is the innocent party and I trust that the members of her congregation will understand her position.

The petitioner does not challenge the genuine strength of his wife's beliefs but his position is that Christian beliefs are individual. He summed up his position to the court with the statement, "I believe what I believe and she believes what she believes".

I have dealt with that aspect of the case because it is there that the real division lies. However, whilst the court must hear and consider these matters, they are not the

core of the decision it must make which is whether the parties have separated without a mutual wish to resume normal marital relations.

Section 3(1)(f) provides that it is a ground to dissolve a marriage if there is evidence:

> "(f) that the respondent and petitioner have been separated for a continuous period of 2 years or more immediately preceding the presentation of the petition without both of them maintaining or intending to maintain or renew normal marital relations or co-habitation with each other."

This is unlike the grounds for divorce which require proof of a matrimonial offence such as adultery, wilful desertion or unreasonable behaviour. Under subsection (1)(f), the petitioner has only to satisfy the court that the parties have been separated for the period of 2 years or more immediately prior to the petition and that, during that period, there has not been a mutual maintenance of or intention to maintain or renew normal marital relations. The wording of the provision with its reference to "both of them" makes it a ground which can be proved by unilateral conduct or intent. Thus, if separation for the requisite period is proved, proof that one of the parties to the marriage has not maintained or intended to maintain or renew normal relations is sufficient whatever the wish or intention of the other party.

In this case, there is no dispute about the period of the separation. On the evidence I have heard, it is clear that the petitioner has not maintained and has no intention to maintain or renew normal marital relations with the respondent and has held that position since he left. The evidence of their beliefs and attitudes is relevant only to the determination of that fact.

As I have stated, I have no doubt about the genuine strength of the respondent's beliefs nor that my decision runs counter to those. However, the law only requires the court to be satisfied that it has not been the wish and intention of both the parties during the period of separation to maintain the marriage. I am so satisfied and there shall be a decree nisi.

I shall adjourn the question of financial provisions to chambers at a date to be agreed and shall then set a timetable for the provision of affidavit evidence. There can be no decree absolute until those matters are resolved.

Fu v Giant Turtle Investments Ltd

Land Court, Nuku'alofa
Ward CJ
L 02/2004

28 April 2004; 28 April 2004

Landlord and tenant – whether air conditioning unit was fixture – ruled that it was fixture

As part of a dispute arising from the termination of the plaintiff's tenancy of premises belonging to the defendant, a question arose as to whether two air conditioning units left on the premises were fixtures. The first, smaller unit was installed by the landlord and it was clear that it was a fixture. The second and more substantial unit was installed by the tenant. It was very large and was approximately 5-6 feet high. It stood on the floor resting on two wooden battens. It was not possible to see if they were fixed to the floor or whether the machine itself was fixed to them. It was unlikely as the whole structure was undoubtedly heavy and needed no further restraint. It required the installation of its own separate electric power supply to which it was connected by a plug and flexible cable. It had a water supply which was piped to and away from it by a series of plastic pipes. The supply pipes were taken from the water tank outside the building, brought down the outside of the wall, across the building under the floor, through a hole cut in the floorboards and thence across the floor to the unit. Other pipes were taken out through the wall by breaking a rough hole in the exterior cladding of the building.

Held:

1. In general terms, if an object was attached simply by its own weight, it would not be considered a fixture unless it was shown that the intention was to make it part of the premises.
2. In making its determination, the court considered the purpose for which it was placed there. If it was placed there for the substantial and permanent improvement of the premises, it may be a fixture. The court may also consider whether the unit could be removed without any substantial damage to, or alteration of, the premises. The general rule was that, if it could be removed without irreparable damage, the degree of damage was irrelevant. However, the manner of installation and the extent and nature of the damage that will be caused by its removal may be relevant to the determination of the intention of the tenant when he installed it.

3. The Court was satisfied that the installation was such that it was intended to make it a permanent improvement. If it were to be removed the defendant would be left with permanent pipe work with no purpose and surrounding damage caused by the manner in which it had been installed. If the pipe work was removed, the floor and the wall would need repair going beyond minor correction.
4. The Court ruled that the larger air conditioning unit was a fixture and became part of the premises. It was, therefore, the property of the defendant and must be left.

Counsel for plaintiff : Mr Niu
Counsel for defendant : Mr Afeaki

Ruling

As part of a wider dispute arising from the termination of the plaintiff's tenancy of premises belonging to the defendant, a question has arisen whether two air conditioning units left on the premises are fixtures. If they are, there does not appear to be any dispute that they are landlord's fixtures.

The first, smaller unit was suggested to be one of two similar units on the premises. It was accepted that, at the commencement of the tenancy, there was one such unit but that the tenants had installed another. When the court inspected the premises, there was only one such unit. Mr. Niu concedes that it must, therefore be treated as that installed by the landlord. I agree but, in any event, it is clear it is a fixture.

The second and very much more substantial unit was undoubtedly installed by the tenant. It is a very large structure approximately 5-6 feet high and well over that height if a wooden extension is included. It is stands on the floor resting on two wooden battens. It is not possible to see if they are fixed to the floor or whether the machine itself is fixed to them. I think it is unlikely as the whole structure is undoubtedly very heavy and needs no further restraint.

In itself, it would not appear to be a fixture. However, the manner in which it has been installed is suggested by the defendants to make it a fixture. It has required the installation of its own separate electric power supply to which it is connected by a plug and flexible cable. It has a water supply which is piped to and away from it by a series of plastic pipes. The supply pipes have been taken from the water tank outside the building, brought down the outside of the wall, across the building under the floor, through a hole cut in the floorboards and thence across the floor to the unit. Other pipes, which would appear to be the exit pipes, have been taken out through the wall by breaking a rough hole in the exterior cladding of the building.

It is clear that the building was leased for use as a restaurant and the unit was to provide for the air conditioning of the whole of the public part of the premises.

In general terms, if an object is attached simply by its own weight, it will not be considered as a fixture unless it is shown that the intention was to make it part of the premises.

In determining that, the court must consider the purpose for which it was placed there. If it was placed there for the substantial and permanent improvement of the premises, it may be a fixture. The court may also consider whether the unit can be

removed without any substantial damage to or alteration of the premises. The general rule is that, if it can be removed without irreparable damage, the degree of damage is irrelevant. However, the manner of installation and the extent and nature of the damage that will be caused by its removal may be relevant to the determination of the intention of the tenant when he installed it.

In this case, as has been stated, the unit was clearly not affixed to the wall or floor of the premises. However, the manner in which it had been installed does suggest it was installed as a permanent improvement of the premises. The provision of a special electricity supply does not necessarily make it a fixture but the reasonably extensive piping of a water supply points the other way.

I have no doubt that it is possible to remove the unit without any real risk of damage to itself but the premises will be left with the pipe work and the permanent damage to the building caused by its badly executed installation.

In the end, I find that the critical factor. I am satisfied that the installation was such that it was intended to make it a permanent improvement. If it were to be removed the defendant would be left with permanent pipe work with no purpose and surrounding damage caused by the manner in which it had been installed. If the pipe work is removed, the floor and the wall will need repair going beyond minor correction.

I rule therefore, that the larger air conditioning unit is a fixture and has become part of the premises. It is, therefore, the property of the defendant and must be left.

R v Makahununiu

Supreme Court, Nuku'alofa
Ward CJ
Cr 293/2003

29 and 30 April 2004; 30 April 2004; 26 May 2004

Criminal law – theft – dishonest intent must be at time of taking - acquitted
Criminal law – false pretences – operating on mind of deceived – not established

On 23 March 2001, Mr Kik Velt deposited a number of cheques amounting to $5,160 into his account at the Westpac Bank of Tonga. The cashier on duty at that time entered the details of the deposit into the computer but misrecorded part of the number of Mr Velt's account. Although the deposit was written into Mr Velt's passbook, the $5,160 was wrongly credited to the savings account of the accused. In the morning of 20 August 2001, the accused went to the bank with his passbook. It recorded a total balance of $305 and he withdrew $250 leaving a balance of $55. However, the teller noticed there was difference with the total in the computer of $5,160 and so she entered the additional credit into the passbook before handing it back to the accused. That afternoon, the accused went to another branch and withdrew $5,000. On 1 November 2001, Mr Velt went to the bank and it was noticed that the figure in his passbook did not match the figure in the bank's records. The mistake was found and the teller who made the original mistake was asked to follow the matter up. The teller went to see the accused at his home the same day and explained what had happened. The accused agreed to contact the bank the next day but did not appear. The teller returned but was only able to speak to the accused's wife. The teller suggested the best course would be to take out a loan to repay the money. Some days later the accused and his wife went to the bank and spoke to one of the officers. Again there was no contact for some days and so the teller went to see him to ask him to sign the loan forms. The accused declined, saying there were things he had to think about first. Thereafter there was no contact and the police were informed. The accused said he thought the money had been deposited to his account by his parents in the United States of America. The accused was charged with one count of theft, contrary to section 143(a) of the Criminal Offences Act, and one of obtaining money by false pretences, contrary to section 164 of the same Act. He pleaded not guilty to both.

Held:

1. The rule in all cases of false pretences was that the prosecution must prove that the false pretence operated on the mind of the person deceived and induced the passing of the property. It was normally necessary to prove it by direct evidence from the person deceived and was only in the most obvious cases that this did not need direct evidence. There was no clear evidence as to the actual false pretence nor was there evidence as to what false sentence induced the cashier to part with the money. The Court found there was no case to answer on the false pretences count.
2. With respect to the count of theft, the Court was not satisfied on the evidence that the prosecution proved that he knew the money was not his when he withdrew it from his account. The fact he went the same day to a different branch and withdrew nearly all the extra money and then, although he thought it was sent by his mother to pay for the new house, he spent nearly all of it on personal items all gave rise to strong suspicion but that was not enough.
3. To be theft the dishonest intent must be present at the time of the taking. If the taking was done in the belief that the taker had a right to the property, the offence was not committed. Should he subsequently realise he had no right to the property and dishonestly decide to keep it for himself he does not commit theft because the taking has already occurred. Clearly, in such an action, he had no colour of right but that could not make his subsequent appropriation a dishonest taking in terms of the legislation.
4. The Court was satisfied beyond any doubt that the accused realised soon after he took the money that it was not his but the Court was not satisfied to the criminal standard that he knew when he took it from the cashier. He was acquitted of theft.

Cases considered:

R v Lambie [1981] 3 WLR 88
R v Laverty [1970] 54 Cr App R 495
R v Tirado [1974] 59 Cr App R 80

Statutes considered:

Criminal Offences Act (Cap 18)
Larceny Act 1916 (UK)

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

Judgment

This accused was charged with one count of theft, contrary to section 143(a) of the Criminal Offences Act, and one of obtaining money by false pretences, contrary to section 164 of the same Act. Both counts related to the same events and he pleaded not guilty to both.

At the end of the trial, I acquitted him but, because the court was due to start the circuit in Vava'u the next day, I stated I would give my reasons in writing on my return. I now do so.

On 23 March 2001, Mr. Kik Velt deposited a number of cheques amounting to $5,160 into his account at the Westpac Bank of Tonga. The cashier on duty at that time entered the details of the deposit into the computer but misrecorded part of the number of Mr Velt's account. Instead of entering the first part of the account number as 01.241..., he wrote 01.291... Although the deposit was written into Mr Velt's passbook, the money was wrongly credited to account 01.291... in the bank's records.

The savings account with that number belonged to the accused and so, on the computer record, it was credited with an extra $5,160.

Five months later, in the morning of 20 August 2001, the accused went to the bank with his passbook. It recorded a total balance of $305 and he withdrew $250 leaving a balance of $55. However, the teller noticed there was difference with the total in the computer of $5,160 and so she entered the additional credit into the passbook before handing it back to the accused. She said she should have checked before doing so but, as she had only been a cashier for a month or so, she did not.

It was suggested by counsel for the defence that the accused asked about the additional sum and was told that it was money which had been wired from abroad. The bank witness denied that and insisted that she simply filled in the book, handed it to him without saying anything and he took it without comment.

This had occurred at the branch of the bank near Pangai. However, that afternoon, the accused went to the Railway Road branch and withdrew $5,000. The procedure for a sum of that size was that it had to be authorised. As the new total in the passbook corresponded with the computer account, the authority was obtained, the money paid to the accused and he left.

More than two months passed until, on 1 November 2001, Mr Velt came into the bank and it was noticed that the figure in his passbook did not match the figure in the bank's records. Needless to say he complained. The mistake was found and the teller who made the original mistake was asked to follow the matter up.

He went to see the accused at his home the same day and explained what had happened. The accused agreed to contact the bank the next day but he did not appear. The teller returned but was only able to speak to the accused's wife. She suggested the best course would be to take out a loan to repay the money.

Some days later the accused and his wife went to the bank and spoke to one of the expatriate officers. Again there was no contact for some days and so the teller went to see him to ask him to sign the loan forms. The accused declined, saying there were things he had to think about first. Thereafter there was no contact and the police were informed.

There was some dispute as to the conversation between the teller and the accused on 1 November 2001 but the teller did agree that the first time they spoke the accused said he thought the money had been deposited to his account by his parents in the United States of America. The witness also agreed that it was common for money to be deposited from abroad to accounts of customers in Tonga. When that is a passbook account as in this case, the new amount will be added to the customer's passbook when he next attends the bank.

The accused was seen by the police shortly after these events. It is not clear on the evidence what happened to the investigation after that. However, in March 2003,

the accused was again interviewed by the police. Remarkably, the interview took place after the accused had appeared on summons in the Magistrates' Court for this offence. That is a procedure which should only be use in exceptional circumstances and I consider it was wrong to do so in the way it occurred here. A number of other objections were raised to the manner in which that interview was conducted. I do not go into them in any detail. They were not challenged on the voir dire and I am satisfied beyond reasonable doubt they do not render the interviews inadmissible.

In the interview by the police, the accused repeated his claim that he believed the money had come from his parents abroad. He also said that, a short while after he had withdrawn the money, he heard from his father and realised the money was not his. He agreed he went with his wife to speak to the palangi bank officer about a loan but then the police charged him so he decided not to repay it.

At the close of the Crown case, I found there was no case to answer on the false pretences count. The charge was under section 164 of the criminal Offences Act:

> "Every person who by any false pretence obtains for himself or for any other person any money, valuable security or other thing whatever shall be liable to the same punishment as if he had committed theft."

Counsel cited authorities relating to offences of deception under the English Theft Act but our section 164 is similar to the offence under section 32 of the English Larceny Act, 1916. The passing of the Theft Act changed the law by replacing the various offences of false pretences with the new offences of deception. It also removed the need for the deception to relate to a present fact. Our law still has that requirement.

In this case, the particulars of offence simply state that the accused "obtained for yourself $5,000 by false pretences." No objection was taken by the defence but the particulars should always set out the false pretence that is being alleged. The prosecution never explained what it was in this case and, at the close of the prosecution case, conceded there was no case to answer. Had he not, I would have struck it out in any event because the rule in all cases of false pretences (and indeed still of deception) is that the prosecution must prove that the false pretence operated on the mind of the person deceived and induced the passing of the property. It is normally necessary to prove it by direct evidence from the person deceived; *R v Laverty* [1970] 54 Cr App R 495; *R v Tirado* [1974] 59 Cr App R 80. It is only in the most obvious cases that this does not need direct evidence; *R v Lambie* [1981] 3 WLR 88.

In this case there was no clear evidence as to the actual false pretence nor was there evidence as to what false sentence induced the cashier to part with the money and the case must inevitably fail.

The case proceeded on the theft charge.

The accused gave evidence. His parents live in the United States. His father is still employed there and his mother used to work until ill health required her to stop. The accused returned to Tonga and married here in 2001. He is living at present in his father's house the construction of which was started in 2001 and completed this year.

He told the court that, in 2001, his parents were in Tonga and his mother advised him and helped him to set up a bank account. Before they returned to the

United States in about July, his mother told him she would transfer a large sum of money into this account to be used for the construction of the house.

He had already come to expect financial assistance from his parents and told the court how they frequently sent him sums of various amounts usually through Western Union. The largest sum he had received in one transfer was US$4,000. He agreed that he had never had it transferred directly to his account before but said that his mother had suggested this might occur and so he had no reason to doubt it was from her when the teller said it came from abroad.

His account of the incident in August 2001 was that the teller asked him if he had family overseas and then told him that there was some money she had to enter into the book.

He said that, after he went home, he realised he needed some money for personal things and so he returned and withdrew $5,000. It was spent on such things as rent, clothes and entertaining friends. He says he did not think anything about it until the teller came and told him of the problem. The accused was shocked and told the teller to leave his house.

Eventually he and his wife went to the bank and spoke to the bank officer but he started pointing his finger at the accused and telling him he had to repay the money. The accused became aggravated and left.

In his examination in chief, he said that the first time he learned it was not his money was when the teller came to speak to him. In cross-examination he insisted that he believed his parents sent the money. He accepted that it was for the house and agreed that he only spent a small portion on the house. He told the court that when he withdrew the money the sum had been verified by the bank and that he had no reason to doubt it was from abroad. It was in his passbook and he had no reason to doubt it was his.

He explained that the first time he called his parents after this withdrawal was after the teller had come to his house. The first time he was satisfied it was a mistake and the money did not belong to him was when he saw the palangi bank official.

I am not satisfied on the evidence that the prosecution has proved that he knew the money was not his when he withdrew it from his account. The fact he went the same day to a different branch and withdrew nearly all the extra money and then, although he thought it was sent by his mother to pay for the new house, he spent nearly all of it on personal items all give rise to strong suspicion but that is not enough. He acknowledged in court that the money was not his and that he should not have used it and I am satisfied that he first realised that soon after he received it as a result of speaking to his father as he said he had done in his interview with the police.

Mr Sisifa for the prosecution suggests that even if the accused received the money innocently, once he realised it was not his and still kept it he committed the offence of theft. The authorities he cited in support are all from the English Theft Act which replaced the offence of larceny with theft. The new offence introduced the concept of dishonest appropriation and removed many of the technicalities which required the creation of special offences under the old law such as larceny by bailee. Under the Theft Act, a dishonest appropriation may arise even after an innocent taking but I do not accept that applies to our offence of theft.

By section 143,

> "Theft is the dishonest taking without any colour of right of anything ...capable of being stolen ... with intent either -
>
> to deprive the owner permanently of such thing, or
>
> to deprive any other person permanently of any lawful interest possessed by him in such thing,
>
> and with the intention of converting such thing to the use of any other person without the consent of the owner or person possessing such interest therein as aforesaid..."

It is clear that the dishonest intent must be present at the time of the taking. If the taking was done in the belief that the taker had a right to the property, the offence is not committed. Should he subsequently realise he had no right to the property and dishonestly decide to keep it for himself he does not commit theft because the taking has already occurred. Clearly, in such an action, he has no colour of right but that cannot make his subsequent appropriation a dishonest taking in terms of section 143.

In this case I am satisfied beyond any doubt that the accused did realise soon after he took the money that it was not is but I am not satisfied to the criminal standard that he knew when he took it from the cashier.

He must therefore be acquitted of theft.

R v Mafi

Supreme Court, Nuku'alofa
Ward CJ
Cr 260-1/2003 and Cr 20-1/04

24-26 May 2004; 31 May 2004

Criminal law – drug possession and cultivation charges – question as to admissibility of confession – admissible and convicted

The accused were both charged in one case with offences under the Drugs and Poisons Act and, in a second case with offences under the Illicit Drugs Act 2003, which has replaced the previous Act. The defendants agreed to have the cases tried together. They were husband and wife and were both unrepresented. Petulisi Mafi pleaded guilty to both indictments. There was no real dispute about the finding of the drugs or that they were prohibited substances, namely Indian hemp in the first case under the Drugs and Poisons Act and cannabis in the second case under the Illicit Drugs Act. At the police station the husband told the officer that he did not want to make any statement because he did not know anything about the drugs. The accused husband claimed that the handcuffs were moved up his arm and tightened so that, in a very short time, they were causing him acute pain. He pleaded to have them removed but to no avail and so he gave the answers in the interview that the officers wished to hear so the handcuffs would be removed. The officers denied those allegations. There was a question as to the admissibility of the husband's statements. The wife told the court that the 8 plants and the 83 bags of Indian hemp were hers and had been given to her by an African friend at Popua service station that night when she went alone to fill the car. She said that she did not tell her husband anything about those things.

Held:

1. The Court considered all the evidence about the interviews with the husband and did not believe his account. The Court believed the officers and was satisfied beyond reasonable doubt that the accused gave the answers voluntarily. They were admissible.
2. The prosecution proved to the criminal standard that the plants were being carefully cultivated in the plastic bowls and the husband was knowingly involved in that cultivation. He was convicted of count 1 of growing Indian hemp. Counts 2 and 3 related to possession of the 83 bags and the 8 plants respectively. The Court was satisfied beyond reasonable doubt that he was in possession of the plants and bags and he was convicted accordingly.

3. With respect to the husband telling the police the drugs were his saying that he would show the officer where he had grown the plants, a confession would only be admitted if the prosecution prove beyond reasonable doubt that it was voluntary. The Court was not satisfied that the accused made that statement voluntarily. After 10 days in custody and having told the police twice that he was not involved, he was still being detained. The Court was satisfied it may have appeared to him that he was simply going to be detained until he changed his story.
4. The Court considered whether the prosecution proved to the criminal standard that the accused was in possession of the cannabis in the bin. The Court did not find the accused husband a credible witness and on the evidence as a whole was satisfied that he did know of the presence of that cannabis. The Court was satisfied the accused was in knowing possession and control of those drugs.
5. The accused husband was convicted of counts 2 and 3 relating to possession. He was acquitted of count 1 relating to cultivation of the cannabis.

Statutes considered:
Drugs and Poisons Act (Cap 79)
Illicit Drugs Act 2003

Counsel for prosecution : Mr Sisifa
Accused in person

Judgment

The accused are both charged in the first case, CR260-1/03, with offences under the Drugs and Poisons Act and, in the second case, CR20-1/04, with offences under the Illicit Drugs Act 2003, which has replaced the previous Act. The defendants agreed to have the cases tried together. They are husband and wife and both are unrepresented.

Petulisi Mafi has pleaded guilty to both indictments and will be sentenced at the conclusion of the trial of her husband.

There is no real dispute about the finding of the drugs or that they are prohibited substances, namely Indian hemp in the first case under the Drugs and Poisons Act and cannabis in the second case under the Illicit Drugs Act.

The first case relates to an incident shortly before midnight on Tuesday, 21 January 2003. The prosecution case is that police officers saw the accused and his wife driving a car in the vicinity of Lapaha. They had a committal warrant for him relating to an unpaid fine and stopped the car. The validity of the warrant has been a matter of some challenge by the accused but I do not need to determine that issue. However, it is relevant to the admissibility of the police interview with the accused.

The accused was asked to get into the police car and the second police officer drove with her in her car to their home so she could leave some laundry before, presumably, going to the police station to be with her husband. As they arrived at the house, she removed the laundry and took it to the door. At that moment the police car arrived and the officer said that the Samiu had run off.

As a result, the officers told Petulisi to get back into the car with the laundry she had removed and she was taken to Mu'a Police Station in her car but, this time, with the officer driving.

On arrival, she appeared to be trying to run away but was stopped and taken into the police station and the office in charge of the police station was called.

When he arrived he directed a search both of the car and of Petulisi. In the former, the officer found hidden in the laundry, some plastic bowls containing earth which appeared to have had plants removed from them recently. The soil was still moist.

Petulisi was searched by a woman police officer and was found to have 83 small plastic bags hidden in her underwear. They each contained a small amount of plant material which was later found to be Indian hemp. When asked Petulisi said, "They are ours".

Some hours later, the same woman officer noticed a cloth which turned out to be a skirt behind a door in the charge office near to where Petulisi had been sitting the previous night. On closer examination, it was found to have 8 small plants wrapped in it. They were fresh and appeared to have been freshly uprooted. They also were identified to be Indian hemp. Again, Petulisi said, "They belong to us".

Her possession of those drugs is relevant to the case against this accused as is her admission that they were hers. However, her use of the words 'ours' and 'us' is no evidence against the accused.

I am satisfied beyond any doubt that the analysis of the substance in the bags and of the plants proved that they were Indian hemp.

Samiu did not come to the police station until the afternoon of 24 January 2003 when he was detained in custody. His challenge to the validity of the arrest warrant questions the reasons for his being detained, as he was, in custody until 29 January but, as I have stated, I do not consider I need to resolve that issue.

He was interviewed about these incidents on 27 January 2003. There were three interviews in all that day. The accused challenged the officers over the making of the statements attributed to him. In his evidence he explained that he had been handcuffed when he first was put in the cell and remained in handcuffs until the day of the interviews. At the commencement of the interviews, he told the officer that he did not want to make any statement because he did not know anything about the drugs. At that point the interviewing office called out to the sergeant that he did not want to say anything. Following the sergeant's intervention, the handcuffs were moved up the accused's arm and tightened so that, in a very short time, they were causing him acute pain. He pleaded to have them removed but to no avail and so he gave the answers in the interview that the officers wished to hear so the handcuffs would be removed. Those allegations were denied emphatically by the officers involved.

As the accused was not represented, I did not hold a trial within a trial on the voir dire. I considered that, by leaving consideration of the admissibility of the interviews until the end of the case, it would ensure the accused was able to give all the relevant evidence he wished. However, I now must consider the admissibility of the interviews before I consider the contents.

The accused said that, at one stage when he was in pain, his wife was taken to the toilet and, on her way, saw him and witnessed his distress. She was called by the accused but was not asked about that part of the incident. She did tell the court that

she had admitted possession of the drugs and said they were nothing to do with her husband. However, the officers tried to force her to deny it and were clearly trying to make her implicate Samiu.

I have considered all the evidence about the interviews with this accused and I do not believe his account. I believe the officers and I am satisfied beyond reasonable doubt that the accused gave the answers voluntarily. They are admissible.

In the first interview he told the officers that he ran away from the police car because he disputed the warrant. However, he told the interviewing office that the marijuana in the car was his. He was able to tell the officer that there were 83 bags and that they were to be sold for $10 each. He then agreed with the officer that the drugs were the true reason why he ran away. Shortly afterwards he was interviewed again and stated that the plants had been grown under the step of his house in Lapaha and they were being taken that night to find a place to plant them out. He told the police that he was the person responsible for growing them and no one else was involved.

In his evidence, he told the court that he had not run away but had simply told the officer that he would walk to the police station. However, he later hid when the police car drove by during the early hours. He said he suspected his wife had been arrested but he did not go to the police station until the afternoon of the Friday. He did not go before that because he thought he would be put in a cell because of the disputed warrant. However, he did not go to a lawyer about the warrant or his wife's arrest and he did not explain why he changed his mind and went to the police station on the Friday without trying to have the matter of the warrant cleared up by his lawyer. When the incident of the handcuffs arose, he was represented at the magistrate's court but could only say that he thinks he told her about his mistreatment.

His wife told the court that the 8 plants and the 83 bags of Indian hemp were hers and had been given to her by an African friend at Popua service station that night when she went alone to fill the car. She did not tell her husband anything about those things.

I do not believe the wife and neither do I believe the accused. I am satisfied beyond any doubt that he knew of the plants in the vehicle and his account to the police was true. I have no doubt at all that the trip that night was, as he told the police, to plant these out. The prosecution has proved to the criminal standard that those plants were being carefully cultivated in the plastic bowls and he was knowingly involved in that cultivation. He is convicted of count 1 of growing Indian hemp. Counts 2 and 3 relate to possession of the 83 bags and the 8 plants respectively. The particulars of charge describe him as being in possession of them at Lapaha/Mu'a police station. I do not understand why it was worded in that way. The evidence is that his possession of them was in the car in Lapaha. I am satisfied beyond reasonable doubt that he was and he is convicted in counts 2 and 3.

The second case arose from a search of an allotment in Lapaha on 13 November 2003. That day the police mounted simultaneous raids on the town and tax allotments of one Lomoloma Lausi'i. The accused and Petulisi were living there. The allotment holder and the accused and his wife were at the tax allotment and so the officers took Petulisi and Lomoloma to the town allotment to allow the search to start there also. Once there, Petulisi told them that the drugs were at the tax allotment and she would show them where. They returned to the tax allotment and called off the search of the 'api'uta.

There is a small shelter on the 'api uta in which the accused and his wife were living and an officer had found a can which appeared to have been used for smoking marijuana. The accused was asked about it and said that it was used for smoking marijuana.

Petulisi indicated an area of saafa grass and the officers saw a red bin with a lid. The accused was called over and asked whose dustbin it was, to which he replied he did not know. It was opened and could be seen to be full of what turned out to be cannabis packed in plastic bags. He was asked whose it was and replied, "Maybe it is yours". He was arrested and taken to the police station.

There was a considerable quantity of cannabis in the bin. It was packed in 10 plastic bags although some contained more than one bag and some contained a number of small bags already packed with cannabis similar to those found on Petulisi in January.

The total weight of cannabis was 1.85 kgs and included approximately 6,000 seeds which had been separated to a great extent from the remainder. There were a total of 27 small bags which had been already packed with the plant material. Also, in one of the bags were two small pieces of hashish weighing 0.8gm.

The accused was interviewed by the police on 16 November 2003. There is also a challenge to the admissibility of these interviews. The accused told the court that, after he was arrested, he told the officer that he did not want to make a statement because he knew nothing about it. He also asked to see a lawyer and one came to visit him the following day, 14th.

He was first interviewed on 16 November 2003 and denied any involvement with the drugs. He was detained in custody and was still in custody on 21 November 2003 when he was again interviewed. Again he denied any knowledge of or involvement with the drugs.

Surprisingly, it should be said, he was still in custody on 24 November. The officer in charge was asked why it was necessary to keep the accused in custody in a case of this nature for more than 10 days. It is clear that the accused was unhappy about his continuing detention and mentioned it to the officer on 21 November. To the court, the officer's explanation was that the magistrate had ordered it. This court was not told the reasons given to the magistrate and it is hard to understand what could have justified such a long time in custody. In the absence of clear reasons, it appears likely it was simply to try and persuade the accused to change his account from denial to admission and the accused's evidence is that was precisely what happened.

He was transferred at one stage to the Police Training School. He had seen his wife and was shocked to see how thin she was looking. She also told him that she had been badly beaten up by the same officer as was questioning this accused. The accused wanted to get out so he could take her to hospital.

However, far from being released, he continued in custody and then, on 24 November, the same officer came out to the Training School and told the accused that he would ask for the accused and his wife to be detained in custody even longer. As a result, the accused decided to tell the police the drugs were his and sent a message to the officer that he would show him where he had grown the plants.

He told the court that he did this only because he was desperate to be released. He also said that he was scared of the officer because he had previously been handcuffed and beaten by the same officer. He said that when he said that he did not

want to make a statement, the officer had advised the accused to be careful or "he might see what would happen"; a statement the accused interpreted as a threat of violence

The officer denied anything of the sort. He also denied that he had been to the Training School earlier in the day the accused sent the message to come. The accused called the gate officer who was on duty that day but she did not support the accused and said the officer had indeed only visited once that day and that was after the accused had sent the message.

The accused's account of his fear of the officer is not helped by the fact that, after the accused said he was threatened, he was still able to make two separate interviews denying any involvement. I accept that, if he believed his wife's account that she had been beaten, that would reinforce his own fear but I do not believe his fear was as great as he claimed because of his ability to resist the officer's questions on the first two occasions. I am also satisfied that the gate officer is correct about the number of visits that day by the officer to the Training School so I do not accept that there was an earlier threat that day to extend the period the accused and his wife would remain in custody.

However, that said, I consider that the length of time the accused was detained in custody was, in the absence of clear reasons, a disgrace. The power to detain an unconvicted person is a severe attack on his right to freedom. The law gives that power to the magistrate to ensure there is some safeguard against abuse of power by the authorities. It is for that reason that magistrates should always ask the reasons for such a request. Any such reason should be carefully and critically considered and the reasons for the detention recorded in the courts papers. Too often this court hears cases where the magistrate appears to consider his duty simply to endorse any request by the police to detain a man in custody. When the trial is heard before the Supreme Court, the officer in charge should be able to state the reasons why it was necessary to continue to continue to detain a man without trial.

This court has said many times before that a request to remand in custody or order or extend a period in custody simply because the police have not completed their investigations, in the absence of anything else, is not sufficient. Yet it continues to be the reason most frequently put forward and, more seriously, is almost invariably accepted and acted on by the magistrate.

There may well be good reason why an accused should not be released such as the fact he has been convicted of many similar offences in the recent past or that there are witnesses yet to be interviewed may be vulnerable to pressure from the accused. That is not the case here. The evidence was always going to be, and was at the trial, only that of police officers and the analyst. In that case and in the absence of clear reasons, I question whether the magistrate should have allowed the police more than one day.

However, the accused was detained in custody from his arrest on 13 November. He was not interviewed until the afternoon of 16 November. As the evidence was entirely the result of a police search, he could and should have been interviewed on the day of, or the day immediately following, his arrest. Even after being interviewed, he was further detained until 21 November. On that day, the police tried again and again the accused denied his part in the offence and expressed concern at his continued detention. Still he was not released and eventually on 24 November he suddenly decided to tell the police he was involved.

The court has discretion to exclude a confession if it believes it may not have been voluntary. For an unconvicted person to be detained in police custody is a traumatic and unpleasant experience. If it continues for some days, it is increasingly oppressive and will tend to sap the will of even the most resolute person especially if it appears simply to be extended because the accused person continues to deny the offence. A confession will only be admitted if the prosecution prove beyond reasonable doubt that it was voluntary.

In this case, I am far from satisfied that the accused made that statement voluntarily. After 10 days in custody and having told the police twice that he was not involved, he was still being detained. I am satisfied it may have appeared to him that he was simply going to be detained until he changed his story. I am not satisfied that the prosecution has proved that was not the case and the interview on 24 November is not admitted. It has already been given in evidence but I ignore its contents.

The police evidence of the search is that the red bin was in the saafa grass about 10 to 15 metres away from the hut where the accused and his wife were staying. It was obviously not clearly visible because the officers on the search did not see it until they were told specifically to search that area. However, it was first seen by the officer from the edge of the clear area near the hut.

Before the court can convict this accused of possession of those drugs it must be satisfied beyond reasonable doubt that the accused knew of the drugs and had control over them. His evidence was that the drugs were not his and he had no knowledge of them. He called his wife and she insisted that was the case; the plants had been cultivated, harvested, dried and packed by her without her husband having any knowledge or involvement.

She told the court that she had said they were hers when she showed them to the police. The accused also told the court that, when the police arrested him, his wife remonstrated with them and demanded to know why he was being taken rather than her as the drugs were hers and not his. She told the court that the whole operation had been hers and the accused knew nothing about it. She told the court that she said the same in her statement to the police but they wanted her to say the drugs were Samiu's. She explained that she was intending to sell them from her house to anyone who came to buy.

I did not consider she was a truthful witness. I am satisfied beyond any doubt she was involved in the preparation of this cannabis and that the intention was to sell it. The quantity and the manner in which some was already packed can only lead to that conclusion.

However, the court must consider whether the prosecution has proved to the criminal standard that the accused was in possession of the cannabis in the bin. I did not find the accused a credible witness and on the evidence as a whole, I am satisfied that he did know of the presence of that cannabis. It was close to the place where he was living and I simply do not believe he was unaware of it. I am satisfied that the soft drink can was also his and demonstrates the use of the drug at his home. In all the circumstances at the time at the tax allotment, I am satisfied the accused was in knowing possession and control of those drugs.

He is charged with two counts of possession of an illicit drug relating to the cannabis leaves in the 10 plastic bags in one count and to the seeds in the other. I am not clear why it was necessary to separate them into two counts but they relate in total to the contents of the red bin. He is convicted of counts 2 and 3.

320 The first count charges him with cultivating 8 cannabis plants in July. The prosecution case is that those were the plants from which the cannabis in the bin was derived. There is no evidence of cultivation by the accused and he is acquitted of count 1.

Fonua v Tonga Communications Corporation Ltd

Supreme Court, Nuku'alofa
Ward CJ
CV 692/2001

10 June 2004

Civil procedure – evidence lacking – discovery ordered

For the full facts of this case, see [2003] Tonga LR 351.

Judgment was given where it was found that the plaintiff had not been dismissed but had resigned voluntarily. The statement of claim alleged that there was a pension scheme under which a staff employee was entitled to a pension upon attaining 50 years of age. The defence required proof of such a scheme and alternatively denied that the defendant was bound by the terms and conditions of the scheme as set out in the statement of claim. Court adjourned for counsel to agree the entitlements but no agreement was reached and so Court adjourned to allow counsel to call further evidence of the scheme and the plaintiff's entitlement under it.

Note: This judgment was appealed to the Court of Appeal and the decision of that Court (allowing the appeal) will be reported. See a further Ruling at [2004] Tonga LR 148.

Held:

1. The burden of proving the existence of a pension scheme clearly lay on the plaintiff. The existence of such a scheme was proved because there was effectively no evidence to counter the statements of the plaintiff. It would have better if counsel for the plaintiff, when preparing the case, had used discovery to ascertain the details of the scheme or of any other payments under the scheme.
2. The Court ordered that there should be discovery by the defendant within 7 days of all documents in his possession relating to a pension scheme, entitlement to the scheme and payments made by the defendant under any such scheme operated by the defendant and inspection by the plaintiff. The cast was listed for hearing in chambers then on 22 June 2004 at 9:00 am.

Case considered:

Veikoso v Dateline Shipping and ors [2004] Tonga LR 56

Statute considered:
Pension Act (Cap 8)

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

Ruling

This is a claim for damages for wrongful dismissal. Following a hearing, I gave judgment in which I found that the plaintiff had not been dismissed but had resigned voluntarily.

The statement of claim alleged that there was a pension scheme under which a staff employee was entitled to a pension upon attaining 50 years of age. The defence required proof of such a scheme and alternatively denied that the defendant was bound by the terms and conditions of the scheme as set out in the statement of claim.

At the hearing, the defence did not call any evidence and I found:

> "The only evidence of any pension rights was in the evidence of the plaintiff. He told the court that pension entitlement was adopted from Government procedures. It was not written but was a standard procedure. He stated he should get two thirds of his salary for 5 years or a pension 'continuously'. He referred to another employee who had resigned in 1999 or 2000 and was paid a pension in that way. None of that was challenged in cross-examination and no evidence was called to rebut it."

I found that the provisions of the Staff Regulations which had been exhibited showed support for the existence of a pension scheme and continued:

> "I am satisfied on a balance of probabilities that the plaintiff resigned voluntarily when he realised the alternative was that he would be charged [with misconduct] and I am equally satisfied that he is, therefore, entitled to any pension or provident fund payments which are due on resignation.
>
> Unfortunately, there is insufficient evidence of the terms or scale of any such scheme. I am unwilling to make an award on the skeletal description given by the plaintiff in his evidence. However, I am satisfied, in the absence of any evidence to the contrary, that the plaintiff has proved the existence of such a scheme and his entitlement under it."

I adjourned for counsel to agree the entitlements but no agreement was reached and so I adjourned to allow counsel to call further evidence of the scheme and the plaintiff's entitlement under it.

Submissions were filed and the case set for a hearing on quantum. However, on the date set for the hearing, counsel advised the court that they would supply documentary evidence and so the case was adjourned for productions of the documentary evidence.

Evidence was filed for the plaintiff in the form of an affidavit by him setting out his knowledge of another case where a pension had been paid.

No evidence was filed by the defendant and when the case was next before me to fix a date for oral submissions, counsel advised the court they were content to rely on the material already before the court.

The written submission by counsel for the plaintiff states that, "The pension scheme which the defendant had was based upon the pension scheme provide for in the Pension Act (Cap 8)."

In his affidavit, the plaintiff refers to his evidence at the trial that the TCC had a pension scheme "under which I stated that I was entitled to receive a pension upon my resignation." He further states his belief that the scheme was such that he was entitled to receive such a pension "upon attaining the age of 50 years".

In his submission, counsel for the defendant no longer disputes "that there is in existence a pension scheme and the issue therefore is the entitlement of the plaintiff to receive anything from the pension scheme". He goes on to argue that the phrase pleaded in the statement of claim that he is entitled to a pension 'Upon attaining 50 years of age' and the similar phrase in section 6 of the Pension Act that an employee shall not be granted a pension who "has not attained the age of 50' mean that any employee who resigns before he reaches the age of 50 loses all pension rights.

I am not willing to allow this case to be argued in this manner. The burden of proving the existence of a pension scheme clearly lay on the plaintiff. The existence of such a scheme was proved because there was effectively no evidence to counter the statements of the plaintiff. How much better it would have been if counsel for the plaintiff, when preparing the case, had used discovery to ascertain the details of the scheme or of any other payments under the scheme.

The reluctance of counsel to use discovery is a constant source of surprise to me. It has been referred to by Ford J, recently in *Veikoso v Dateline Shipping and ors* [2004] Tonga LR 56. I agree entirely with his comments.

As there is now no dispute that such a scheme exists, it seems remarkable that the court has not been provided with any details of the nature of the scheme or how it operates. I would expect an organisation like the defendant would have well-established rules for the application of such a scheme. Had the plaintiff sought discovery, he might have been able prove the whole of his case during the trial. I fully understand that the plaintiff might not personally be familiar with the details of such a scheme but how much better if counsel when presenting his case had documents to support his assertion of its existence and his own entitlement.

It is not the court's duty to direct counsel how to prepare and present their cases in court. The consequence of poor preparation should be that his case will not succeed. Unfortunately, in such circumstances, the person who suffers is unlikely to be the lawyer but the party who has entrusted him with the conduct of his case.

In this case, I am not willing to allow the matter to proceed on the submissions of counsel as to the meaning of a phrase, which has not even been properly proved to be part of the pension rules. On the other hand, if I simply find that plaintiff's entitlement has not been proved, I may be causing an injustice.

The present position is the result of the manner in which both counsel have conducted their respective cases. I am not content to proceed on that basis.

I shall order that there should now be discovery by the defendant within 7 days of all documents in his possession relating to a pension scheme, entitlement to the

scheme and payments made by the defendant under any such scheme operated by the defendant and inspection by the plaintiff. I shall list the case for hearing in chambers then on 22 June 2004 at 9:00 am.

Tonga v Halapua

Supreme Court, Nuku'alofa
Ward CJ
FD 107/2002

14 March 2004; 21 June 2004

Matrimonial property – determination of financial provision – orders made

The full facts are set out in the grant of decree nisi at *Tonga v Halapua* [2005] Tonga LR 35.

Held:

1. The Court ordered that possession of the town allotment of the petitioner remain with the wife respondent. It further ordered that the name of the landlord in the lease agreement be altered to that of the respondent, that the tenant be notified and that all the terms otherwise should be unaltered. The respondent should have full rights to the proceeds and to negotiate any future lease of the premises. With that went the responsibility for the maintenance of the property.
2. The Court had the power to order that the tax allotment of the petitioner should also be in the possession of the respondent. However the Court was not satisfied that the use of the allotment should be given to the respondent or her son. Also the use of the allotment by the petitioner's sister made it difficult for her to be evicted and the court should not such an order without knowing more of their circumstances.
3. The Court considered that it was appropriate to charge some rent for the 'api and ordered that the petitioner pay the respondent a sum in addition to the rental from his town 'api of $2,000 per annum in consideration of the use of his 'api by his sister. The petitioner was liable for the payment and it was due each year on the last working day of August each year.
4. The terms of the order were stayed pending appeal. If no appeal is pursued, the terms would have retrospective force to the date of ruling.

Ruling

Following the grant of a decree nisi to the husband in this case, I adjourned determination of financial provisions to chambers. I have received affidavits and was ready to give my ruling when counsel for the respondent wife, who had not appeared at the hearing of the petition, sought leave to appeal the original order. I gave leave and did not, therefore, give my ruling. Having now heard the basis of the appeal, I

consider I should still briefly state the conclusion I had reached but stay the order pending the appeal.

In cases of this nature, the information deposed is frequently coloured and distorted by the attitudes of the parties. This case is no exception. The respondent has claimed her husband had assets he denies possessing and the petitioner, whilst being willing to provide for his wife in terms of rent income, feels she should be able to support herself by work and therefore the support he offers is sufficient.

The respondent is living in a house on an 'api held by her brother who is at present resident abroad. Before her husband went to 'Eua, the family were living there. The children of the marriage have all reached their majority but two still live with her. The youngest daughter is studying at the USP in Fiji and has a child, which is left with the respondent also. The respondent is restricted in any chance to earn because of the need to look after the small child.

The petitioner has given her the rental income from his town 'api in Nuku'alofa. That amounts to $900 per month. Her claim is that the rent is not paid regularly and it should, for properties in such a central position, be higher. Both those matters are, of course, at present within the control of her husband.

She also asks for the control and possession of the petitioner's tax allotment, which is, at present, being used by his sister and her family. The respondent claims that the petitioner has the right to a further allotment held by his widowed mother.

The petitioner responds that he does not have a right to a second tax allotment His mother passed away in 1999 and, in any event, did not hold an allotment. As regards his own tax allotment, he says that, when he inherited that allotment from his father, his sister was already living on it as the result of permission given by their father whilst he was still alive. He says that his son, as his heir, should wait patiently for his time to inherit the tax allotment. He questions why his wife should not also use the tax 'api of the brother at least whilst he is abroad.

I am satisfied that the offer by the husband of the rental income from his town allotment is a sensible and reasonable one in the light of his present circumstances. However, I understand the concern of the wife that she still has no control over that property now or in the future. I order that possession of the town allotment of the petitioner shall remain with the respondent. I further order that the name of the landlord in the lease agreement shall be altered to that of the respondent, that the tenant be notified and that all the terms otherwise should be unaltered. The respondent shall have full rights to the proceeds and to negotiate any future lease of the premises. With that will go the responsibility for the maintenance of the property.

I have no doubt the court has the power to order that the tax allotment of the petitioner shall also be in the possession of the wife. However, in this case, I am not satisfied that the use of the allotment should be given to the respondent or her son. I accept that the use by the petitioner's sister makes it difficult for them to be evicted and I am far from sure that the court should make such an order without knowing more of their circumstances.

However, I consider it would be appropriate to charge some rent for the 'api. I order that the petitioner shall pay the respondent a sum in addition to the rental from his town 'api of $2,000 per annum in consideration of the use of his 'api by his sister. Whether he asks his sister to pay that or pays it himself is no part of this order. The petitioner is liable for the payment and how and whether he recovers it is a matter for

him. The rental payment shall be due each year on the last working day of August each year.

I make no further orders save that the terms of this order shall be stayed pending appeal. If no appeal is pursued, the terms shall have retrospective force to the date of this ruling.

Taione anors v Kingdom of Tonga

Supreme Court, Nuku'alofa
Ward CJ
CV 374/2004

14 June 2004; 21 June 2004

Civil procedure – orders sought regarding proceedings – timetabling orders made

In early 2003 the importation into the Kingdom of the Taimi 'o Tonga newspaper was effectively banned. Court challenges in April and May 2003 resulted in the bans being lifted. The Court of Appeal upheld the decisions in those cases in July of the same year. Later in 2003, the Legislative Assembly passed three statutes relevant to the same issues: the Constitution of Tonga (Amendment) Act 2003 (which amended clause 7 of the Constitution and added a new clause 103A), the Media Operators Act 2003, and the Newspaper Act 2003. The plaintiffs made an application by way of judicial review for declarations that the amendment of clause 7, the addition of clause 103A, the Media Operators Act, and the Newspaper Act were each separately ultra vires, invalid and of no lawful effect. The defendant maintained that the statutes were validly enacted. The defendant applied for the following orders: (1) varying or revoking orders 1 and 2 of Ward CJ dated 13 May 2004; (2) dismissing the fourth plaintiffs from the proceeding; (3) that discovery and inspection of documents was not necessary; (4) that the evidence be given by affidavit; and (5) providing a timetable for the filing of affidavits and for dealing with any further interlocutory matters.

Held:

1. The defendant objected to the inclusion of the affidavits from the previous proceedings on the ground that they were not relevant and, therefore, ought not to constitute evidence. Whether those objections were well grounded was a matter for the trial judge to decide and the Court was not satisfied that the fact the defence pleaded their irrelevance was sufficient ground to determine that point. The application for an order revoking paragraphs 1 and 2 of the order of 13 May 2004 was refused and the question of their relevance was left for the trial judge.
2. The defence objected to the inclusion of the fourth plaintiff because they did not have sufficient interest and that, in any event, the inclusion of multiple parties was a step with wide implications and something that had been frowned on in other jurisdictions. In a case which involved important

constitutional issues which related directly to individual freedoms, it could be argued that every person who was subject to the Constitution must have sufficient locus to challenge an act which removed or restricted freedoms guaranteed by that Constitution. Unqualified removal of a constitutional freedom had such a universal effect, it was hard to see how any one individual could be seen to be more affected than another. The determination of locus must be construed widely if it was ever to be possible to challenge the issue in the courts. The final decision would have to be made at the trial when the court could ascertain the actual position in terms of both the evidence and the law. The Court declined to make the order sought to dismiss the fourth plaintiffs from the action.

3. The Court found that there should be discovery and inspection by both sides but there was no purpose in ordering discovery against the fourth plaintiffs. The Court ordered that there should be discovery within 21 days.
4. Counsel agreed that the evidence should be by affidavit, subject to cross-examination and the Court set the dates for that.

Case considered:

Inland Revenue v National Federation [1982] AC 617

Statutes considered:

Constitution of Tonga (Amendment) Act 2003
Media Operators Act 2003
Newspaper Act 2003

Counsel for plaintiffs/respondents	:	Dr Harrison and Mr Tu'utafaiva
Counsel for defendant/applicant	:	Mr Radich and Mr Kefu

Ruling

A sequence of events in the early months of 2003 effectively banned the importation into the Kingdom of the Taimi 'o Tonga newspaper. Court challenges in April and May 2003, (Cases CV 124, 219 and 228 of 2003) resulted in the bans being lifted. The Court of Appeal upheld the decisions in those cases in July of the same year.

Later in 2003, the Legislative Assembly passed three statutes relevant to the same issues: the Act of Constitution of Tonga (Amendment) Act 2003, which amended clause 7 of the Constitution and added a new clause 103A, the Media Operators Act 2003, and the Newspaper Act 2003. It is not necessary to set out the details of those acts but, using powers under the Newspaper Act, the authorities refused to grant a licence for 2004 to the second plaintiffs in relation to the Taimi and to the third plaintiff in relation to another newspaper, Kele'a, of which he was, then, the editor. Subsequently, following the appointment of another editor, the Kele'a has been granted a licence.

The first plaintiff was arrested on 12 February 2004 at Fua'amotu Airport and charged with an offence contrary to section 10(1) of the Newspaper Act. He has been committed to the Supreme Court for trial.

This action is an application by way of judicial review for declarations that the amendment of clause 7, the addition of clause 103A, the Media Operators Act and the Newspaper Act are each separately ultra vires, invalid and of no lawful effect.

The fourth plaintiffs are described as "'Akilisi Pohiva together with the one hundred and seventy one citizens, organizations and businesses of the Kingdom of Tonga whose names are set out in the schedule to this statement of claim". That list includes People's Representatives (of whom the named 'Akilisi Pohiva is one), religious leaders, district and town officers, non-government and media organizations and citizens.

On 10 May 2004 I granted leave to the plaintiffs to apply for judicial review and adjourned the application for further directions to chambers to be heard inter partes.

On 13 May 2004 following application by the plaintiffs and without opposition by the defendant I ordered:

1. That the plaintiffs have leave to read as evidence in these proceedings the affidavits from the previous proceedings in this court in cases numbers CV 124/03, CV 219/03 and CV 228/03 of the deponents listed in the application.
2. That the defendant shall submit a list of affidavits from the same previous proceedings they wish to be read as evidence in these proceedings within 28 days.

A defence has been filed maintaining that the statutes were validly enacted and, by application dated 28 May 2004, the defendant now applies for orders:

1. Varying or revoking orders 1 and 2 of Ward CJ dated 13 May 2004.
2. Dismissing the fourth plaintiffs from the proceeding.
3. That discovery and inspection of documents is not necessary in this proceeding.
4. That the evidence in this proceeding be given by affidavit.
5. Providing a timetable for the filing of affidavits and for dealing with any further interlocutory matters.

It is these applications which are now before the court and the court has been greatly assisted by the manner in which counsel have prepared and presented their submissions.

1. Variation of the orders of 13 May 2004.

There is no challenge to the fact that the court has the power to vary or revoke an interlocutory order.

The defendant objects to the inclusion of the affidavits from the previous proceedings on the ground that they are not relevant to the present proceedings and, therefore, ought not to constitute evidence in these proceedings.

The plaintiffs suggest that this is more than simply an application to revoke an earlier order. It is in truth an attempt to obtain a ruling from the court on the relevance of evidence which the plaintiffs would seek to adduce in support of its case. Part of

the basis of the claim that the statutes were invalid is that they were passed for an improper purpose and in breach of the constitution.

Mr Radich contends that is not the purpose of his application. He accepts that improper purpose is a ground for judicial review but this case does not challenge the decision to refuse licences in which it might have been relevant. He suggests that it is not a proper or relevant basis for a challenge to the purpose of a statute or for the determination of questions of Parliamentary sovereignty.

I appreciate his concern. This case raises important issues but it will not be helped if they are obscured by the inclusion or irrelevant evidence of the history of these actions. However, I do not consider the admissibility of evidence is a matter for me to decide at this stage. I bear in mind that I shall not be the trial judge but, even if I had been, I would rarely consider it appropriate to make an order excluding evidence at this stage and would only do so in the clearest case.

The facts to which those earlier matters relate are set out in paragraphs 8 – 24 of the claim. The defence has simply declined to plead to those paragraphs on the grounds that they deal with matters that precede and are unrelated to the questions in issue in this proceeding and have previously been considered and ruled upon by the Court of Appeal. Whether those objections are well grounded is a matter the trial judge will be able to decide and I am far from satisfied that the fact the defence pleads their irrelevance is sufficient ground for me to determine that point at this stage. The trial judge will be in a much better position to decide and, as the evidence is in the form of affidavits, the trial judge will no doubt be able to hear further submissions, if he wishes, at the commencement of the court hearing.

The application for an order revoking paragraphs 1 and 2 of my order of 13 May 2004 is refused and the question of their relevance is left for the trial judge.

2. The standing of the fourth defendants.

There is no challenge to the standing of the first, second and third plaintiffs. The defence objection to the inclusion of the fourth plaintiffs is that they do not have sufficient interest and that, in any event, the inclusion of multiple parties is a step with wide implications and something that has been frowned on in other jurisdictions.

Dr Harrison contends that the question of sufficient interest has already been decided when the court granted leave to seek judicial review. I do not accept that is the case. Clearly, when the court gives leave at the *ex parte* stage, it has formed a preliminary view, inter alia, on the locus of the applicants. However, that is a provisional finding and is, in the words of Lord Fraser in *Inland Revenue v National Federation* [1982] AC 617, "subject to revisal later".

I am asked to reconsider that question at this point and whether their inclusion has any real purpose. On the latter point, Mr. Radich reminds the court that the same counsel represents all the plaintiffs and the remedies sought are the same. What purpose, therefore, will be achieved by their presence? It appears to be correct that they will not be submitting evidence other than that produced by the plaintiffs as a whole and they will not presumably all be present for the hearing. Even any costs order is unlikely to be extended to them in the event of success in the action although their position in respect of the costs of the defendant in the event that the plaintiffs do not succeed may affect them more directly. It may be that some form of

representative action may have achieved the same purpose but that is not a matter for the court to decide.

Where a plaintiff is not directly affected by the challenged act, it will be a very rare case where the court would find he had sufficient locus. However, it is question of fact and law. In a case such as this which may involve important constitutional issues relating directly to individual freedoms, it can be argued, as Dr Harrison had done, that every person who is subject to the Constitution must have sufficient locus to challenge an act which removes or restricts freedoms guaranteed by that Constitution. Unqualified removal of a constitutional freedom has such a universal effect, it is hard to see how any one individual can be seen to be more affected than another. In many cases, the removal so equally affects every citizen that it can be argued that no one person can claim to be more affected than any other. In those cases, the determination of locus must be construed widely if it is ever to be possible to challenge the issue in the courts.

I have strong reservations about the practical effect of allowing multiple parties but, in terms of locus, I am not persuaded that my original view should be revised at this stage. The final decision will have to be made at the trial when the court can ascertain the actual position in terms of both the evidence and the law.

I decline to make the order sought to dismiss the fourth plaintiffs from the action.

The remaining applications are not subject to dispute.

3. Discovery.

It is clear that there should be discovery and inspection by both sides. However, I see no purpose in ordering discovery against the fourth plaintiffs and I do not do so. This is a case that should be heard as soon as possible and I have set a timetable which makes it possible to hear the action, as has been agreed with counsel, on 30 August 2004. In those circumstances I order that there shall be discovery within 21 days of this order.

4. Affidavits.

Counsel agree that, subject to cross-examination, the evidence shall be by affidavit. I order that the plaintiffs shall file any further affidavits within 14 days following discovery and inspection and the defendants any affidavits within 14 days of that. Notice of requirement to cross-examine shall be filed no later than 13 August 2004.

5. Timetable.

That effectively deals with the timetable. I note Mr. Harrison's agreement to a date later than originally agreed was made with considerable concern that the matter should not be further delayed by interlocutory applications. I hope that will not occur and I have little doubt my successor in this case will be aware of that concern and take a robust approach to any further application.

As the issues have largely been left to the trial judge, I leave determination of the costs of these applications to the trial judge also.

Taione anors v Kingdom of Tonga

Supreme Court, Nuku'alofa
Webster CJ
CV 374/2004

30, 31 August, 1, 2 September 2004; 15 October 2004

Constitutional law – validity of legislation – three Acts declared void
Constitutional law – freedom of expression – Acts too restrictive – void
Constitutional law – constitutional damages – restriction on availability – void

The plaintiffs challenged the amendments to the Constitution of Tonga purporting to have been made by the Act of Constitution of Tonga (Amendment) Act 2003; and they challenged the Media Operators Act 2003 and the Newspaper Act 2003, both of which they claimed to be invalid. The basic primary factual chronology relevant to the application was established as follows:

> The legislation which was challenged followed chronologically a series of events in 2003 where the Government had enacted various pieces of legislation which had the effect of placing certain restrictions on the freedom of the Press. The previous Chief Justice had found that the legislation was invalid and unconstitutional. Those decisions were subsequently upheld by the Court of Appeal.
>
> The outline chronological history of the three Acts which were challenged was:
>
> 26 May: Ward CJ delivered the 2nd Lali Media decision.
> 28 May: Cabinet recommended to Privy Council the Act of Constitution (Amendment) Bill 2003 [the Constitution Bill] and the Media Operators Bill 2003 [the Media Bill].
> 30 May: Cabinet recommended to Privy Council that the Newspaper Bill 2003 [the Newspaper Bill] be approved for tabling and referred to the Privy Council.
> Privy Council approved all three Bills for tabling in the Legislative Assembly.
> 17 Jun: Cabinet recommended to Privy Council that Constitution Bill be approved for tabling and referred to Privy Council; and Media Bill be approved for tabling and referred to Privy Council.

20 Jun: Privy Council approved tabling of Constitution Bill and Media Bill.
1 Jul: Cabinet again recommended to Privy Council that the Newspaper Bill be approved for tabling and referred to the Privy Council.
8 Jul: Privy Council approved tabling of Newspaper Bill.
16-17 Jul: Appeals heard by Court of Appeal.
25 Jul: Court of Appeal upheld *Lali Media* decisions of Ward CJ.
29 July: Media Bill passed three times by Legislative Assembly.
16 Oct: Constitution Bill passed three times by Legislative Assembly.
20 Oct: Newspaper Bill passed three times by Legislative Assembly.
5 Nov: Cabinet unanimously agreed to Constitution Bill being submitted to HM The King for assent.
7 Nov: Privy Council unanimously recommended that Constitution Bill be submitted to HM The King for assent.
18 Nov: Newspaper Act 2003 [the Newspaper Act] assented to by HM The King.
21 Nov: Act of Constitution of Tonga (Amendment) Act 2003 [the Constitution Amendment Act] assented to by HM The King.
24 Nov: Media Operators Act 2003 [the Media Act] assented to by HM The King.
27 Nov: All three Acts published in Tonga Government Gazette.

The challenge was by way of judicial review, or alternatively simply as being inconsistent with the Constitution and hence void to that extent in terms of Clause 82 of the Constitution, as amended in 1990. The two principal issues were: the Constitution of Tonga and its amendment; and the liberty of freedom to speak, write, and print opinions and freedom of the press, otherwise known as freedom of expression.

Held:

1. The Court found that the Media Act 2003 was inconsistent with Cl 7 of the Constitution because it would prevent certain people from exercising freedom of the press, and thus would prevent the public from having access to information and comment freely.
2. The Newspaper Act 2003 gave such wide powers to the Minister to determine content standards for newspapers that it was impossible to say that those powers fell entirely within the recognised exceptions to the freedom of the press granted by Cl 7. The licensing provisions were also wide restraints on publication or circulation and so restrictions on freedom of the press.

3. The Acts could not stand because they were too widely expressed, too unclear as to its limitations, and too intimidating because a person could not be sure whether or not what he or she wrote may result in prosecution or even imprisonment. It was not the Court's function to redraft legislation and the Act was unacceptable as it stood. In each Act the inconsistent provisions were so extensive and inextricably bound up with the other provisions that the latter could not survive independently.
4. The Court found that both Acts were inconsistent with Cl 7 and were therefore void in terms of Cl 82 of the Constitution.
5. Freedom of the press under the Constitution was not limitless and there remained a responsibility on the press. It was important that freedom of the press did not mean that a newspaper had licence to publish what it wanted, when it wanted, about whom it wanted, and how it wanted in any improper, mischievous or illegal manner.
6. The Court found that it was likely that constitutional damages may be available under the Constitution and if so, the new Cl 103A inserted in 2003 would significantly affect and restrict the law of liberty. The Court therefore found that Cl 103A was void to the extent that it was inconsistent with the law of liberty in the Constitution and any consequent right to constitutional damages.

Cases considered:

'Akau'ola & Kingdom of Tonga v Pohiva [1990] Tonga LR 159 (CA)
'Akau'ola v Attorney General [1997] Tonga LR 36 (CA)
Abrams v United States (1919) 250 US 616
Alesana v Samoa Observer Co Ltd [1998] WSSC 1
Armstrong v Budd (1969) 71 SR (NSW) 386
Arnold v King-Emperor (1914) 83 LJPC 300
Attorney-General v BBC [1980] 3 All ER 161 (HL)
Attorney-General v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545 (HL)
Attorney-General v Observer (Times Law Report, 22 December 1987)
Attorney-General v Trethowan [1932] AC 526 (PC)
Attorney General for Alberta v Attorney General for Canada [1947] AC 503 (PC)
Attorney General for Australia v R & Boilermakers' Society of Australia [1957] 2 All ER 45 (PC)
Attorney General for Ontario v Reciprocal Insurers [1924] AC 328 (PC)
Attorney-General of the Gambia v Momodu Jobe [1984] AC 689 (PC)
Attorney-General of Trinidad & Tobago v Whiteman [1991] 2 AC 240, 247 (PC)
Bank of New South Wales v The Commonwealth (1948) 76 CLR 1
Boaler Re Vexatious Actions Act 1896, Re [1914-15] All ER Rep 1022 (CA)
Bribery Commissioner v Ranasinghe [1964] 2 All ER 785 (PC)
Chavunduka v Minister of Home Affairs [2000] 4 LRC 561
Clayton v Heffron (1960) 105 CLR 214
Commissioner of Taxation of the Commonwealth of Australia v Lutovi Investments Proprietary Limited (1978) 140 CLR 434
Cormack v Cope [(1974) 131 CLR 432

Derbyshire CC v Times Newspapers Ltd [1993] 1 All ER 1011 (HL)
Desjarlais, Re [1989] 3 FCR 605 FCA (Canada)
Ellen St Estates Ltd v Minister of Health [1934] 1 KB 590 (CA)
Fie'eiki v Fifita [1995] Tonga LR 184 (CA)
Finau v 'Alafoki & anor [1989] Tonga LR 66
Fotofili v Siale [1987] TOPC 2; [1987] SPLR 339 (PC)
Fuko v Vaikona [1990] Tonga LR 148 (CA)
Hector v Attorney-General of Antigua [1990] 2 All ER 103 (PC)
Hector v Attorney-General of Antigua and Barbuda [1990] 2 WLR 606
Hinds v The Queen [1976] 1 All ER 353 (PC)
Ingraham v McEwan [2003] 4 LRC 270 (CA)
James v Commonwealth (1936) 55 CLR 1, [1936] 2 All ER 1449 (PC)
Kariapper v Wijesinha [1967] 3 All ER 485 (PC)
Kielley v Carson [1842] 4 Moore PC 63 at 91 (13 EH 225 at 236)
Kingdom of Tonga v Pohiva [1993] Tonga LR 25
Lali Media Group Ltd & 'Akau'ola v 'Utoikamanu & The Kingdom of Tonga [2003] Tonga LR 186
Lali Media & Others v Prince 'Ulukalala Lavaka Ata & Others & The Kingdom of Tonga [2003] Tonga LR 117
Lim Laboratories Ltd v Evans [1984] 2 All ER 417 (CA)
Lyon v Daily Telegraph [1943] 1 KB 753
Matadeen v Pointu [1999] 1 AC 98 (PC)
McCawley v The King [1920] AC 691 (PC)
Minister of Lands v Pangia (Scott J unreported 1932)
Minister of Police v Moala [1997] Tonga LR 210 (CA)
New York Times Co v United States 403 US 713, 91 SCt 2140, 29 L Ed 2d 822 (1971)
Olivier v Buttigieg [1966] 2 All ER 459 (PC)
Ontario v Canada [1896] AC 348
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42 (HL)
Petition of The Earl of Antrim & 11 Other Irish Peers [1967] 1 AC 691
Phillips v Britannia Hygienic Laundry Co Ltd [1923] All ER Rep 127 (CA)
Pillai v Mudanayake [1955] 2 All ER 833 (PC)
Pinder v The Queen [2003] AC 620 (PC)
Pohiva v Prime Minister and Kingdom of Tonga [1988] LRC (Const) 949
President & Trustees of Tonga Ma'a Tonga Kautaha, Ex Parte [1908-1959] Tonga LR Vol 1 (1911) 9
Public Prosecutor v Ooi Kee Saik [1971] 2 MLJ 108
Pyx Granite Co v Ministry of Housing [1959] 3 All ER 1 (HL)
R v Central Independent Television plc [1994] 3 All ER 641
R v Halliday [1917] AC 260
R v Home Secretary ex p Simms [1999] 3 All ER 400 (HL)
R v Hughes [2002] 2 AC 259 (PC)
R v Leitch [1998] 1 NZLR 420 (CA)
R v Pohiva (Case No 11/87, 15 January 1988)
R v Shipley, 21 St Tr 847
Read v Croydon Corporation [1938] 4 All ER 631
Reyes v The Queen [2002] 2 AC 235 (PC)

Robati v Privileges Standing Committee of the Parliament of the Cook Islands [2001] NZAR 282 (CA)
Sanft v Fotofili [1987] TOPC 1; [1987] SPLR 354
Schenck v United States, 249 US 47, 39 SCt 247, 63 Led2d (1919)
Silkin v Beaverbrook Newspaper [1958] 1 WLR 743
Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667 (CA)
State v Zuma 1995 (4) BCLR 401
T & T Newspaper Publishing Group Ltd v Central Bank of Trinidad & Tobago [1990] LRC (Const) 391
Tarr v Tarr [1972] 2 All ER 295 (HL)
The State v Petrus [1985] LRC (Const) 699
Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd [1955] 2 All ER 657 (HL)
Toronto v Virgo [1896] AC 88
Touliki Trading Enterprises Ltd v Fakafanua [1995] Tonga LR 8
Touliki Trading v Fakafanua & Kingdom of Tonga (No 2) [1996] Tonga LR 145 (CA)
Tu'itavake v Porter [1989] Tonga LR 14
'Utoikamanu v Lali Media Group Ltd [2003] Tonga LR 218 (CA)
Vaikona v Fuko (No 2) [1990] Tonga LR 68
Vauxhall Estates Ltd v Liverpool Corporation [1932] 1 KB 733 (KBD)

Statutes considered:

Act of Constitution of Tonga (Amendment) Act 2003
Broadcasting Act 1989
Civil Law Act (Cap 25)
Civil Law (Amendment) Act 2003
Communications Act 2000
Constitution of Tonga (Cap 2)
Interpretation Act (Cap 1)
Land Act (Cap 132)
Media Operators Act 2003
Media Operators Ordinance 2003
Newspaper Act 2003
Prohibited Publications Act (Cap 54)

Rules considered:

European Convention of Human Rights

Counsel for plaintiffs : Dr R E Harrison QC
Counsel for defendant : Mr Radich, Ms Hodgson, and Mr Kefu

Judgment

Preliminary

This is a challenge by the plaintiffs to the amendments to the Constitution of Tonga purporting to have been made by the Act of Constitution of Tonga (Amendment) Act 2003; and to the Media Operators Act 2003 and the Newspaper Act 2003, both of which are said to be invalid. The challenge is by way of judicial review, or alternatively simply as being inconsistent with the Constitution and hence void to that extent in terms of Clause 82 of the Constitution, as amended in 1990.

Evidence

In supplement of affidavits already filed for the plaintiffs by the 1st plaintiff Mr Alan F Taione; Mr Kalafi Moala, Chief Executive of the 2nd plaintiff, Lali Media Group Ltd; the 2nd plaintiff Mr Mateni Tapueluelu, Editor of Taimi 'o Tonga; the 3rd plaintiff Mr Po'oi Pohiva, Publisher and Deputy Editor of Kele'a; and the leading 4th plaintiff Mr S 'Akilisi Pohiva, No 1 People's Representative of Tongatapu, Publisher and Editor of Kele'a, the plaintiffs led evidence from Mr Pesi Fonua, Editor of Matangi Tonga; and the 2nd plaintiff Mr Mateni Tapueluelu.

The defendant filed an affidavit from Mrs 'Eseta F Fusitu'a, Chief Secretary and Secretary to HM Cabinet, and also led evidence from her in order that she could be cross-examined in relation to that affidavit. The defendant also filed an affidavit from Dr 'Ana M Taufe'ulungaki, a Tongan who is Director of the Institute of Education of Suva, as an expert witness on the social context of the Constitution. The plaintiffs' Counsel Dr Harrison QC wished to cross-examine this witness in relation to her affidavit, but she was not available on 30 August as she had commitments in Fiji, and the defendant did not seek an adjournment until she was available, so I ruled that the case should proceed and I would consider the standing of her evidence in the whole context of the case and all submissions. Subsequently Dr Taufe'ulungaki would have been available on 3 September, but Dr Harrison then decided not to pursue his original request to cross-examine her.

In the event, because this case turns on the interpretation of the Constitution of Tonga and whether the 2 Acts challenged are consistent with the Constitution, apart from the evidence about the occurrence of the basic events, which was essentially agreed, the Court did not require to take into account most of the other peripheral evidence, including the oral evidence heard on 30 August. The affidavit of Dr Taufe'ulungaki is dealt with later in this decision.

Other preliminary matters

Several other preliminary matters were raised, including the standing to bring this claim of the 4th plaintiffs, who numbered around 150 and included People's Representatives, along with District and Town Officers, religious leaders, and individuals and organisations from throughout Tonga. During the course of the hearing the defendant accepted that the 4th plaintiffs had such standing, and so dropped its challenge on that ground.

The defendant also raised the relevance of reading in evidence from the previous cases concerning Lali Media and the banning of Taimi 'o Tonga, but it was agreed that that issue should also be dealt with in my decision at the end of the case

after hearing all submissions. In the event, while I did not entirely accept the defendant's submission, as can be seen below while arriving at my decision in this case I only required to make minimal reference to relevant parts of that evidence, though I referred to the decisions of the previous Chief Justice and the Court of Appeal in the previous Lali Media cases.

Submissions

Dr Harrison QC made written and oral submissions in support of the plaintiffs' claims (for 1½ days); Mr Radich made written and oral submissions in reply in support of the defendant's defence (for 1 day); then Dr Harrison made further submissions for the plaintiffs in reply (for ½ day). Both Counsel also submitted extensive legal authorities to the Court.

I wish to record my gratitude to all Counsel involved for the thoroughness of their very extensive written and oral submissions, which has made my task very much easier.

Primary factual chronology

There was little or no dispute about the basic primary factual chronology which I consider is relevant to this application. On the evidence and productions presented to it, I found that the following material primary factual chronology relevant to this application was established:

The legislation which is challenged in this case followed chronologically a series of events in 2003 (described in more detail below) where the Government had enacted various pieces of legislation which had the effect of placing certain restrictions on the freedom of the Press. The previous Chief Justice had found in *Lali Media Group Ltd & 'Akau'ola v 'Utoikamanu & The Kingdom of Tonga* [2003] Tonga LR 186 [1st Lali Media decision]; and *Lali Media & Others v Prince 'Ulukalala Lavaka Ata & Others & The Kingdom of Tonga* [2003] Tonga LR 117 [2nd Lali Media decision] (on 4 April and 26 May 2003 respectively) that the legislation was invalid and unconstitutional. Those decisions of the previous Chief Justice were subsequently upheld by the Court of Appeal on 25 July 2003 in *'Utoikamanu v Lali Media Group Ltd* [2003] Tonga LR 218 (CA) [the Lali Media appeals].

Following chronologically those earlier events in 2003, the outline chronological history of the 3 Acts which are now challenged was:

> 26 May: Ward CJ delivers the 2nd Lali Media decision.
>
> 28 May: Cabinet recommends to Privy Council the Act of Constitution (Amendment) Bill 2003 [the Constitution Bill] and the Media Operators Bill 2003 [the Media Bill].
>
> 30 May: Cabinet recommends to Privy Council that the Newspaper Bill 2003 [the Newspaper Bill] be approved for tabling and referred to the Privy Council.
>
> Privy Council approves all 3 Bills for tabling in the Legislative Assembly.
>
> 17 Jun: Cabinet recommends to Privy Council that Constitution Bill be approved for tabling and referred to Privy Council; and Media Bill be approved for tabling and referred to Privy Council.

20 Jun: Privy Council approves tabling of Constitution Bill and Media Bill.
1 Jul: Cabinet again recommends to Privy Council that the Newspaper Bill be approved for tabling and referred to the Privy Council.
8 Jul: Privy Council approves tabling of Newspaper Bill.
16-17 July: Appeals heard by Court of Appeal.
25 July: Court of Appeal upholds Lali Media decisions of Ward CJ.
29 July: Media Bill passed 3 times by Legislative Assembly.
16 Oct: Constitution Bill passed 3 times by Legislative Assembly.
20 Oct: Newspaper Bill passed 3 times by Legislative Assembly.
5 Nov: Cabinet unanimously agrees to Constitution Bill being submitted to HM The King for assent.
7 Nov: Privy Council unanimously recommends that Constitution Bill be submitted to HM The King for assent.
18 Nov: Newspaper Act 2003 [the Newspaper Act] assented to by HM The King.
21 Nov: Act of Constitution of Tonga (Amendment) Act 2003 [the Constitution Amendment Act] assented to by HM The King.
24 Nov: Media Operators Act 2003 [the Media Act] assented to by HM The King.
27 Nov: All 3 Acts published in Tonga Government Gazette.

Principal issue - validity of amendment of Clause 7 of the Constitution

The principal and first issue in this case, although by no means the only issue, is whether the purported amendment of Clause 7 of the Constitution of Tonga by the Act of Constitution of Tonga (Amendment) Act 2003 [the Constitution Amendment Act] is valid.

When the Constitution was enacted in 1875 it read:

> "Freedom of the press
>
> 7. 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 slander or the laws for the protection of the King and the Royal Family."

Clause 7 remained unchanged for over a century, but has been amended once before, in 1990, following which it read:

> "Freedom of the press
>
> 7. 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."

After the 2003 amendment it purports to read:

> "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 slander or the laws for the protection of the King and the Royal Family.
>
> (2) It shall be lawful, in addition to the exceptions set out in sub-clause (1), to enact such laws as are considered necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, privileges of the Legislative Assembly and to provide for contempt of Court and the commission of any offence.
>
> (3) It shall be lawful to enact laws to regulate the operation of any media."

Amendment of the Constitution

Although the 1875 Constitution has been amended several times previously, sometimes in quite major respects, both Counsel agreed that this appears to be the first time that the validity or legitimacy of an amendment to the Constitution has been challenged. This case is therefore of very great importance in the legal and constitutional history of Tonga.

Clause 79 of the Constitution provides:

> "Amendments to Constitution
>
> 79. It shall be lawful for the Legislative Assembly to discuss amendments to the Constitution provided that such amendments shall not affect the law of liberty the succession to the Throne and the titles and hereditary estates of the nobles. And if the Legislative Assembly wish to amend any clause of the Constitution such amendment shall after it has passed the Legislative Assembly three times be submitted to the King and if the Privy Council and the Cabinet are unanimously in favour of the amendment it shall be lawful for the King to assent and when signed by the King it shall become law."

In relation to the proceedings of the Assembly when the Constitution Bill was passed, the plaintiffs did not challenge the internal proceedings of the Assembly, ie they accepted that the manner and form of the passing of the Constitution Bill was valid.

Freedom of expression - general

This case is also crucial for 2 other reasons, the first of which is that it concerns one of the great constitutional and human rights freedoms, the allied freedoms of freedom of speech and freedom of the Press, which I refer to collectively as freedom of expression.

As already mentioned, the legislation which is challenged in this case followed a series of events in 2003 which had led to decisions of the previous Chief Justice that certain pieces of legislation which had the effect of placing restrictions on the freedom of the Press were invalid and unconstitutional. Those decisions of the previous Chief Justice were subsequently upheld by the Court of Appeal on 25 July 2003 in *'Utoikamanu v Lali Media Group Ltd* [2003] Tonga LR 218 (CA), which is binding on this Court in relevant cases such as this, and where the Court of Appeal said about freedom of expression:

> "Before proceeding to consider the particular facts of these appeals, it is worth emphasizing, as Dr Harrison QC did in his submission by reference to John Stuart Mill's famous essay *On Liberty*, that the freedom of the press is not so much conferred on the press as on the people whom it sets at liberty to receive knowledge and opinions, and to debate matters concerning them freely. This has always been regarded as the hallmark of a free society, and the Constitution places Clause 7 at its forefront, as one of a group of clauses concerned with liberty. Those clauses are constitutional guarantees entrenched in a unique way, along with the structure of the monarchy and the nobility, by Clause 79, which states that amendments of the Constitution "shall not affect the law of liberty". Their place in the Constitution is explained in some detail in *Touliki Trading v Fakafanua & Kingdom of Tonga (No 2)* [1996] Tonga LR 145 at 152-154; see also the speech of King Tupou I at the opening of the Parliament at which the Constitution was adopted in 1875.
>
> .....
>
> Clause 7 is a constitutional guarantee of freedom of speech and of the press. Some limitations are conceded by its language and, as applies to any provision in an instrument, some modification of it may be implicit in the context in which it appears (see, for example, *Minister of Police v Moala* [1997] Tonga LR 210 (CA) at 219, commenting on the effect on it of Clause 70). But such a guarantee is not to be ignored or brushed aside. .... Nor is advocacy of amendment of the Constitution by constitutional processes unlawful. How could it be, when Clause 79 of the Constitution expressly contemplates its amendment and the discussion of proposed amendments? In a system of responsible government which includes the participation of regularly elected representatives of the people and of the nobles, public discussion is an

> essential element, as the great King Tupou I plainly recognized: see also *Minister of Police v Moala* at 219-220, a passage more accurately reported in [2001] NZAR 917 at 928.

> In our opinion, the appeals fail also on the ground that the actions taken under the various provisions earlier set out violated Clause 7 of the Constitution."

What was said in *Minister of Police v Moala* at 219-220 and [2001] NZAR 917, 928 (which was about Clause 70 of the Constitution and contempt of the Legislative Assembly) was:

> "Clause 70 does not attempt to pick up the wide ambit of the powers and privileges of the House of Commons ... . Nor, in a written Constitution such as that of Tonga, would it be appropriate for it to do so. Each of the organs of Government in Tonga has the powers that are defined by the Constitution, which as the Chief Justice pointed out, and as was pointed out by this court in *Touliki v Fakafanua* ... , places at its very forefront the liberties of Tongan citizens. Clause 70 is intended to trench upon those liberties only so far as is necessary to enable a Parliamentary Assembly to function effectively. The clause is an exception to a principle of liberty, and should be understood, not in any loose or expansive sense, but in accordance with its terms."

> "To discuss legislation or other resolutions proposed, or to be proposed, to the Legislative Assembly, or passed or to be passed by it, is of the very essence of a constitutional polity - which Tonga is, as clause 31 of the Constitution explicitly states. Indeed, clause 7 makes freedom of the press subject only to the law of slander (an additional reason to read clause 70 as referring to libel in the legal sense) and the protection of the Crown. What Milton wrote, translating Euripides (Doré ed, The Complete Poems of John Milton, vol II, p 665), is embraced by our Constitution:
>
> > "This is true liberty, when freeborn men
> > Having to advise the public may speak free; ...
> > What can be juster in a state than this?" "

There is therefore already much authority in Tongan law upholding the freedom of expression.

However in considering the words of Clause 7 it is also appropriate to draw some guidance from other jurisdictions, as both Counsel sought to do in support of their respective cases, always bearing in mind that this Court's primary duty in this case is to interpret and apply the Constitution of Tonga on the principles set out below. I considered that 2 aspects came over strongly.

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* [1993] Tonga LR 25 at 44-45:

> "Blackstone in his Commentaries on the Laws of England IV 151 recognised the need for a free press, describing it as an essential liberty –
>
> > "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done ... is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or.., offensive writings, which, when published, shall on a fair and' impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment."
>
> That approach is markedly similar to that adopted by Lord Mansfield in *R v Shipley* 21 St Tr 847 at 1040, namely freedom to print "without previous licence, subject to the consequences of law". All this is wholly consistent with the statement by Professor Street in Freedom, the Individual and the Law at page 101 that –
>
> > "freedom of the press means freedom to publish ... not licence for the press to acquire news as it thinks fit, immune from the restraints of the law as it does so."
>
> There can of course be no dubiety about the need for a free press. In the Spycatcher case [*Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545] Scott J at 589 considered the ability of the press freely to report allegations

of scandals in government as "one of the bulwarks of our democratic society. It could not happen in totalitarian countries. If the price that has to be paid is the exposure of the government of the day to pressure or embarrassment when mischievous and false allegations are made, then, in my opinion, that price must be paid". Lord Bridge (in the Privy Council) went somewhat further in *Hector v Attorney-General of Antigua and Barbuda* [1990] 2 WLR 606,608 -

> "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticisms amounts to political censorship of the most invidious and objectionable kind." "

"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." "

The second aspect is that the extent of any limitations on freedom of speech and of the Press should depend on proper and appropriate interpretation of the Constitution, and should not depend on the values and discretion of judges, as expressed by Lord Millett in *Pinder v The Queen* [2003] AC 620 (PC) at 628-631:

> "A constitution is an exercise in balancing the rights of the individual against the democratic rights of the majority. On the one hand, the fundamental rights and freedoms of the individual must be entrenched against future legislative action if they are to be properly protected; on the other hand, the powers of the legislature must not be unduly circumscribed if the democratic process is to be allowed its proper scope. The balance is drawn by the Constitution. The judicial task is to interpret the Constitution in order to determine where the balance is drawn, not to substitute the judges' views where it should be drawn. .....
>
> Their [the judges'] function, which like all judicial functions is to be discharged fairly and impartially, is limited to interpreting the Constitution. As Lord Hoffmann said in *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 108:
>
> > "It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they

> consider should have been the moral and political views of the framers of the constitution. ... As Kentridge AJ said in giving the judgment of the South African Constitutional Court in *State v Zuma* 1995 (4) BCLR 401,412: 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.' "

and as earlier stated by Hoffmann LJ in *R v Central Independent Television plc* [1994] 3 All ER 641, 651-2 (CA):

> "There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word "nevertheless." The judge then goes on to explain that there are other interests which have to be balanced against press freedom. And in deciding upon the importance of press freedom in the particular case, he is likely to distinguish between what he thinks deserves publication in the public interest and things in which the public are merely interested. He may even advert to the commercial motives of the newspaper or television company compared with the damage to the public or individual interest which would be caused by publication.
>
> The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.
>
> Furthermore, in order to enable us to meet our international ... obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), it is necessary that any exceptions should satisfy the tests laid down in article 10(2). They must be "necessary in a

democratic society" and fall within certain permissible categories, namely:

> "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, for maintaining the authority or impartiality of the judiciary."

It cannot be too strongly emphasised that outside the established exceptions, or any new ones which parliament may enact in accordance with its obligations under the Convention, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins. .....

> In any area of human rights like freedom of speech, I respectfully doubt the wisdom of creating judge-made exceptions, particularly when they require a judicial balancing of interests. The danger about such exceptions is that judges are tempted to use them. The facts of the individual case often seem to demand exceptional treatment because the newspaper's interest in publication seems trivial and the hurt likely to be inflicted very great. The interests of the individual litigant and the public interest in the freedom of the press are not easily commensurable. ... But no freedom is without cost and in my view the judiciary should not whittle away freedom of speech with ad hoc exceptions. The principle that the press is free from both government and judicial control is more important than the particular case."

I have set out these quotations from high and respected authorities at some length because I wish to emphasise that these aspects come from many countries and lawyers with great respect and authority and are not simply personal ideas or values which I myself have conceived.

Serious matter for Court to declare legislation invalid

The second crucial matter is that the plaintiffs are asking the Court to declare invalid Acts in connection with those important freedoms which have been passed by the Legislative Assembly, which at any time is not a step that a court should take lightly. As I said in *Tu'itavake v Porter* [1989] Tonga LR 14:

> "It is a serious matter for a court to declare that any Act passed by Parliament is unconstitutional and so invalid, and it is therefore not a step which a court should take hastily or lightly."

That is even more so in this case as it relates to the validity of amendments to the Constitution, but the Courts are the guardians of constitutional rights (see *Pinder v The Queen* [2003] AC 620,628-631 (PC) at page 13 below).

It was accepted by both sides that, unlike many common law countries, Tonga has a supreme Constitution, which means that legislation passed by the legislature (ie the Legislative Assembly and HM The King in terms of Clause 56 of the Constitution, as set out at page 11 below) can reviewed by this Court in terms of Clause 82 of the Constitution, which now provides:

> "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."

It can be noted that that clause has itself been amended twice, once in 1903, and more recently when the entire clause was replaced in 1990 by the wording above.

It was also accepted by both sides that as a result this Court has power to determine whether an Act passed by the Legislative Assembly (a) has been passed in accordance with the requirements of the Constitution; and (b) is consistent with the Constitution.

While, as mentioned above, it was not submitted in this case that the proceedings as such of the Legislative Assembly were at fault, it was stated by the Tongan Privy Council in *Fotofili v Siale* [1987] TOPC 2; [1987] SPLR 339 (PC) 347-9, which again is binding on this Court in relevant cases such as this:

> "It follows that in England the validity of an Act of Parliament is not open to challenge on the ground that its passage through the House is attended by any irregularity.
>
> The same is not true in Tonga, where there is a written Constitution. If, on a true construction of the Constitution, some event or circumstance is made a condition of the authentic expression of the will of the legislature, or otherwise the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court, notwithstanding that the question may involve internal proceedings of the Assembly.
>
> Again, a statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution although its passage through the House was not attended by any irregularity.
>
> The position is then that the Assembly of Tonga, and indeed any Parliamentary body based on a written Constitution, does not have the privilege of supremacy over the Courts enjoyed in the United Kingdom."

At the same sitting, in *Sanft v Fotofili* [1987] TOPC 1; [1987] SPLR 354, 358, the Tongan Privy Council considered a claim that a Bill had not been passed lawfully *by* the Legislative Assembly and, noting as relevant the passages from *Sanft v Fotofili* quoted above, confirmed that, provided that the constitutional requirements were met,

the Court had "no jurisdiction to inquire into the 'internal proceedings' of the Assembly".

Presumption of constitutionality

There is a presumption of constitutional validity of legislation under which, if it is possible to read the statutory language as subject to an implied term which avoids conflict with constitutional limitations, the court should be very ready to make such an implication, as explained by Lord Diplock delivering the judgment of the Privy Council in London in *Attorney-General of the Gambia v Momodu Jobe* [1984] AC 689, 702 (PC):

> "Where, as in the instant case, omissions by the draftsman of the law to state and express in words what, from the subject matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention, a Court charged with the judicial duty *or* giving effect to Parliament's intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating, by necessary implication, words which would give effect to such inferred intention, wherever to do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect."

This was endorsed in *Hector v Attorney-General of Antigua* [1990] 2 All ER 103 (PC) at 107.

Law of liberty

Reference has already been made to the provisions in Clauses 7 and 79 of the Constitution about the law of liberty. I understood it to be accepted by Counsel that in the context of the Constitution freedom of speech and freedom of the Press form part of the law of liberty, as indeed it was impliedly accepted by the Court of Appeal in the passage from the *Lali Media appeals* referred to at page 5 above.

However Mr Radich submitted for the defendant, and Dr Harrison accepted, as I do, that freedom of speech and freedom of the Press cannot mean absolute freedom, and that in practice, in addition to the 3 existing express limitations in the exceptions in Clause 7 for the law of defamation, official secrets or the laws for the protection of the King and the Royal Family, as accepted by the Court of Appeal in the *Lali Media appeals* it is circumscribed by implied limitations. Such limitations were referred to by Dalgety J in *Kingdom of Tonga v Pohiva* [1993] Tonga LR 25 at 45 and 46:

> "However, the freedoms enshrined in English Common Law are not absolute. "The right of fair comment is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law on which we depend for our personal freedom": per Scott LJ in *Lyon v Daily Telegraph* [1943] 1 KB 753. An editor has exactly the same rights, neither more nor less, than

any other citizen: see *Silkin v Beaverbrook Newspaper* [1958] 1 WLR 743 per Diplock J at 746. As with any journalist -

> " ... his privilege is no other and no higher ... the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of every other subject. No privilege attaches to his position." per Lord Shaw in *Arnold v King-Emperor* (1914) 83 LJPC at 300.

That however is not to underestimate the crucial role played by the "Press" in modern society. It has "... a legitimate role in exposing scandal in Government. An open democratic society requires that to be so": *Attorney-General v Observer* (Times Law Report, 22 December 1987). As Martin CJ stated in *R v Pohiva* (Case No 11/87, 15 January 1988) -

> "If a newspaper believes that wrong has been done it is right that it should report it. But it must first take careful steps to ensure that what it alleges is true."

In *Spycatcher* [*Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545] at 623 Bingham LJ makes reference to a distinguished American author, Archibald Cox who recently wrote in Freedom of Expression at page 4 that -

> "Freedom of expression, despite its primacy, can never be absolute. ... At any time unrestrained expression may conflict with important public or private interests ... Some balancing is inescapable. The ultimate question is always, where has - and should - the balance be struck"

How the balance will be struck will of course depend on all the facts and circumstances of each particular case."

In *James v Commonwealth* (1936) 55 CLR 1, [1936] 2 All ER 1449 (PC) at 1473-4 the Privy Council in London, in illustrating the difficulties of interpreting the word "free" in the expression "trade between the states shall be absolutely free" in section 92 of the Commonwealth of Australian Constitution, referred in passing to the meaning of "free speech":

> "In any case the use of the language involves the fallacy that a word completely general and undefined is most effective. A good draftsman would realise that the mere generality of the word must compel limitation in its interpretation. "Free" in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law ... Free love, on the contrary, means

> licence or libertinage, though even so there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to anyone who comes, subject however to his condition or behaviour not being objectionable. Free trade means in ordinary parlance freedom from tariffs. Free in sect. 92 cannot be limited to freedom in the last-mentioned sense."

Some of the limitations may also be seen in other jurisdictions, as both Counsel referred to in their submissions and are dealt with below at page 28 onwards.

Framework in the Constitution for legislation

Mr Radich for the defendant referred in his submissions to Parliamentary sovereignty, but I do not think that is the correct expression in Tonga, given the role played by HM The King in making legislation, as set out in Clause 56:

> "Power of Legislative Assembly
> 56. The King and the Legislative Assembly shall have power to enact laws, and the representatives of the nobles and the representatives of the people shall sit as one House. When the Legislative Assembly shall have agreed upon any Bill which has been read and voted for by a majority three times it shall be presented to the King for his sanction and after receiving his sanction and signature it shall become law upon publication. Votes shall be given by raising the hand or by standing up in division or by saying "Aye" or "No"."

and in Clause 68:

> "King's veto precludes discussion
> 68. Should the King withhold his sanction from any law passed by the Legislative Assembly and submitted to him for approval it shall be unlawful for the Legislative Assembly again to discuss such law until the following session."

There are also the specific provisions about HM The King's relations with the Assembly in 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."

However the specific terminology is not crucial in this case – probably legislative supremacy is a better expression.

Jurisdiction of the Supreme Court

In this context it is also appropriate in setting out the constitutional framework and the jurisdiction of this Court to mention 3 provisions in the Constitution.

Clause 84, the first clause in the section of the Constitution headed The Judiciary provides:

> "The Courts
> 84. The judicial power of the Kingdom shall be vested in the Court of Appeal, the Supreme Court, the Magistrate's Court, and the Land Court."

Clause 90, which has been amended several times, concerns the jurisdiction of this Court and provides:

> "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."

The judicial oath is also stipulated in Clause 95 of the Constitution (as amended in 1966), in the case of judges who are not Tongan subjects, making it clear that the judge must perform his duties in accordance with the Constitution and the laws of the Kingdom.

Interpretation of the Constitution

I was referred by both Counsel to my own earlier decision (already referred to) in *Tu'itavake v Porter* on this subject.

In *James v Commonwealth* (1936) 55 CLR 1, [1936] 2 All ER 1449, 1464 (PC) the Privy Council in London said:-

> "The words used [in a constitution] are necessarily general and their full import and true meaning can often only be appreciated when considered; as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."

The guidelines enunciated in that decision had been foreshadowed in the Land Court in *Finau v 'Alafoki & anor* [1989] Tonga LR 66; and were repeated in *Vaikona v Fuko (No 2)* [1990] Tonga LR 68 and upheld by the Court of Appeal in the subsequent appeal in *Fuko v Vaikona* [1990] Tonga LR 148 (CA), thus binding this Court in a case such as this. I believe they are still substantially the law and, together with the background and authorities referred to there (which for brevity I shall not repeat), I import them into this decision as follows:

> "To summarise the principles which emerge from these cases with relevance to the interpretation of the Constitution in the present application, this Court must -
>
> (1) first pay proper attention to the words actually used in context;
> (2) avoid doing so literally or rigidly;
> (3) look also at the whole Constitution;
> (4) consider further the background circumstances when the Constitution was granted in 1875;
> (5) bear in mind established principles of international laws [*not relevant here*];
> (6) finally, be flexible to allow for changing circumstances."

Since then there has also been the case of *Touliki Trading Enterprises Ltd v Fakafanua* [1995] Tonga LR 8; [1996] Tonga LR 145 (CA). Although Tu'itavake and the other cases were considered by the Supreme Court in that case, the principles set out above were not changed by it; Lewis J also referred at p 32 to the subsequent case of *Attorney-General of Trinidad & Tobago v Whiteman* [1991] 2 AC 240, 247 (PC), where (although not referred to in argument before me) there is the following passage of relevance:

> "The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights."

Dr Harrison also referred the Court to what was said by the Privy Council in London in *Pinder v The Queen* [2003] 1 AC 620, 628 (PC):

> "14. The appellant submitted that article 17(2) is a derogation from the constitutional guarantee contained in article 17(1), and that it must consequently be narrowly construed. Their Lordships agree; the many authorities in which the principle has been stated are too well known to require citation. But it must not be pushed so far that narrow construction becomes misconstruction. Due regard must always be paid to the language and purpose of the constitutional provision. As Lord Bingham of Cornhill observed in *Reyes v The Queen* [2002] 2 AC 235,246, para 26 (PC):
>
> "As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional

> provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution ... "

If the court indulges itself by straining the language of the constitution to accord with its own subjective moral values then, as Holmes J said almost a century ago in his first opinion for the Supreme Court of the United States *(*Otis v Parker (1903) 187 US 606, 609):

> "a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions ... " "

The passage then continues with the passages already cited (at page 7 above).

The minority view in that case (at p 638) of Lord Nicholls of Birkenhead and Lord Hope of Craighead is also of relevance:

> "It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of courts is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given "strict and narrow, rather than broad, constructions": see *The State v Petrus* [1985] LRC (Const) 699, 720D-F, per Aguda JA in the Court of Appeal of Botswana, applied by their Lordships' Board in *R v Hughes* [2002] 2 AC 259, 277, para 35 (PC). ... An unambiguous literal interpretation should give way to a narrower purposive interpretation when it is sufficiently clear this would accord better with the intended purpose of the exception."

There is also some guidance in *Hinds v The Queen* [1976] 1 All ER 353, 359 (PC), referred to by Mr Radich in his submissions about the supremacy of the legislature, where the Privy Council in London said:

> "A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of the subject-matter and of the surrounding circumstances with reference to which it was made. ...
>
> In seeking to apply to the interpretation of the Constitution [of Jamaica] what has been said in particular cases about other constitutions, care must be taken to distinguish between judicial reasoning which depended on the express words used in the particular constitution under consideration and reasoning which depended on what, though not expressed, is

> nonetheless a necessary implication from the subject-matter and structure of the constitution and the circumstances in which it has been made. ...
>
> Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. ...
>
> ... To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading ... ."

and in the minority opinion of Viscount Dilhorne and Lord Fraser in *Hinds* at 380:

> "A written constitution must be construed like any other written document. It must be construed to give effect to the intentions of those who made and agreed to it and those intentions are expressed in or to be deduced from the terms of the constitution itself and not from any preconceived ideas as to what such a constitution should or should not contain. It must not be construed as if it was partly written and partly not. We agree that such constitutions differ from ordinary legislation and this fact should lead to even greater reluctance to imply something not expressed. While we recognise that an inference may be drawn from the express provisions of a constitution (see *Attorney General for Australia v R & Boilermakers' Society of Australia* per Viscount Simonds [1957] 2 All ER 45,51 (PC)) we do not agree that on the adoption of a constitution a great deal is left to necessary implication. If this were so, a written constitution would largely fail to achieve its object. If it does not define clearly what parliament can do and cannot do by ordinary enactment, then the government and parliament ... may find that as a result of judicial decision after a considerable lapse of time all the time spent in legislating has been wasted and that laws urgently required have not been validly enacted."

So I consider that the Court should adhere to the 5 principles as summarised in *Tu'itavake v Porter*, but adding as para (1A) that it must not construe the Constitution as partly written and partly not; expanding para (2) to add that it applies especially for the protection of human rights; inserting as para (2A) that any derogation is to be narrowly construed, but not so narrowly as to amount to misconstruction; and inserting as para (2B) that the court must beware of imposing the judge's own values.

Position of the legislature

The main thrust of the submissions by Mr Radich for the defendant was that the legislature is supreme and can amend the Constitution if and as it so wishes - but that is not the complete picture for Tonga.

The Court of Appeal in *Minister of Police v Moala* (which was primarily concerned with clause 70 of the Constitution relating to contempt of the Legislative Assembly) also stated (at 212-4):

> "But the position in Tonga is not at all the same [*as the UK or Australia*]. The Legislative Assembly is not the beneficiary of what Baron Parke, in *Kielley v Carson* [1842] 4 Moore PC 63 at 91 (13 EH 225 at 236), described as "the peculiar powers of Parliament", powers which are a result of an historical process in the distant past and, his Lordship thought, "ought not ... to be extended any further". ... Rather than leave the powers of the Legislative Assembly to common law, or implication, or ... to a general grant of the powers of the United Kingdom House of Commons, the Constitution of Tonga has chosen to confer specific and limited powers, which are contained in clause 70.
>
> As was pointed out by Martin J and by the Privy Council in *Fotofili v Siale* [1987] SPLR 339, the definition by the Tongan Constitution of the powers and privileges of the Legislative Assembly makes all the difference. Those powers and privileges are not at large, and whether the occasion for their exercise has arisen must depend on a true understanding of the Constitution. The Privy Council accepted (at 348) that "when a matter is a 'proceeding' of the House beginning and terminating within its own walls it is outside the jurisdiction of the courts". But it added (at 349-350) the significant statement:
>
> > "[I]n determining its jurisdiction to inquire into internal proceedings of the Assembly [the Court] must apply the English common law regarding the privilege of Parliament to determine the regularity of its own proceedings, *provided of course the Assembly has not acted contrary to the provisions of the Constitution in the course of those proceedings*, for in such *a* case the Court is given jurisdiction by Article 90 of the Constitution..."
>
> We conclude then that 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.*
>
> .....

By the Constitution, the jurisdiction to determine its meaning and application has been conferred on the Supreme Court, and an "exclusive power and jurisdiction to hear and determine all appeals ... from the Supreme Court" has been conferred on the Court of Appeal. See clauses 90 and 92. Relevantly for present purposes, clause 90 provides:

> "The Supreme Court shall have jurisdiction in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom".

The words "in Law and Equity" do not limit the width of the conferral of power in all cases arising under the constitution, for those words are words of extension, not of limitation: cf *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 383; *Commissioner of Taxation of the Commonwealth of Australia v Lutovi Investments Proprietary Limited* (1978) 140 CLR 434, 443-444. In *Clayton v Heffron* (1960) 105 CLR 214, 233 "law" and "equity" were treated, in the joint judgment of Dixon CJ, McTiernan, Taylor and Windeyer JJ, as comprehending the entire spectrum of legal jurisdiction. It is interesting to compare the direct conferral of jurisdiction on the Supreme Court by clause 90 of the Constitution of Tonga with the indirect conferral of jurisdiction on the High Court of Australia under s 76 of the Australian Constitution ...

The Tongan position, as distinct from that in England and that under s 49 of the Constitution of the Commonwealth of Australia, which assimilates the Australian Parliament to the English House of Commons, is well illustrated by the New South Wales case *Armstrong v Budd* (1969) 71 SR (NSW) 386, where Herron CJ said (at 398):

> "[T]his Court [the Supreme Court of New South Wales] has a jurisdiction to determine whether in a particular case the House [he was referring to the Legislative Council, one of the Houses of Parliament of New South Wales] has exceeded the powers conferred on it by the Constitution. ... "

The effect of a written constitution, in curtailing the very wide parliamentary powers and privileges that have been conceded to the House of Commons in the United Kingdom, has been repeatedly affirmed by the highest courts of countries that have written constitutions. ... "

The Court was referred by Mr Radich for the defendant on the matter of parliamentary sovereignty to *Bribery Commissioner v Ranasinghe* [1964] 2 All ER 785 (PC); and also to *Hinds v The Queen* [1976] 1 All ER 353 (PC). But in the context of the Tongan Constitution I did not find that these cases supported his submissions for total supremacy of the legislature. Rather they supported the position, set out above, taken by the Court of Appeal in Tonga in *Minister of Police v Moala*,

which of course binds this Court in this case, that the powers of the legislature of Tonga are not at large but are circumscribed by the written Constitution of Tonga.

Mr Radich also referred to *Attorney-General v Trethowan* [1932] AC 526 (PC) 539-40, where the Privy Council in London found that, as the requirement of the Constitution of New South Wales had not been met, Bills abolishing the Legislative Council and amending the Constitution were therefore *ultra vires* the Constitution and invalid. Again that supports the position stated in *Minister of Police v Moala*. The Privy Council in London stated:

> "Reading the section as a whole, it gives to the legislature of New South Wales certain powers, subject to this, that in respect of some laws they can only become effectual provided they have been passed in such manner and form as may from time to time be required by any Act still on the statute book."

In *Ranasinghe* at 792 the Privy Council in London said:

> " ... a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether that the legislature is sovereign ... , or whether the constitution is "uncontrolled" ... . Such a constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that the legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process."

Dr Harrison for the plaintiffs referred to the case of *McCawley v The King* [1920] AC 691 (PC), from a well known passage in which the Privy Council in *Ranasinghe* took the initial part of the passage quoted above, but beyond that I did not consider *McCawley* directly in point or helpful.

Then in *Hinds* at 360-361 the Privy Council in London said:

> "In the result there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftsmanship which may conveniently be described as 'the Westminster model'.
>
> The more recent constitutions on the Westminster model, unlike their earlier prototypes, include a chapter dealing with fundamental rights and freedoms. The provisions of this chapter form part of the substantive law of the state and until amended by whatever special procedure is laid down in the

> constitution for this purpose, imposed a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers. ...
>
> One final general observation: where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the people themselves. The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties ... , minority and majority alike, who took part in the negotiations which led to the constitution, should not be altered without mature consideration by the parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament ... as an ordinary law are inconsistent with the constitution ... , neither the courts ... nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the constitution and so can be validly passed only after the constitution has been amended by the method laid down by it for altering that entrenched provision."

It was also notable that in reaching its decision, the Privy Council in *Hinds* had regard to what it described as the manifest intention of the constitution and the provisions under consideration.

There were also other important passages in the minority opinion of Viscount Dilhorne and Lord Fraser in *Hinds* at 376, which can be quoted briefly:

> " ... Certain provisions of the Constitution [*of Jamaica*] are entrenched, that is to say, they can only be altered or repealed or amended by Parliament if special procedures laid down in s 49 of the Constitution are followed. ...
>
> That the Parliament ... has power to [*create a court* ...] is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then it could only do

> so effectively if the Constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution. The Constitution does not prescribe that any special procedure has to be laid down for the valid enactment of a Bill to which s 50 (see below) does not apply which conflicts with the Constitution. It requires that a special procedure shall be followed for the amendment of the Constitution."

In relation to this case and the question of whether the Constitution has been validly amended, the principles which I draw from those cases are:

(A) that a constitution can be altered or amended by the legislature in so far as the constitution itself provides, and so long as the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions stipulating how such amendments are to be done;

(B) a provision conflicting with a specifically protected provision (ie an entrenched provision) in a constitution can be validly passed only after the constitution has been amended by the method laid down by it for altering that entrenched provision;

(C) logically and juridically principle (B) must also apply to provisions purporting to amend the constitution itself;

(D) principle (B) applies also to provisions about fundamental rights and freedoms, which form part of the substantive law and, until amended by whatever special procedure is laid down, impose a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers;

(E) in deciding whether any provisions of a law passed by the legislature as an ordinary law are inconsistent with the constitution, the court is not concerned with the propriety or expediency of the law impugned, it is concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the constitution and so can be validly passed only after the constitution has been amended as in (B) above.

Entrenching provisions in the Constitution

As indicated at page 4 above, the Constitution of Tonga contains at Clause 79 a procedure for amendment of provisions of the Constitution, which provides a type of entrenchment in that as a proviso it states "provided that such amendments shall not affect the law of liberty the succession to the Throne and the titles and hereditary estates of the nobles".

Applying the principles already stated, I interpret those words to mean what they say, ie that those particular provisions cannot be amended except within the

terms of the Constitution while those words stand in Clause 79. As Dr Harrison submitted in relation to the other parts of the entrenching provision in Clause 79 – ie "provided that such amendments shall not affect ... the succession to the Throne and the titles and hereditary estates of the nobles" - Clause 67 of the Constitution provides:

> "Privilege of nobles
> 67. It shall be lawful for only the nobles of the Legislative Assembly to discuss or vote upon laws relating to the King or the Royal Family or the titles and inheritances of the nobles and after any such bill has been passed three times by a majority of the nobles of the Legislative Assembly it shall be submitted to the King for his sanction."

That shows that it may be possible to amend those other provisions entrenched by Clause 79 provided that the special procedure stipulated by Clause 67 is followed: but in the absence of any special more onerous or lengthy procedure being stipulated for amendment of the law of liberty, the inference is strengthened and reinforced that the law of liberty cannot be amended while the entrenching provision of Clause 79 still stands.

As already mentioned, I believe that it is beyond doubt that the provisions of Clause 7 (which themselves use the word "liberty") fall within "the law of liberty". It was stated by the Court of Appeal in *Touliki Trading v Fakafanua* [1996] Tonga LR 145, 154 (CA):

> "Each of these early clauses of the Constitution is primarily concerned with the implications of the constitutional entrenchment of human liberty."

That is the same position as I believe applies to the other relevant entrenchment in this case, ie the words in Clause 7 itself "and no law shall ever be enacted to restrict this liberty" and that there shall be freedom of speech and of the press "for ever".

The Court of Appeal also stated in *Touliki Trading* at 152:

> "Subject to special provisions concerning the Land Court, cl. 90 of the Constitution confers jurisdiction on the Supreme Court "in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom". ... It is accordingly not in doubt that an Act of the legislature (or an Order-in-Council) may be declared invalid by the Supreme Court, ... if it be found to infringe the Constitution: *Fuko v Vaikona* [1990] Tonga LR 148, 150-1, citing *Minister of Lands v Pangia* (Scott J unreported 1932); *Fotofili v Siale* (Privy Council unreported 3 August 1987 [now [1987] TOPC 2; [1987] SPLR 339, 347-9 (PC), see page 9 above]). In the last case, the Privy Council stated the law: ... [quoting the passage referred to at page 9 above]"

It was stated by the Court of Appeal in *Minister of Police v Moala* at p 215, referring to *Robati v Privileges Standing Committee of the Parliament of the Cook Islands* [2001] NZAR 282 (CA):

> "[In *Robati* at 289] Quilliam JA ... held that where Parliament, though claiming to pursue its privilege, acts unconstitutionally, "it must be proper for the Court to intervene". He cited also the remarks of Barwick CJ in the High Court of Australia in *Cormack v Cope* [(1974) 131 CLR 432] (supra, at 453):
>
> > "Whilst it may be true the Court will not interfere in what I would call the intra-mural deliberative activities of the Parliament, it has both a right and a duty to interfere if the constitutionally required process of law making is not properly carried out."
>
> and (at 464):
>
> > "[T]here is no Parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law making are observed."
>
> No sensible reason can be advanced why the Court should be more chary of interfering to prevent a gross excess of Parliament's right to deal with a breach of privilege (reaching beyond its constitutional limits) than of interfering to prevent an irregularity in the procedure for the adoption of a Bill."

I therefore cannot accept that the authorities support the submissions of Mr Radich that the entrenching provisions in Clauses 7 and 79 are of no effect.

To sum up, in Tonga the legislature has supreme power to enact laws but, unlike the Westminster Parliament, as stated by the Court of Appeal in *Minister of Police v Moala* at 212 that is not an unfettered power because Tonga has a written Constitution, so the legislature can only make laws within the terms of the Constitution and its powers within the Constitution.

The legislature's power to enact laws includes power under Clause 79 of the Constitution to amend the Constitution itself, but only according to the terms of Clause 79, and in particular any restrictions contained in it as to the procedure to be followed and any specially protected provisions, ie entrenched provisions.

Mr Radich submitted for the defendant that the legislature can even amend the words in Clause 79 (and Clause 7) which provide for that protection, ie "provided that such amendments shall not affect the law of liberty ... ". But it is very important in this case that the legislature did not do so and the words protecting the law of liberty still stand, and the Court does not have to decide whether that submission is correct. That would be a very different matter: as Lord Hoffmann said in *R v Home Secretary ex p Simms* [1999] 3 All ER 400, 412 (HL):

> "The constraints upon its exercise by Parliament [*of the power to legislate contrary to fundamental principles of human rights*] are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is

> because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

Possibility of repeal by implication

Mr Radich cited two English cases in relation to implied repeal, *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733 (KBD) and *Ellen St Estates Ltd v Minister of Health* [1934] 1 KB 590 (CA), but I did not find them either particularly relevant or helpful. They say little more than is provided by section 16 of the Interpretation Act of Tonga:

> "Repeal by implication.
> 16. Whenever any Act is passed which contains provisions irreconcilable with but does not expressly repeal an existing Act, then the provisions in such existing Act which are irreconcilable with the provisions of the new Act shall be held to be impliedly repealed."

but that applies to Acts of the Legislative Assembly, not to the Constitution. As Dr Harrison submitted in reply, those cases were not concerned with superior law constitutions, nor with express attempts to bind a future legislature, even as to manner and form.

Repeal by implication is not favoured by the courts, for it is to be presumed that the legislature would not intend to effect so important a matter as the repeal of a law without expressing its intention to do so:

> "Repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or, on the other hand, to effect so important to measure as the repeal of the law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."
> *R v Halliday* [1917] AC 260 at 305

The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together. If it is reasonably possible so to construe the provisions as to give effect to both, that must be done. (*Halsbury's Laws (4th Ed)* Vol 44 para 966)

The principle of implied repeal and amendment has been applied to enactments which are inconsistent with a controlled constitution; but only if the constitutional requirements are complied with in relation to the inconsistent enactment is the constitution is amended: see *Kariapper v Wijesinha* [1967] 3 All ER 485 (PC) at 494 and 495; *Halsbury's Laws (4th Ed)* Vol 44 para 966 Note 5, where, having considered the cases of *McCawley* and *Ranasinghe* already referred to, it was stated by the Privy Council in London:

> "Accordingly, therefore, on general principles and with the guidance of the earlier authority, their Lordships have come to the conclusion that the act, inconsistent as it is with the constitution [of Ceylon], is to be regarded as amending that constitution unless there is to be found in the constitutional restrictions imposed on the power of amendment some provision which denies it constitutional effect. .....
>
> In the course of argument, a good deal was made of the doubts and complexities that must follow if the constitution can be amended by laws which do not, as it were, show their colours, and the point was forcibly emphasised by reference to the very law under consideration. The Board is thoroughly aware of the difficulties that are likely to result from altering the constitution except by laws which plainly and expressly amend it with particularity. Considerations of this sort, powerful as they ought to be with the draftsman, cannot in a court of law weigh against the considerations which have brought the Board to its conclusions that a bill, which on its passage into law would amend the constitution, is the bill for its amendment."

In *Petition of The Earl of Antrim & 11 Other Irish Peers* [1967] 1 AC 691 at 724 Lord Wilberforce said:

> "I confess to some reluctance to holding that an Act of such constitutional significance as the Union with Ireland Act is subject to the doctrine of implied repeal or of obsolescence – all the more when these effects are claimed to result from later legislation which could have brought them about by specific enactment."

I share the reluctance of Lord Wilberforce. The Court cannot consider that the words of protection, ie the entrenching provisions, have been impliedly repealed by the passing by the legislature of the purported amendments to Clause 7 in 2003 or earlier, or the unchallenged amendments to other clauses falling within the entrenching provisions. Although mentioned for the defendant, any inference to be drawn from the passing of the 2 subsequent Acts (the Media Operators Act 2003 and the Newspaper Act 2003) was not strongly argued and in any event, as stated in *Hinds*, an Act which has not been passed in accordance with the entrenching provisions (ie the full procedure in Clause 79, by being submitted to the King after being passed by the Legislative Assembly 3 times and to the Privy Council and Cabinet, who were

unanimously in favour of it) cannot achieve an amendment to the written Constitution.

Even although Clause 7 was previously amended in 1990 when official secrets was added to the list of exceptions, I consider that falls within the recognised exceptions to freedom of expression, as explained at pages 28-31 below.

In any event I do not accept that there could be an implied repeal. Quite simply the constitutional requirements were not complied with in relation to the allegedly inconsistent enactment, so it must be denied constitutional effect to the extent that it conflicts or is inconsistent with Clauses 7 and/or 79. The law of liberty is of such importance in the framework of the whole Constitution and the laws of Tonga as a whole that its constitutional protection cannot be amended simply by implication: any amendment to the protection for the law of liberty given in Clause 79 and in Clause 7 itself would have to be done directly and openly, not by a side wind, as it were.

Protected (ie entrenched) provisions

However in addition to the unique nature of the challenge to the purported amendments to the Constitution, the difficult and unusual position with which the Court is faced in this case is that the amendments to Clause 7 in the Constitution Amendment Act of 2003 appear or purport to make amendments which may "affect the law of liberty" without having removed, altered or amended the entrenching words in either Clause 7 itself or in Clause 79.

So the Court has to look at the purported amendments to Clause 7 and consider whether they conflict with the entrenched freedoms, as entrenched and conferred by that clause in its previous form. Those entrenched freedoms are part of the law of liberty in the Declaration of Rights which forms Part I of the Constitution, which must be given a wide meaning in the context of the conferment of the Constitution by King George Tupou I in 1875 and its adoption by Parliament at that time.

I was unable to accept the submissions by Dr Harrison for the plaintiffs that due to the entrenching provisions of Clauses 7 and 79 the amendments to Clause 7 were in effect automatically void on an all or nothing basis.

Context of the 1875 Constitution

There is a great deal of material and information showing the context in which the Constitution was adopted in 1875.

The Court was referred to Dr Sione Latukefu's book "The Tongan Constitution – A brief history to celebrate its centenary", pages 20-34 of which were mentioned in the *Touliki Trading* decision in the Court of Appeal, which in turn was referred to by the Court of Appeal in its *Lali Media* decision. There are many relevant references in those pages to the context of the Constitution, but for brevity I shall refer to them rather than set them all out in detail.

At page 20 it is clear that by the 1830s King George Tupou recognised that much of Tongan customary law was incompatible with Christianity, so there was a need for a new legal machinery better suited to the country's changing needs and aspirations; and this first venture into legislation, culminating in the Vava'u Code of 1839, was heavily influenced by missionary teaching.

Some years later the King sought further advice, as described at pages 23-4, from 'the highest English legal authority in New Zealand on the matter' and was

advised to adopt a Code of Laws similar to the Society Islands Laws, making any modifications necessary to suit local conditions. The eventual success of these codes can be attributed to the fact that the final decisions were taken by the Tongans (page 27).

Then the King turned to trying to secure the recognition of Tonga by the Western powers and in the 1850s he concentrated on improving the country's legal system (pages 28-29). The King sought more help and Sir George Grey, Governor of New Zealand, exhibited much interest in the affairs of Tonga, and an intimate friendship developed between him and the King, to whom he offered advice on various matters (pages 29-30). At the instigation of the missionaries, King George decided to visit New South Wales towards the end of 1853, in order to see how the people of civilised countries lived and managed their affairs. After his return from Sydney, King George received several letters from Mr Charles St Julian, a law reporter for the Sydney Morning Herald, who was also Hawaiian Consul in Sydney, with suggestions that the King should take steps to secure formal recognition of his independence by foreign powers, and that he should establish a constitutional government. A copy of the Constitution adopted by Hawaii at that time was also presented to the King.

Subsequently the King himself was at the receiving end of criticism in the Press (page 31):

> "The King's apparent lack of enthusiasm for the reforms which St Julian believed were needed in Tonga, led the latter to publish an article in the Sydney Morning Herald on 9 January 1858, alleging among other things that King George's 'government of his own islands is totally inefficient except for the wants of the merest savages, and, with the true feeling of a semi-barbaric chief, he obstinately resists all improvement.' When this article was challenged by the General Secretary of Methodist Overseas Missions, St Julian defended his allegation that King George's Government was inefficient:
>
> > I am unable to deny its truth, [he wrote] when I remember that the Tonguese laws, imperfect as they are, are administered by chiefs who divide among themselves, by way of remuneration for their trouble, the fines and labour of those whom they convict and when I remember too that they have proved powerless for the enforcement of some of the simplest contracts known to civilised men - That King George having brought his governmental system to its present condition and hitherto expressed the strongest disinclination to make such further improvements as would fit his state for the duties imposed on civilised governments and justify its admission within the pale of internationality ... [he] must have an organised government, and an effective

> code of Laws impartially administered, but relieve the lower orders from the exactions of chiefdom, must encourage industrial improvement, but give up his local preachership and stand neutral between all sects and classes of his subjects."

There was good international reaction from countries such as England and Australia after promulgation of the 1862 Code of Laws, which was heartening to the King, who wished to gain the recognition of the world at large for his Government (page 37). So by the 1870s, the attitudes of the Europeans, together with the growing international rivalry in the Pacific, drove home to King George more forcefully than ever before the urgent need for international recognition of his Government if the independent sovereignty of Tonga was to be maintained. These events must have reminded the King of St Julian's advice that permanent independence could only be assured through the establishment of a good and efficient constitutional government. Interestingly in the context of the present case, St Julian had also argued that it was essential for good government that:

> "Such fundamental principles should be laid down as would form what is termed a constitution and all subsequent legislation should be in strict accordance with these principles."

The King felt that the 1862 Code did not go far enough and that it was time for a full constitution (pages 39-40).

The framing of the Constitution, during which Baker evidently used the Press to explain it, was described by Dr Latukefu at pages 40-41. Baker sought advice and assistance from the Premier of New South Wales, Sir Henry Parkes, who gave him a copy of all the laws of the Government of New South Wales since its inception. These laws, together with the copy of the 1852 Constitution of Hawaii, enabled Baker to compile a draft constitution for King George who, as he had done with the earlier codes, considered and altered it according to what he believed most suitable for his country. As Dr Latukefu explains:

> "Between March and September 1875 Baker used the issues of the monthly Koe Boobooi which he edited to explain to the people the nature of a constitution. He compared it to the Bible, which he said was 'the book which explains our spiritual freedom, the things we should do and the things we should not ... in particular the way in which the church should be governed, and what is to be done in the church ...' The constitution on the other hand, he argued, was 'the Book of freedom and the method by which the country is governed ... the testament of our freedom to the people of the country, and a testament of how they should be ruled.' Both Baker and the King saw the constitution as a magic wand which would solve most if not all internal problems and protect Tonga from external threats."

Dr Latukefu also records part of King George Tupou's well known speech at the opening of Parliament (page 41):

> "The Constitution was presented for discussion in the Parliament which was opened on 16 September 1875 and, on this occasion, King George made an admirable and moving speech in which he referred to the draft Constitution:
>
> > You are called upon to meet and deliberate on the new work to be done by the Government, to pass the Constitution, and to govern the land and to have the law of the country in accordance with it. The form of our Government in the days past was that my rule was absolute, and that my wish was law and that I chose who should belong to the Parliament and that I could please myself to create chiefs and alter titles. But that, it appears to me, was a sign of darkness and now a new era has come to Tonga - an era of light - it is my wish to grant a Constitution and to carry on my duties in accordance with it and those that come after me shall do the same and the Constitution shall be as a firm rock in Tonga for ever. When the Constitution has been passed it shall be a palladium of Freedom to all Tongans for ever. It is quite clear now that they are free; and let this be the most valuable privilege of the Country, for by the passing of the Constitution a Tongan can boast that he is as free as were the Romans of former days, as the British are now."

Once again the Press was used for publication of the full text of the Constitution; and Dr Latukefu quotes part of the King's closing speech (pages 41-2):

> "The full text of the Constitution was published in Tongan for the public as a supplement to the September issue of Koe Boobooi. The Parliament passed the Constitution with minor amendments and, in closing the Parliament on 4 November 1875, King George gave a speech in which he said:
>
> > Let this day, the 4th November, be a day of rejoicing and commemoration for the people of Tonga forever.
> >
> > I am grateful to you, the representatives of this parliament, because of your eagerness in the work to which you have been called to carry out. I am also thankful because of your glad acceptance of the Constitution – because the majority of you agreed that it should become

> the Law of the Land. And you who have disagreed, let the day soon come when you will realize that the Constitution established by the Parliament is the greatest possession of our country ...
> And now, here is the Constitution of Tonga, written on parchment, to be kept in the Parliament of Tonga, a document to commemorate and to testify to the work that we are doing today. This day I have added my name to it and so it becomes the Law of Tonga. May you and your descendants, you the people of Tonga be blessed now and for ever while you follow the Constitution. May the day never dawn for Tonga when someone, or anyone, will alter the basic principles of the Constitution. Let it become the Foundation stone of our country for ever ... May each of you inscribe on your hearts:-
> "Tonga for the Tongans." If Tonga will remain as it is now, I will not say that it is because of our intelligence or our knowledge or whatever it is we can do, but only because we are with God. As I have said before I will say again, "Tonga is dedicated to God.""

Finally Dr Latukefu emphasises the context of the Constitution and the derivation of its Declaration of Rights at pages 43-44:

> "Evidently the Constitution was a major innovation on the King's part, and the principal motives which actuated him to make such a move were dear: to maintain Tonga's independence by gaining recognition for it from the great powers; and to ensure its future internal stability and integrity, particularly after his death. However, this memorable document ought not to be viewed in isolation, for it marked the culmination of progressive attempts by King George to achieve acceptable, Christian, civilised legislation for Tonga. ...
>
> The Declaration of Rights [in the Constitution] consisted of 32 articles. It contained the usual safeguards, following very closely those of the Hawaiian Constitution of 1852. ... "

I was also referred by Dr Harrison to extracts from "Island Kingdom – Tonga Ancient and Modern" (Revised 2nd Ed 2001) by I C Campbell, which at pages 9–10, 88-89, 97-98 and 99 largely corroborate Dr Latukefu's account, eg:

> "But St Julian evidently expected an immediate endorsement of .his work and, when he did not see it, published a bitterly

> hostile letter in the *Sydney Morning Herald*, alleging misgovernment, inefficiency and corruption in Tonga, and particularly condemning the king's alleged stubbornness in refusing to make improvements." (page 89)
>
> "Modern government, in other words, was to be Tonga's safeguard against a foreign takeover." (page 98)
>
> "The assembly made laws, but they became valid only on receiving royal assent. The assembly, again with the king's consent, could also amend the constitution, but the procedure was such as to ensure that any amendment would be protracted and carefully considered. In short, a proposed amendment had to be passed by the Legislative Assembly twice, in different sessions, which were held annually." (pages 98-99)
>
> "The constitution was thus a very radical innovation: it abolished what had remained of traditional chieftainship; it brought royalty under its control; it made future political change dependent on the interpretation of the rules in the document itself; and it preserved in the hands of the King a very large share of power. Indeed, it may be said that it completed the transition from chieftainship to kingship, or from chieftaincy to kingdom. But the prime intention was to turn aside foreign criticism and avert confrontations that might cause Tonga to lose its independence. The guarantees of freedom given to the Tongans therefore were a means of satisfying foreigners rather than an objective in themselves - and, as contemporary critics remarked, the document was beyond the understanding and the needs of the Tongans themselves at the time." (page 99)

There was also the affidavit for the defendant of Dr 'Ana M Taufe'ulungaki, Director of the Institute of Education of Suva, in which she stated that the concept of freedom of speech in the Tongan Constitution and its application within Tongan society are governed by codes of appropriate behaviour or poto within the Tongan socio-cultural context. Although tendered as expert evidence, Dr Taufe'ulungaki made it clear that her qualifications are a Doctorate in English from the University of Birmingham and a Masters degree in education from the University of Leeds; that although Tongan by birth she has spent a considerable portion of her academic career working abroad; and there was no indication that she had any qualifications or experience in either history or law. Although she described herself as an expert on education in the Pacific and on Tongan culture, there was a lack of information as to exactly why she felt entitled to describe herself as an expert on Tongan culture, so I was unable to accept her as such. As indicated above, in the relevant circumstances of the adoption of the Tongan Constitution in 1875, the expertise which is likely to be of assistance to the Court is that of a historian or possibly a lawyer experienced in the field.

A considerable part of Dr Taufe'ulungaki's affidavit was about education, which I could not see as relevant to the issue before the Court. There was also another

section headed 'Legal Systems', which in fact seemed to be more about sociology and politics than legal systems, but in any event which I was unable to accept as Dr Taufe'ulungaki patently does not have the expertise to give expert evidence on legal systems. I was therefore unable to accept Dr Taufe'ulungaki's conclusion, which did not appear to follow from or be developed from the preceding material in the affidavit – and which did not accord with the historical accounts given above (which I did accept).

Her conclusion was that the Tongan Constitution was formulated and developed for the socio-cultural context of the Tongan people, and, although much of it was borrowed from western legal systems and frameworks, it was and is underpinned by the fundamental values of the Tongan people, which are aimed at maintaining, enhancing and promoting group cohesion and relationships. Even if the first part of that were correct – which is not borne out by the historical extracts quoted above, as I believe that it is undisputed that context when the Constitution was adopted in 1875 was that that was done to reassure the Western powers and prevent them colonising or annexing Tonga, in which it succeeded. I therefore consider that the freedoms in Part I have to be understood in a Western sense and not in the Tongan sense propounded by Dr Taufe'ulungaki: the whole historical context contradicts her unsupported assertion that in 1875 the Constitution was adopted on the basis that it was underpinned (ie propped or supported) by the fundamental values of the Tongan people.

It is clear from Dr Latukefu's book that there was a Press in Tonga at that time, and indeed King George Tupou I and Baker themselves used it to publish information in Koe Boobooi about the new Constitution and then to publish the text of it there; and that the King must have been aware of the possible consequences of freedom of the Press as he had previously been subjected to a strong and rude attack by St Julian in the Sydney Morning Herald (as also stated by Mr Campbell in his book).

But even if Dr Taufe'ulungaki is an expert on Tongan culture, I accepted the submissions by Dr Harrison for the plaintiffs that, in terms of the authorities on interpreting a constitution, Tongan culture is not a relevant factor, except of course to any extent that it formed part of the context when the Constitution was adopted in 1875. In support of that position, I also noted that there is no mention of Tongan culture in the Constitution, nor in the Interpretation Act nor the Civil Law Act, except in section 4(b), which refers to the application of the common law of England and the rules of equity only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary. Nor is there even any suggestion in the many previous cases before the courts of Tonga to which I have been referred where interpretation of the Constitution has been considered that (apart again from the background circumstances when the Constitution was granted in 1875) Tongan culture or custom was a relevant factor.

Even in the Land Act (Cap 132) section 146(3) simply provides:

> "(3) The duties of the assessor shall be to assist the Judge with explanation and advice in regard to Tongan usages and customs and other matters of a similar nature."

Nor am I able to accept that freedom of speech is simply a Western notion, as I believe it is now a principle accepted or valued in many places throughout the world:

one has only to look at countries where it is an issue to see that now it is no longer espoused by Western people alone.

Context of amendments in 2003

In the same way that the context in which the original Constitution was adopted in 1875 is relevant to its interpretation, I considered that the context in which these amendments were adopted in 2003 may be relevant.

The context was explained in Mrs Fusitu'a's affidavit:

> "4. In the 1990's, the media in Tonga became a more prominent force in society. As a consequence of increasing concern with the standard of media performance, the Government had been considering how the newspaper industry might be better regulated in order to preserve a balance between the right to fair comment and the public's right to be honestly informed through credible and ethical journalism.
>
> 5. Broadcasting standards for television and radio in Tonga had been provided for through the Broadcasting Act 1989. In 2000, the Broadcasting Act was replaced by the Communications Act 2000, which established the Department of Communications and gave that Department powers to regulate and license television and radio operators and to promulgate standards for the content of their programmes.
>
> 6. The Government continued to work with the private newspaper industry to improve the standard of media for Tonga. This included trying to form Tonga's first Newspaper Association, which eventually failed.
>
> 7. The lack of self-regulation and standard setting within the newspaper industry together with complaints and pressures from the public was placing a burden on the Government to take steps to protect public freedoms and Tongan customary law in the face of unsubstantiated and unattributed single source statements in numerous articles. The concerns were widespread; throughout Government, businesses and individuals.
>
> 8. Ultimately, the amendment to clause 7 of the Tongan Constitution was based upon similar provisions in Singapore, with assistance from relevant provisions in the Constitutions of other countries.
>
> 9. The attempts to work with the media so that it may set standards and regulate itself continuously failed. As a last resort, it was proposed to prepare legislation that would enable the Government to set journalistic standards, if necessary. Since that legislation was passed, a Media Council

> has been officially established by the media industry and standards have been produced by that Council.
>
> .....
>
> 11. As is evident from that diagram [*referred to in para 10 and outlining the legislative process*], before proposed legislation enters the Legislative Assembly, it must first pass through His Majesty's Cabinet and His Majesty's privy Council for their approval. This requirement means that His Majesty and all Cabinet Ministers are aware of legislation proposed and of any related proposed legislation before votes are cast in the Legislative Assembly and before His Majesty assents to any legislation. The suite of media reforms that I discuss in this affidavit were no different in this regard. On 28 and 30 May 2003 His Majesty's Cabinet approved the processing and tabling of three pieces of legislation relating to regulation of the media, those pieces of legislation being the Act of the Constitution of Tonga (Amendment) Bill 2003; the Media Operators Bill 2003 and the Newspaper Bill 2003."

With reference to Para 7, I noted the authority of the Privy Council in London in *Hector v Attorney-General of Antigua* [1990] 2 All ER 103, 106 (PC) that:

> " ... 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."

A further part of that context in 2003 was that the Government had enacted various pieces of legislation which had the effect of placing certain restrictions on the freedom of the Press, such as an Order-in Council prohibiting the importation of Taimi 'o Tonga newspaper; and the Protection from Abuse of Press Freedom Ordinance 2003 (the long title of which was An Ordinance for The Protection of The King, Royal family, Government and People of this Kingdom from Abuse of Press Freedom; but which specifically referred to Taimi 'o Tonga and Lali Media). The previous Chief Justice had found (on 4 April and 26 May 2003 respectively) that both these pieces of legislation were invalid and unconstitutional, decisions upheld subsequently by the Court of Appeal on 25 July 2003. The previous Chief Justice had further on 26 May 2003 made an interim order restraining the Government from revoking under the Media Operators Ordinance 2003 (the long title of which was An Ordinance for The Imposing of Restrictions on Ownership of Licence by Media Operators in the Kingdom) any licence held by Lali Media, which was made an injunctive order on 9 June 2003. The previous Chief Justice had also on 4 April 2003 held that the long-standing section 3 of the Prohibited Publications Act (Cap 54) was invalid and unconstitutional, which again was subsequently upheld by the Court of Appeal on 25 July 2003.

I considered that that context could be interpreted in 2 ways, either as a determination by the Government to press on with its policy, in the face of the previous Chief Justice's rulings, by amending the Constitution to enable it to proceed with the policy regardless; or by acceptance of the previous Chief Justice's rulings and an intention (although clumsily put into action) to abide by them and proceed with the policy in a proper constitutional manner under the Constitution. The second view is indeed given some credence by the fact that it is within judicial knowledge that the civil action by Lali Media in consequence of the 2003 events was settled out of court by the parties on undisclosed terms before it came to a hearing in June 2004.

But the facts set out above and the affidavits in this case, plus the limited amount of oral evidence I heard, provided no evidential basis for reaching a view on which, if either, interpretation is correct, so I find the 2003 context to be neutral and not of any particular help in relation to consideration of the amendments to the Constitution. I therefore rely on the words of the amendments alone, together with the other factors on constitutional interpretation summarised in *Tu'itavake* and other authorities as already mentioned.

I should add that I did not find it necessary to refer to the affidavit evidence in the previous *Lali Media* cases in 2003, as these were given essentially with reference to the position prior to the purported amendments to the Constitution and the passing of the other 2 Acts, and I did not consider them to be relevant to the very limited consideration carried out above.

Freedoms not absolute

As already mentioned it was accepted that freedom of speech and freedom of the Press are not absolute, as indicated in the authorities discussed. Dr Harrison submitted, and I accept, that the critical difference of view between the 2 parties related to the nature of any inherent limitations on these freedoms, over and above the 3 express exceptions in Clause 7; and the ability or inability of the legislature to enact limitations on them.

Dr Harrison referred to *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011 (HL) at 1020 where Lord Keith said, with reference to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which he first quoted:

> " "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ... 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation

> or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

> As regards the words "necessary in a democratic society" [in Article 10 of the European Convention of Human Rights] in connection with the restrictions on the right to freedom of
1890 expression which may properly be prescribed by law, the jurisprudence of the European Court of Human Rights has established that "necessary" requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate to the legitimate aim pursued. .....

> My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention. My noble and learned friend, Lord Goff of Chieveley, in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 (HL) at 660-1,
1900 expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and article 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field."

Dr Harrison also referred to *R v Home Secretary ex p Simms* [1999] 3 All ER 400 (HL) at 407, where Lord Steyn repeated that:

> "The starting point is the right of freedom of expression. In a
1910 democracy it is the primary right: without it an effective rule of law is not possible. Nevertheless, freedom of expression is not an absolute right. Sometimes it must yield to other cogent social interests. ...

> In *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 (HL) at 660-1, Lord Goff of Chieveley expressed the opinion that in the field of freedom of speech there was in principle no difference between English law on the subject and article 10 of the [European Human Rights] Convention. ... I would respectfully follow the guidance of
1920 Lord Goff of Chieveley and Lord Keith of Kinkel [in *Derbyshire CC*].

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J

> (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market:" *Abrams v United States* (1919) 250 US 616,630 per Holmes J (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country ...
>
> The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In these respects the prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons. But the free speech at stake in the present cases is qualitatively of a very different order. The prisoners are in prison because they are presumed to have been properly convicted. They wish to challenge the safety of their convictions. In principle it is not easy to conceive of a more important function which free speech might fulfil."

Dr Harrison also referred 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."

although in a dissenting judgment the well-known Chief Justice Warren Burger said:

> "In these cases the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances – a view I respect, but reject – can find such cases as these to be simple or easy."

In another US case about the First Amendment (not cited to me) in *Schenck v United States*, 249 US 47, 39 SCt 247, 63 Led2d (1919) Justice Oliver Wendell Holmes stated his famous aphorism about 'falsely shouting fire in a theatre' and set forth a 'clear and present danger' test to judge whether speech is protected by the First Amendment. He said:

> "The question is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree."

Mr Radich then referred to *T & T Newspaper Publishing Group Ltd v Central Bank of Trinidad & Tobago* [1990] LRC (Const) 391, 409, where despite there being no qualifications to freedom of the Press in the Constitution of Trinidad and Tobago, the High Court recognised that the freedom was not absolute:

> "Freedom of the press is ... one of the bastions of liberty, and will never be restrained in a free society; it is a right enshrined in the Constitution; it stands without qualification ... it must be given a broad and purposive meaning. Freedom of the press does not mean that the press 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. Newspapers have a legitimate role in a free society to bring before the public information which might not be accessible to the public. It includes an inherent right not only to impart, propagate and communicate ideas, views, news and information, but to print, publish, circulate and disseminate without interference by anyone."

Mr Radich also cited *Ingraham v McEwan* [2003] 4 LRC 270, 286, where it was stated by the Court of Appeal of the Bahamas:

> "... in ... examination of the constitutional provisions in ... the Constitution, there is nothing in any of the fundamental rights provisions, other than the prohibition of cruel and inhuman treatment, which can be said to be cast in absolute terms. ... such absolute rights would be unworkable.
>
> In simple terms, if any one person has the absolute freedom of expression, for example, then it means that every other persons' [*sic*] similar right is destroyed or at least diminished to such an extent as to be insignificant. Indeed art 15 of the Constitution makes it clear that the fundamental rights of 'every person' ... is subjected to the fundamental rights of every other person in ... and to the public interest"

Mr Radich further referred to *Public Prosecutor v Ooi Kee Saik* [1971] 2 MLJ 108, where the accused had been charged with an offence under the Sedition Act, involving the publication of seditious words. But that case suggested that a court can

take a pragmatic view of freedom of expression in the constitutional state, which I am unable to accept in view of the authority of cases such as *Pinder* already referred to and the importance of freedom of expression depending on proper and appropriate interpretation of the Constitution and not the values and discretion of judges.

Mr Radich also referred to *Alesana v Samoa Observer Co Ltd* [1998] WSSC 1, in the Supreme Court of Western Samoa, but although that was another Polynesian case, it concerned the exception to freedom of expression for defamation, which is already one of the exceptions in the unamended Clause 7 of the Tongan Constitution, so I did not consider that it added anything in this case.

In seeking legal justification and precedent for the interpretation of the extent of the implied limitations on the freedoms conferred by Clause 7, I therefore find that there is high authority for these being construed in terms of English common law (applicable in terms of the Civil Law Act (Cap 25)), in accordance with the limitations set out in Article 10(2) of the European Convention of Human Rights (as set out at page 28 above). Those exceptions may well have applied in Tonga by another route through the UK Human Rights Act 1998 prior to the amendment of the Civil Law Act (Cap 25) by the Civil Law (Amendment) Act 2003, which from 26 August 2003 removed the application in Tonga of statutes of general application in force in England.

While the legal principles referred to in the cases cited above by Mr Radich may be sound, they refer to the circumstances and societies in other countries and to other constitutions and I cannot see the legal justification for imposing them on the interpretation of Clause 7 of the Constitution of Tonga.

Express limitations - other constitutions

In his submissions in relation to express limitations on freedom of expression, Mr Radich referred to various examples from the constitutions of other countries, including the Constitution of Singapore, which I noted from Mrs Fusitu'a's affidavit appears to have been the primary source of the new Clause 7(2) of the Constitution of Tonga:

> *"Article 14 Freedom of Speech, Assembly, and Association*
>
> 1. Subject to clauses 2 and 3:
>
> (a) every citizen of Singapore has the right to freedom of speech and expression;
>
> (b) all citizens of Singapore have the right to assemble peaceably and without arms;
>
> (c) all citizens of Singapore have the right to form associations.
>
> 2. Parliament may by law impose:
>
> (a) on the rights conferred by clause 1(a), such restrictions as it considers necessary or expedient in the interests of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of Court, defamation or incitement to any offence."

However, again precisely because these related to the circumstances of other countries and their specific constitutions, I did not consider that reference to them was of assistance in this case. What has been done in relation to other constitutions in different circumstances sheds little light on interpretation of the Constitution of Tonga; and also none, except to some extent that of Singapore, are in similar form to the new Clause 7(2) & (3). For example the relevant provision in the Fiji is much more comprehensively and clearly drafted and there was no indication that it was added as an amendment after the rest of the Constitution of Fiji was in place.

Severability

The test of severability of a legislative provision, referred to in *Hinds v The Queen* [1976] 1 All ER 353 (PC) at 372-3, has been laid down authoritatively by the Privy Council in London in *Attorney General for Alberta v Attorney General for Canada* ([1947] AC 503, 518 per Viscount Simon):

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

Validity of additions to Clause 7

As already mentioned the Court has to examine the additions to Clause 7 to see whether they either in terms of the unamended Clause 7 restrict the liberty of free speech, or in terms of Clause 79 affect the law of liberty.

"Restrict" means to limit (Chambers); or to confine to or within certain limits, to restrain by prohibition (Oxford). A person, though not prohibited, is restricted from using something if he is permitted to use it to a certain extent or subject to certain conditions, but otherwise obliged not to use it, but ... a person is [not] properly said to be restricted from using something by a condition the effect of which is to offer him some inducement not to use it, or in some other way to influence his choice: *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, 671 (HL), per Lord Oaksey.

"Affect" means to act upon, produce a change in (Chambers); or to influence (Oxford); and the meanings given in legal dictionaries are the same. It is said to be very wide in scope (Words & Phrases Legally Defined 1999 Supplement: *Re Desjarlais* [1989] 3 FCR 605, 608, FCA (Canada) per Desjardins JA).

The wording of the new purported Clause 7(2) of the Constitution, which is repeated here for ease of reference, is itself not entirely clear:

> "(2) It shall be lawful, in addition to the exceptions set out in sub-clause (1), to enact such laws as are considered necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, privileges of the Legislative Assembly and to provide for contempt of Court and the commission of any offence."

The word "expedient" occurring in that sub-clause means "advantageous, fit, proper, suitable to the circumstances; useful, politic (as opposed to just or right)" (Oxford); "suitable, advisable, politic (Chambers). It sets a lower standard than "necessary", a conclusion reinforced by the consideration that the legislature often employs the alternative standards of "necessary or expedient" (Words & Phrases Legally Defined 1999 Supplement: *R v Leitch* [1998] 1 NZLR 420, 428-9 (CA)). As the criterion of laws being "expedient" therefore sets a lower standard for legislating for exceptions to freedom of expression than that of being necessary in terms of a pressing social need, it thus goes beyond the implied exceptions to freedom of expression and is inconsistent with Clauses 7(1) and 79. On the other hand the criterion of laws being "necessary" may allow laws to be made if they are necessary in terms of a pressing social need, provided they are no more than is proportionate to the legitimate aim being pursued and do not involve prior restraint of freedom of expression except in cases of clear and present danger – but, and this is most important, any individual law made under the umbrella of sub-clause (2) would have to fall properly within those standards and it would always be liable for scrutiny for inconsistency in terms of Clause 82 of the Constitution.

I consider that the various factors listed in sub-clause (2) fall into 2 groups, the first being those which can be accepted as falling within the list contained in Article 10(2) of the European Convention of Human Rights and so are within the common law understanding of implied exceptions to freedom of expression. Even construing the words in the unamended Clause 7 granting freedom of expression widely and the exceptions narrowly, they thus cannot be said to restrict or affect the liberty of freedom of expression bestowed by Clause 7 (as subject to the implied exceptions). In that group are national security, public order (though cf *Hector v Attorney-General of Antigua* [1990] 2 All ER 103 (PC)), morality, privileges of the Legislative Assembly and contempt of court.

Although the privileges of the Legislative Assembly are to some extent provided for separately at Clauses 70 and 73 of the Constitution, they come within protection of the reputation or the rights of others and so are within the recognised exceptions to freedom of expression. Contempt of court is already well recognised under the common law (see eg *Fie'eiki v Fifita* [1995] Tonga LR 184 (CA); *'Akau'ola v Attorney General* [1997] Tonga LR 36 (CA)), and the Legislative Assembly could legislate on it further if it thought appropriate, as provisions for contempt of court may well be provisions which are fundamentally necessary in a democratic society due to a pressing social need.

So I found that parts of Clause 7(2) were not amendments which inevitably and necessarily restrict or affect the freedoms of the unamended Clause 7 (read in the sense of including their implied limitations), and so those parts do not inevitably and necessarily conflict with the entrenching provisions and absolute prohibitions in Clauses 7 and 79. Therefore I find that the legislature had power to make the amendment adding those parts of Clause 7(2) to the unamended Clause 7 and that that amendment was validly made to that extent.

Turning to the other listed factors, the expression "the public interest" can have a multitude of meanings, such as an interest which a class of the community have by which their legal rights or liabilities are affected; or something in which the public has a vital interest in either a pecuniary or personal sense (*Stroud's Judicial Dictionary*). It has been pointed out as a word of caution that "there is a world of

difference between what is in the public interest and what is of interest to the public": *Lim Laboratories Ltd v Evans* [1984] 2 All ER 417 (CA) 435. I consider that in any case the public interest can be said to be encompassed within the expression "necessary in a democratic society", but it is too wide and vague in terms of being allowable as a stated exception to freedom of expression.

In the context of the Constitution as already discussed, there is no authority or warrant for including an additional factor such as the cultural traditions of the Kingdom which is not recognised at common law in the exceptions to freedom of expression.

The power to provide for "the commission of any offence" is presumably intended to mean the power to provide that certain acts will be offences, though that is not what it says. I consider that it is void for want of meaning and, independently, because it is excessively wide. It appears to be a mistaken rendering of "incitement to any offence" in Article 14(2) of the Constitution of Singapore. In any event such a blanket power could not be said to be entirely within the expression "necessary in a democratic society".

Thus the other listed factors, ie the public interest, cultural traditions of the Kingdom, and the commission of any offence do not come within the common law understanding of implied exceptions to freedom of expression, either by reference to Article 10(2) or otherwise. So although some of them appear in the corresponding clause in the Constitution of Singapore, which Mrs Fusitu'a said was the primary model for sub-clause (2), they cannot be held to be valid factors which are implied exceptions to freedom of expression. As the Privy Council in London said in *Olivier v Buttigieg* [1966] 2 All ER 459, 466 (PC), on appeal from Malta:

> " ... where 'fundamental rights and freedoms of the individual' are being considered, a court should be cautious before accepting the view that some particular disregard of them is of minimal account."

In consequence of all the above I consider that those parts of sub-clause (2) are inconsistent with the fundamental liberty of freedom of expression and so are void in terms of Clause 82 of the Constitution.

That is because they are amendments which may restrict and will inevitably affect the freedoms of the unamended Clause 7, and so may conflict with the entrenching provisions and absolute prohibitions in Clause 7 and will definitely conflict with Clause 79. Therefore because those prohibitions still stand, the legislature had no power to make the amendment adding those parts of Clause 7(2) to the unamended Clause 7 and that amendment was not validly made to that extent.

Those parts are not so inextricably bound up with the parts I have found valid that what remains cannot independently survive; and on a fair review of the whole matter I consider that it can be assumed that the legislature would have enacted what survives without enacting the part that is void.

Although I see no reason why the presumption of constitutionality should not apply to amendments to the Constitution as it applies to legislation, I do not consider that it applies with reference to these objectionable amendments, as they cut across or inhibit the freedom of expression to too great an extent and it is not possible to read the language of those parts of the amendment as subject to implied terms which would avoid conflict with constitutional limitations.

Under the principles of interpretation of the Constitution, I must give a wide meaning to the freedoms or liberties conferred by Clause 7, which means that I must construe narrowly restrictions to that – in this case the purported addition of exceptions to the freedoms. Doing so, I have come to the conclusion that the objectionable parts of sub-clause 7(2) are inconsistent with the unamended Clause 7 of the Constitution, so they are void in terms of Clause of the Constitution. I very much regret having to make such a finding in relation to an amendment to the Constitution which has had the approval of the Legislative Assembly, the Cabinet, the Privy Council and His Majesty The King, but it is the clear duty of this Court under the Constitution to do so and thus to uphold the Constitution as it stands.

Thus I find that the part of sub-clause 7(2) that are valid read as follows (indicating the spaces where invalid parts were by square brackets):

> "(2) It shall be lawful, in addition to the exceptions set out in sub-clause (1), to enact such laws as are considered necessary [...] in [...] national security, public order, morality, privileges of the Legislative Assembly and to provide for contempt of Court [...]."

But I add the rider that I have already given above – that the sub-clause may only allow laws to be made if they are necessary in terms of a pressing social need, provided they are no more than proportionate to the legitimate aim being pursued and do not involve prior restraint of freedom of expression except in cases of clear and present danger. I repeat, and emphasise as important, that any individual law made under the umbrella of sub-clause (2) would have to fall properly within those standards and it would always be liable for scrutiny for inconsistency in terms of Clause 82 of the Constitution.

The resulting sub-clause unfortunately does not read very clearly, but it did not do so originally and I believe it is comprehensible as it stands. There is certainly no power within Clause 82 for this Court to amend it to clarify the drafting, cf a case to which I was referred by Mr Radich, *Ex Parte President & Trustees of Tonga Ma'a Tonga Kautaha* [1908-1959] Tonga LR Vol 1 (1911) 9, 13:

> "It is not for the Chief Justice to say that the effect of a law passed at variance with the Constitution is beneficial or otherwise, he can only deal with the Constitution as it is, not as it might have been. He can add nothing to it, he can take nothing away from it, to act otherwise would be to render the Constitution an illusion and a farce."

although I recommend that the legislature might at some future date consider doing so.

Turning then to Clause 7(3), which also is repeated for ease of reference:

> "(3) It shall be lawful to enact laws to regulate the operation of any media."

"Regulate" means to control or adjust by rule (Chambers); and to control, govern or direct by rule or regulations, to subject to guidance or restrictions, to bring or reduce to order, and to correct by control (Oxford); and so has a very wide meaning

(although that does not include an absolute prohibition: *Toronto v Virgo* [1896] AC 88; *Ontario v Canada* [1896] AC 348; *Tarr v Tarr* [1972] 2 All ER 295, 302 (HL)).

It is much more difficult to see such a wide provision as this as falling within the accepted exceptions to the freedom of expression. Any attempt at regulation by legislation in terms of Clause 7(3) may restrict and affect the fundamental freedoms bestowed by Clause 7; and it is difficult to envisage examples of regulation of the media which may not in some way impose a prior restraint on freedom of expression, except perhaps in the mildest of forms or falling within the exceptions acceptable at common law, such as regulation to prevent publication of offensive material. But in view of the presumption of constitutionality, it may be possible to read the language of sub-clause 7(3) as subject to an implied term which avoids conflict with constitutional limitations, ie that laws can only be made under it if they are necessary in terms of a pressing social need, and provided they are no more than proportionate to the legitimate aim being pursued and do not involve prior restraint of freedom of expression, except in cases of clear and present danger. I am thus loath to declare sub-clause (3) inconsistent with the Constitution, but it must be subject to the implied term above. The caveats which I have given in respect of sub-clause (2) apply with even greater force to sub-clause (3) and I consider it highly likely that legislation falling under the umbrella of sub-clause (3) may inevitably be found to be inconsistent with Clause 7 as a whole.

So I found that Clause 7(3) is not an amendment which inevitably and necessarily restricts or affects the freedoms of the unamended Clause 7, and so it does not inevitably and necessarily conflict with the entrenching provisions and absolute prohibitions in Clauses 7 and 79. Therefore I find that the legislature had power to make the amendment adding Clause 7(3) to the unamended Clause 7 and that amendment was validly made, but it must be read as subject to the implied term that laws can only be made under Clause 7(3) if they are necessary in terms of a pressing social need, and provided they are no more than proportionate to the legitimate aim being pursued and do not involve prior restraint of freedom of expression, except in cases of clear and present danger.

Subject to that, I believe that the terms of sub-clauses (2) & (3) cover in fuller terms what has always been covered in the legal position on freedom of expression.

Media Act & Newspaper Act - general

It was submitted (and the evidence supported) that these 2 Acts were put forward to the Cabinet, the Privy Council and the Legislative Assembly all together as a suite of 3 Bills. These Acts are the Media Operators Act 2003 [Media Act] and the Newspaper Act 2003 [Newspaper Act]. Detailed submissions were made on the alternative positions of these 2 Acts (a) if the Constitution was validly amended; and (b) in relation to the unamended Constitution, although it was difficult to see the force of the defendant's submissions on the latter when all 3 Bills were put together as a suite, the inference from that being that it was necessary to amend the Constitution, in particular Clause 7, to validate the 2 Bills.

The general power of the legislature to make Acts which do not purport to amend the Constitution is given in Clause 56 of the Constitution and is set out again here for ease of reference:

> "Power of Legislative Assembly

> 56. The King and the Legislative Assembly shall have power to enact laws, and the representatives of the nobles and the representatives of the people shall sit as one House. When the Legislative Assembly shall have agreed upon any Bill which has been read and voted for by a majority three times it shall be presented to the King for his sanction and after receiving his sanction and signature it shall become law upon publication. Votes shall be given by raising the hand or by standing up in division or by saying "Aye" or "No"."

It is important in that clause that the participation of the Legislative Assembly is completed when it "shall have agreed upon any bill which has been read and voted for by a majority three times".

Dr Harrison for the plaintiffs made submissions on the factual position on the comparative timing of the procedure for the 3 Bills, which is set out at page 3 above.

The Constitution Bill was passed by the Legislative Assembly 3 times (in accordance with Clause 79 of the Constitution) on 16 October 2003, but did not receive Royal Assent, when it was signed by the King, until 21 November, when it became law in terms of Clause 79 and the Constitution was purportedly amended in accordance with the terms of the Constitution Amendment Act. That Act was then published in the Tonga Government Gazette on 27 November.

But prior to that the Media Bill had been agreed upon and passed by the Legislative Assembly on 29 July, ie well before the purported amendments to Clause 7 of the Constitution had become law, or indeed had even been discussed or passed by the Legislative Assembly in terms of Clause 79 of the Constitution. I therefore found that, on the basis of the timetable of the Legislative Assembly, the Media Act (which received Royal Assent on 24 November and was published in the Tonga Government Gazette on 27 November, when in terms of Clause 56 it became law) was not agreed upon and passed by the Legislative Assembly at a time when Clause 7 of the Constitution had been amended.

By contrast the Newspaper Bill was agreed upon and passed by the Legislative Assembly on 20 October, ie after the purported amendments to Clause 7 of the Constitution had been discussed and passed by the Legislative Assembly in terms of Clause 79 of the Constitution on the 16 October, but again before those purported amendments had become law in terms of Clause 79, so once again I had to find that, on the basis of the timetable of the Legislative Assembly, the Newspaper Act (which received Royal Assent on 18 November, ie also even before the purported amendments to Clause 7 had received Royal Assent and so become law on 21 November) was not agreed upon and passed by the Legislative Assembly at a time when the purported amendments to Clause 7 of the Constitution had been completed and passed into law, albeit that the Legislative Assembly itself had passed them.

So both Acts have to be measured - for consistency with the Constitution in terms of Clause 82 - against the unamended Clause 7 and should not be measured for consistency against Clause 7 as purportedly amended. However as I consider that the valid remaining parts of the amended Clause 7 in legal terms merely cover in fuller terms what has always been covered in the legal position on freedom of expression, I do not consider that there is any substantive or practical difference.

Constitutionality of legislation

As already mentioned, this was considered in *Tu'itavake v Porter* [1989] Tonga LR 14, where I said:

> "Constitutionality of legislation
>
> It is a serious matter for a court to declare that any Act passed by Parliament is unconstitutional and so invalid, and. it is therefore not a step which a court should take hastily or lightly.
>
> It is clear too that legislations may indirectly offend some constitutional limitation, although as drafted it does not do so directly, but the result will be the same, that the legislation will be *ultra vires*: *Pillai v Mudanayake* [1955] 2 All ER 833, 837 (PC):
>
> > "... the question for decision in all these cases is in reality the same, namely, what is the pith and substance, as it has been called, or what is the true character of the legislation which is challenged."
> > AG for Ontario v Reciprocal Insurers [1924] AC 328, 337 (PC) cited in Pillai."

That position is also made specific in Tonga by section of the Interpretation Act:

> "Construction of Acts to be subject to Constitution.
> **34**. Every Act shall be read and construed subject to the Constitution and so as not to exceed the legislative power of the Kingdom to the intention that where an Act would, but for this section, have been construed as being in excess of that power, that Act shall nevertheless be valid to the extent to which that Act is not in excess of that power."

In addition the Court must consider and take into account the presumption of constitutionality, which has already been explained at page 9 above.

Are Media Act & Newspaper Act consistent with Clause 7?

Media Act

The Media Operators Act 2003 is a very brief Act of only 5 sections, the long title of which, indicating the general purposes and scope of the Act, is "An Act relating to licensing of media operators", though in fact the relevant definition of "media operation" in section 2 (Interpretation) restricts the meaning of that term to the operation of a newspaper. It is largely a repeat of the Media Operators Ordinance 2003, action under which became the subject of a ruling by the previous Chief Justice in May 2003.

The principal part of the Act is section 3, the headnote or marginal note of which is "Restriction on issuing of media licences". The term "media licences" appears to be undefined and so is to that extent inconsistent with the language of the section itself, which concerns "Any licence required by law for trading or operating

of any media operation". However in some ways the question for the Court is answered by the terms of the headnote to section 3, which shows that the whole purpose of this Act is to restrict the issuing of licences to operate a newspaper - in this case completely prohibiting the grant of a licence to a person who is not a Tongan subject or to a foreign corporation as detailed in section 3(b),(c) & (d).

Bearing in mind all the authorities and guidance on freedom of expression already referred to at length, I consider that section 3 of the Media Act is clearly inconsistent with Clause 7 (whether unamended or validly amended), because it prevents certain people from exercising freedom of the Press, and thus prevents the public from having access to information and comment freely. It effectively prohibits certain people from holding a licence for publication of a newspaper, rather than simply regulating them and does not fall within the valid parts of the new Clause 7(2) of the Constitution. It does not even make any attempt at regulation. I do not consider that what is said by Mrs Fusitu'a in her affidavit comes up to indicating that such a prohibition is necessary in terms of any of the factors in Clause 7(2) or a pressing social need, is no more than proportionate to the legitimate aim being pursued, and does not involve prior restraint of freedom of expression, except in cases of clear and present danger: nor would it meet an implied term to that effect.

I was unable to accept the submission by Mr Radich for the defendant that because the Act provides for the ownership of newspapers, rather than who writes in them, that it did not restrict freedom of the Press, which I consider it patently does.

Although I heard submissions about the relevance of Clause 4 (Same law for all classes) of the Constitution on this matter I do not think it is necessary to go into that. The restriction on freedom of speech and the Press is so serious and inconsistent with Clause 7 that its application in the Media Act, whether to Tongans or to non-Tongans, has to be void in any event, so that issues under Clause 4 are not crucial.

I do not consider that the presumption of constitutional validity of legislation applies in this case as the provision in question goes to the heart of freedom of expression, so that it is not possible to read the statutory language as subject to an implied term (such as only being exercised if necessary in terms of a social need etc) which would avoid conflict with constitutional limitations.

The final question in relation to the Media Act is whether section 3 is severable from the remaining provisions of the Act so that the latter still remain enforceable as part of the law of Tonga.

I consider that section 3 is the core of the Media Act and all the other sections of the Act are tied together and inextricably bound up with section 3, so it is not possible to sever the inconsistent sections so that they can survive independently. On a fair review of the whole matter it could not be assumed that the legislature would have enacted what survives without enacting section 3. I therefore find that the whole of the Media Act is void as being inconsistent with Clause 7, even to the extent that that clause has been validly amended.

Newspaper Act

The Newspaper Act 2003, the long title of which, indicating the general purposes and scope of the Act, is "An Act to make provision for the regulating of newspapers in the Kingdom", has 5 Parts and 20 sections. The core is Part III dealing with Newspapers, which has 3 Divisions covering Responsibility and Standards, Newspaper Licences and Powers of authorised officers.

In general the provisions of the Act appear to consistently put hurdles in the way of a free Press for newspapers, as under section 8 the Minister may, with the consent of the Cabinet, determine content standards for newspapers, which may include but are not limited to:

> "(a) the restriction or prohibitions relating to the supply of unsuitable content or particular types of content;
> (b) the methods of classifying content;
> (c) the restrictions or prohibitions relating to advertising content; and
> (d) the representation of Tongan culture and national identity."

Given the unlimited width of this power, which is effectively one of prior restraint, it is impossible to say that it will only be exercised in circumstances which will fall entirely within the recognised exceptions to the freedom of the Press.

Further no newspaper is to be published without a licence granted by the Minister (section 9); a licence is required for the sale and distribution of any foreign newspaper (section 10); it is forbidden to sell, import etc any declared foreign newspaper (section 11). Each of these is either a wide restraint on publication or a wide restraint on circulation, cf *Olivier v Buttigieg* [1966] 2 All ER 459,465-6 (PC), where the Privy Council in London, on appeal from Malta adopted what had been said in an Indian case:

> "There can be no doubt that freedom of speech and expression includes freedom of publication of ideas and that freedom is secured by freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed without circulation the publication would be of little value."

and, as already mentioned, also said:

> " ... where 'fundamental rights and freedoms of the individual' are being considered, a court should be cautious before accepting the view that some particular disregard of them is of minimal account."

Thus these powers would be a restriction on freedom of the Press which does not fall within the recognised exceptions to the freedom of the Press.

Section 12, which declares its purpose openly with the headnote "Censorship", prohibits a licensee from supplying any content in a newspaper which:

> "(a) is indecent or obscene;
> (b) displays excessive violence;
> (c) is blasphemous;
> (d) is treasonous or seditious;
> (e) invades the privacy of an individual without that individual's consent;
> (f) is defamatory;
> (g) is not honest, fair, independent and does not respect the rights of others; or

(h) contravenes the Laws of the Kingdom."

By prohibiting such content in a newspaper, those provisions of section 12 bear heavily as prior restraints on freedom of the Press. While some of the objectives are laudable and may well fall within the recognised exceptions to freedom of expression such as the protection of morals or public safety, and indeed may already be covered as offences under other laws, others such as invading privacy and content which is not honest (ultimately a question for a court of law) or fair (a highly subjective matter) are breaking new ground and cannot be held to be consistent with the Constitution, cf the case already referred to of *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."

I accepted the submission by Dr Harrison for the plaintiffs that a serious objection to section 12(1) is that it criminalises acts which in some cases are independent criminal or civil wrongs, potentially creating a duplicate liability which may have no connection with perceived journalistic standards. In particular I accepted that the reference in para (e) to content which invades the privacy of an individual without that individual's consent is an unworkably vague formulation which is a serious inroad into Press freedom. There are no general laws governing privacy, so it is unclear what an individual's privacy right or interest may in law consist of, nor what an invasion of such privacy may consist of; the provision draws no distinction between public figures and those who are not; and there appears to be no defence of truth.

In this context the Newspaper Act clearly does not follow the famous saying which effectively sums up freedom of expression, attributed to Voltaire:

"I disapprove of what you say,
but I will defend to the death your right to say it."

Sections 13 and 15 in Division 3 (Powers of authorised officers) then provide extensive powers to authorised officers (a term itself widely defined in section 2(1) as any police officer, customs officer or any person authorised by the Registrar of Newspapers or the Deputy or Assistant Registrar of Newspapers) to examine packages on suspicion that they contain a declared (ie proscribed) foreign newspaper and to seize and detain illegal newspapers. Those powers clearly inhibit freedom of expression and free circulation of the Press.

Section 14 is incongruously placed in Division 3 as it does not deal with the powers of authorised officers, but prohibits and makes it an offence to subscribe to a declared foreign newspaper – a clear breach of the freedom to receive opinions.

The penalties prescribed by section 17 for offences under the Act are heavy, being either or both a fine not exceeding $10,000 or imprisonment for a term not exceeding 1 year.

I was unable to accept the submissions by Mr Radich for the defendant that in this respect the Court had no authority to tamper with the legislature's right to enact

legislation, as the powers given in this Act are too excessive for that. Nor could I accept, given the terms of Clause 82 of the Constitution, that the Court's role is simply to monitor the use of the Act.

Mr Radich had earlier referred to *Chavunduka v Minister of Home Affairs* [2000] 4 LRC 561, 579, where the Supreme Court of Zimbabwe said:

> "The wealth of learning which supports the conclusion reached by [the Chief Justice] contains a relatively simple message, which is this: the section is too widely expressed, too unclear as to its limitations, and too intimidating (because no one can be sure whether what he says or writes will or will not attract prosecution and imprisonment). That is why it cannot stand.
>
> We are not saying that freedom of expression is limitless. We are not saying that people may publish anything they wish, however pornographic, however untruthfully subversive, however race-hatred inspiring.
>
> It is not the court's function to redraft legislation. That is the function of Parliament and the state's draftsmen and women. All we are saying is that the section is unacceptable as it stands."

I find myself very much in agreement with those views in relation to the Newspaper Act 2003.

Bearing in mind all the authorities and guidance on freedom of expression already referred to, I thus consider that those substantial parts of the Newspaper Act are clearly in direct conflict with and inconsistent with Clause 7 of the Constitution, even as validly amended, because they prevent certain people from exercising freedom of the Press (even as it is subject to the recognised exceptions), and thus prevent the public from having access to information and comment freely. Again I do not consider that what is said by Mrs Fusitu'a in her affidavit comes up to indicating that such provisions are necessary in terms of any of the factors in Clause 7(2) or a pressing social need, are no more than proportionate to the legitimate aim being pursued, and do not involve prior restraint of freedom of expression, except in cases of clear and present danger: nor would they meet an implied term to that effect.

Although I again heard submissions about the relevance of Clause 4 (Same law for all classes) of the Constitution on this matter I do not think it is necessary to go into that. The restriction on freedom of speech and the Press is once more so serious and inconsistent with Clause 7 that its application in the Newspaper Act, whether to Tongans or to non-Tongans, has to be void in any event, so that issues under Clause 4 are not crucial.

Once again I do not consider that the presumption of constitutional validity of legislation applies in this case as all the provisions in question go to the heart of freedom of expression, so that it is not possible to read the statutory language as subject to implied terms (such as only being exercised if necessary in terms of a social need etc) which would avoid conflict with constitutional limitations.

The final question is whether those objectionable parts of the Act are severable from the remaining provisions of the Act so that the latter still remain enforceable as part of the law of Tonga.

While it might have been possible for some of the unobjectionable parts of section 12 to remain on their own, that could not be done because section 12 is tied up with the newspaper licensing system of the Act. I thus regret that I consider that those objectionable parts of the Act are so extensive and would give the defendant such unfettered discretion that all the other sections of the Act are tied together and inextricably bound up with them, so it is not possible to sever the inconsistent sections so that they can survive independently. On a fair review of the whole matter it could not be assumed that the legislature would have enacted what survives without enacting those objectionable parts. I therefore find that the whole of the Newspaper Act is void as being inconsistent with Clause 7.

Conclusion on Media Act & Newspaper Act

Under the principles of interpretation of the Constitution, I must give a wide meaning to the freedoms or liberties conferred by Clause 7, and I must construe restrictions to that narrowly. Doing so, and having proper regard to the pith and substance of the 2 Acts which have been challenged, I have therefore come to the conclusion that each of these 2 Acts is inconsistent with Clause 7 of the Constitution, even as amended, so they are void in terms of Clause 82 of the Constitution. The presumption of constitutional validity is of no avail in these cases. Once again I very much regret having to make such a finding in relation to legislation which has had the approval of the Legislative Assembly, the Cabinet, the Privy Council and His Majesty The King, but again it is the clear duty of this Court under the Constitution to do so and thus to uphold the Constitution.

Responsibility of the Press

Even although I am declaring these 2 Acts void, as has been indicated in places throughout this decision, freedom of the Press under the Constitution is not limitless and there still remains a responsibility on the Press, especially as freedom of the Press is not so much conferred on the Press, as on the people, whom it sets at liberty to receive knowledge and opinions. There are well-recognised exceptions to freedom of expression which have now been spelt out in the parts of the amendments to Clause 7 of the Constitution which I have found valid.

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.

Clause 103A

The terms of Clause 103A, which was also inserted into the Constitution as a new provision by the Constitution Amendment Act are:

> "103A. The remedy for breach of any provisions of the Constitution shall be declaratory relief and shall not affect any award of damages under any other law."

It is not exactly clear what the words "declaratory relief" either mean or were intended to mean. In terms of *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, 64 (HL) (referred to in *Touliki Trading Enterprises Ltd v Fakafanua* [1995] Tonga LR 8, 22), it is now considered permissible to refer to parliamentary materials in order to ascertain the meaning of legislation where the legislation is ambiguous, or obscure, or the literal meaning leads to absurdity; and the parliamentary material relied on consists of statements by a Minister or other promoter of the Bill, which led to the enactment of the legislation, together if necessary with such other Parliamentary materials as are necessary to understand such statements and their effect; and those statements were clear. It was said in that case (at p 64):

> "Statute law consists of the words Parliament has enacted. It is the Court's duty to construe those words and it is the Court's duty in doing so to give effect to the intention of Parliament in using those words."

The Explanatory Note by the Hon Attorney General on the Constitution Bill, to which therefore the Court can refer states:

> "Section 3: Amendment to Clause 103
> This Amendment does not affect damages available under the law of torts and contracts, or other causes of actions. This new Clause sets out clearly the present position in law, where the Constitution does not specifically provide for damages as remedy for any breach of the Constitution. The remedy for such a breach is declaratory only."

The Oxford Dictionary of Law describes "declaratory judgment" as a judgment that merely states the court's opinion on a question of law or declares the rights of the parties, without normally including any provision for enforcement. Curzon's Dictionary of Law describes "declaration judgment" as a judgment which merely states the court's opinion on a question of law, or declares the rights, existing or future, of the parties; and does not generally carry an order for enforcement (Order 15 Rule 16). In his classic work *Constitutional and Administrative Law* (5th ed 1986) de Smith in his chapter on Remedies clearly deals with the declaration or declaratory judgment as being separate from and not including the prerogative orders of certiorari, prohibition and mandamus or the prerogative writ of habeas corpus; and explains that declarations can be awarded in almost every situation where an injunction will lie and are a discretionary remedy, but states that there are few limits to the potential scope of declaratory relief in public law (p 622-624). In the later work *Judicial Review of Administrative Action* (5th Ed 1998) by de Smith, Woolf & Jowell at 18-001 it is stated:

> "A declaratory judgment is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It declares what the legal position is and what are the rights of the parties. ... A declaratory judgment ... pronounces upon the existence of a legal relationship but does not contain any order which can be enforced against the defendant."

In addition, in the Supreme Court [of Tonga] Rules 1991, at Order 27 Rule 1, a similar distinction is made:

> "This order applies to any action against an inferior court, tribunal or public body (including an individual charged with public duties) in which the relief claimed includes an order of mandamus, prohibition or certiorari, or a declaration or injunction (in this order referred to as "judicial review")."

Thus from these definitions I would assume that "declaratory relief" means exactly what it says, ie a declaration and nothing more.

However Mr Radich for the defendant submitted orally that the term "declaratory relief" included the prerogative orders. If the Government is prepared to honour that submission in all cases in which it is concerned, that is well and good, but I regret that I cannot accept that as a matter of law prerogative orders are properly included within the term "declaratory relief".

As stated previously, I fully accept that the legislature has power to amend the Constitution to make a provision of this nature - but as before, always subject to the entrenchment provision in Clause 79. Those words - "provided that such amendments shall not affect the law of liberty ... " - while they still stand in the Constitution, effectively bar any amendment to the Constitution which does affect the law of liberty.

It was stated in *Minister of Police v Moala* at 219:

> "Each of the organs of Government in Tonga has the powers that are defined by the Constitution, which as the Chief Justice pointed out, and as was pointed out by this court in *Touliki v Fakafanua* ... , places at its very forefront the liberties of Tongan citizens. Clause 70 is intended to trench upon those liberties only so far as is necessary to enable a Parliamentary Assembly to function effectively. The clause is an exception to a principle of liberty, and should be understood, not in any loose or expansive sense, but in accordance with its terms."

I accept that it has not been established in Tonga that there is a right to constitutional damages. Although the matter was raised in *Pohiva v Prime Minister and Kingdom of Tonga* [1988] LRC (Const) 949, it is not authority for that, as Martin CJ specifically stated that the breach in question was a tort:

> "Clause 7 establishes a constitutional right. Every person has the right of free speech. By necessary implication, it also imposes a duty - a duty on every person to permit exercise of

> that right. The duty is owed to all persons. Any interference with that right is a breach of the duty and a tort. If such a breach of duty causes loss to someone, that person is entitled to be compensated. A person who has suffered this type of wrong may seek his remedy in tort, even though he may be able to frame his claim in some other way. And when dealing with fundamental rights the Court will not stand on technicalities. It looks at the reality of the situation and unless there are compelling reasons to the contrary will provide a remedy."

and the Court of Appeal deliberately declined to take up the matter in *Edwards v Pohiva* (Cross-Appeal) [2003] TOCA 8:

> "Dr Harrison submits that this court has not previously considered the question whether the Constitution of Tonga gives rise to a separate cause of action for damages or compensation for a proved breach of a constitutional provision. However, he also accepts that, if the court rejects the appeal on other grounds, it will not be necessary to decide whether there is a separate right of action for breach of the Constitution.
>
> That is now the position. The appeal having otherwise failed, we do not propose to deal with this submission in what would necessarily be an *obiter* finding. It is preferable that this issue be determined in a case where the decision will be determinative."

There has been a great deal of authority in other jurisdictions as to why there should be a right to constitutional damages, particularly where there is a written constitution. The matter was much discussed in a case cited by Mr Radich for the defendant, *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA) and it seems to me that there may well be a right to constitutional damages in Tonga.

However, referring back to *Edwards v Pohiva*, any decision in this case as to whether there is such a right to constitutional damages in Tonga would be obiter, as the plaintiffs simply seek a declaration and not damages or any other remedy; and in addition it could be said that it was not fully argued before the Court. Certainly the cases referred to in *Baigent's Case* were not subject to detailed submissions. So I find myself in the same position as the Court of Appeal in *Edwards v Pohiva* and consider that it is not appropriate to make any kind of definitive ruling on the issue, but for the purposes of consideration of the consistency of Clause 103A with the Constitution as a whole, taking into account all the authority cited above I shall proceed on the basis that it may be possible for this Court to award constitutional damages in an appropriate case.

I have already mentioned the submissions for the defendant on the issue of whether "declaratory relief" includes or excludes the prerogative orders and writ (of habeas corpus). I regret that I do not think it can be argued with any logical or legal force that "declaratory relief" includes the prerogative orders and writ. It therefore concerned me greatly, as Dr Harrison submitted for the plaintiffs, that Clause 103A

may have ruled out the prerogative orders in relation to breach of any provisions of the Constitution. The scenario which he presented - ie the abolition of the powers of the court to grant prerogative orders or the prerogative writ of habeas corpus (in exercise of the liberty in Clause 9 of the Constitution) - is indeed a bleak one for upholding the liberties enacted in Part I of the Constitution.

But at the same time the Court of Appeal accepted in *'Akau'ola & Kingdom of Tonga v Pohiva* [1990] Tonga LR 159, 162 (CA) that "It has always been competent for an application to be made in the Tongan Supreme Court for relief of the kind referred to in [the English] RSC Order 53", ie applications for judicial review and the prerogative orders.

It is a common law presumption of legislative intent that access to the courts in respect of justiciable issues is not to be denied save by clear words in a statute: *de Smith, Woolf & Jowell Judicial Review of Administrative Action* (5th Ed) 5-017.

The subject's right of access to the courts may be taken away or restricted by statute, "but the language of any such statute [ie one depriving the subject of a right of appeal to the courts] should be jealously watched by the courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension. ... Parliament may enact this as they may enact anything else. But I should expect words showing a clear intention so seriously to interfere with the liberties of the subject.": *Re Boaler Re Vexatious Actions Act 1896* [1914-15] All ER Rep 1022 (CA), at 1030 and 1031 per Scrutton J; *Halsbury's Laws (4th Ed)* Vol 10 para 720.

It was also said by Viscount Simonds in *Pyx Granite Co v Ministry of Housing* [1959] 3 All ER 1 (HL) at 6:

> "It is a principle not by any means to be whittled down that the subject's recourse to [the] courts for the determination of his rights is not to be excluded except by clear words. That is ... a 'fundamental rule' from which I would not for my part sanction any departure."

The position in relation to implied repeal of terms of a Constitution has already been dealt with above. As to statutes providing a new remedy where a remedy already exists, the remedies may co-exist unless the later statute expressly or by necessary implication excludes existing remedies: *Halsbury's Laws (4th Ed)* Vol 44 para 943. Note 7 to para 943 referred to in *Read v Croydon Corporation* [1938] 4 All ER 631, 652 (KBD), where Stable J adopted the test put forward by Atkin LJ in *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] All ER Rep 127 (CA) at 132, ie the question is one of the true construction of the particular statute concerned as a whole, and it may be the intention of the statute, as disclosed by its scope and by its wording, that other remedies should not be included. I believe the same applies in relation to this Constitution.

I therefore cannot hold that this Court's jurisdiction under Clause 90 of the Constitution, which makes specific mention of "all cases in Law and Equity arising under the Constitution ... ", and which quite clearly thus includes jurisdiction to make prerogative orders and writs in respect of breaches of any provisions of the Constitution, could be overridden or swept away by Clause 103A without any specific mention that that was being done, notwithstanding the broad language of the Constitution and the interpretation to be given to it: as this is an exemption provision rather than an enabling provision, it has to be construed strictly.

I am therefore left with the conclusion that, while accepting the supremacy of the legislature and its ability to make provision under the Constitution for breach of any provision of the Constitution, the effect of Clause 103A may simply be to restrict the remedies such as constitutional damages which might otherwise be available for breaches of its provisions. But even if that is so, I consider that that significantly affects and restricts the law of liberty, which is not sanctioned by the Constitution as it stands, particularly in relation to the subject matter of this case, Clause 7 and the additional words there "and no law shall ever be enacted to restrict this liberty".

I therefore find in terms of Clause 82 that Clause 103A is void to the extent that it is inconsistent with the law of liberty in the Constitution (ie the relevant provisions of the declaration of rights in Part I of the Constitution, in particular Clause 7, which was the subject of this case) and any consequent right to constitutional damages under the Constitution.

Claim of judicial review

I have dealt with the plaintiffs' claims on the basis that they are constitutional claims in terms of the Court's jurisdiction under Clause 82 of the Constitution, but in as much as I have found that some of the amendments to the Constitution and the 2 Acts made under it are inconsistent with the Constitution and hence void, they are also ultra vires and so the result on judicial review is the same.

Costs

As neither side has been entirely successful, but each side has been partially successful in their claims and defence 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.

Conclusions

The Court therefore makes the following declarations:

1. Parts of Clause 7(2) of the Constitution are inconsistent with the entrenching provisions of Clauses 7 and 79 of the Constitution and so are void in terms of Clause 82 of the Constitution. The remainder of Clause 7(2) is not inconsistent and is valid, so that Clause 7(2) must read:
   "(2) It shall be lawful, in addition to the exceptions set out in sub-clause (1), to enact such laws as are considered necessary in national security, public order, morality, privileges of the Legislative Assembly and to provide for contempt of Court."
2. Clause 7(3) of the Constitution is not inconsistent with the entrenching provisions of Clauses 7 and 79 of the Constitution and so is valid, provided that it must be read as subject to the implied term that laws can only be made under it if they are necessary in terms of a pressing social need, and provided they are no more than proportionate to the legitimate aim being pursued and do not involve prior

restraint of freedom of expression, except in cases of clear and present danger.

3. The Media Operators Act 2003 is inconsistent with Clause 7 of the Constitution, and so is void in terms of Clause 82 of the Constitution.
4. The Newspaper Act 2003 is inconsistent with Clause 7 of the Constitution, and so is void in terms of Clause 82 of the Constitution.
5. Clause 103A is void to the extent that it is inconsistent with the law of liberty in the Constitution and any consequent right to constitutional damages.

And no order as to costs is made meantime.

CLERICAL CORRECTION TO DECISION AND SUMMARY

I am humbled to find that a clerical error has crept into the Decision in this case and also the Summary.

It relates to the form of Clause 7(1) of the Constitution as it was after the 2003 amendments, and remains now. It is reproduced wrongly at page 4 of the Decision and page 2 of the Summary.

In both instances in Clause 7(1) the end of the sub-clause should read:

> "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."

DATED: 15 October 2004

Chief Commissioner of Inland Revenue v Lafi Motors anors

Supreme Court, Nuku'alofa
Webster CJ
CV 407/2003

20 January 2005; 21 January 2005

Customs and excise – short levy on customs duties – understatement of value of cars – judgment for plaintiff

The claim was for customs import duty and ports and services tax (under the Ports and Services Tax Act (Cap 71)) which was short-levied on 32 Japanese used motor vehicles imported by the first defendant in August 2002. The short-levy arose because the values of the vehicles had been considerably understated on the customs entry forms. The lawyer was unable to obtain instructions as the first defendant appeared not to be operating any longer in Tonga and the second and third defendants were in New Zealand and contact addresses were unable to be obtained. The Court heard the trial in the absence of the defendants.

Held:

1. The first defendant considerably understated the CIF values on the customs entry forms for 32 Japanese used motor vehicles which it imported to Tonga in August 2002. This was discovered in routine auditing by the Compliance Improvement Division. When the CIF values were fairly reassessed by comparison with the values of similar vehicles imported by other importers, the resultant reassessment produced a balance of customs import duty and ports and services tax of $43,727.87 due by the first defendant to the plaintiff.
2. The defendants were indebted to the plaintiff for the outstanding amount of $34,118.95 ($43,727.87 - $9,608.92) in respect of the short-levied customs import duty and ports and services tax. The defendants had earlier accepted that that debt was due, particularly as they had made one earlier payment (of $9,608.92) towards their indebtedness.
3. Judgment was entered for the plaintiff against the defendants jointly and severally to pay to the plaintiff the sum of $34,118.95; with interest at 10% per annum from 20 January 2005 until paid.

Statutes considered:

Customs and Excise Act (Cap 67)
Ports and Services Tax Act (Cap 71)

Counsel for plaintiff	:	Ms Simiki
Defendants	:	Not present nor represented

Reasons for Decision

This is a claim by the Chief Commissioner of Revenue, who is authorised by the Customs and Excise Act (Cap 67) to collect and recover the customs duties imposed by that Act.

The 1st Defendant Lafi Motors ran a business at Tofoa, Taufa'ahau Road, Nuku'alofa importing and selling motor vehicles in Tonga. At the relevant times the 2nd and 3rd Defendants, Mr Lafitani Pouanga and Mr Machindar Singh, were partners in the 1st Defendant.

The claim was for customs import duty and ports and services tax (under the Ports and Services Tax Act (Cap 71)) which was short-levied on 32 Japanese used motor vehicles imported by the 1st Defendant in August 2002. The short-levy arose because the values of the vehicles had been considerably understated on the customs entry forms.

Initially Mr Tu'utafaiva appeared for the Defendants, for whom he had been acting since the claim had been lodged in July 2003, but I granted him leave to withdraw as he had not been able to obtain instructions for at least the last year, as he said that the 1st Defendant appears not to be operating any longer in Tonga and the 2nd and 3rd Defendants are in New Zealand and he has been unable to obtain contact addresses. I therefore proceeded to hear the trial in the absence of the Defendants in terms of Order 23 Rule 4(1)(ii).

The Plaintiff led evidence from Mr Kelemete Vahe, now Principal Revenue Officer, and Mr Sione Houpi Tu'ipulotu, Revenue Officer Grade 1, both in the Compliance Improvement Division of the Revenue & Services Departments. They both spoke to the discovery of the understated values and how these were reassessed by comparison with the values of similar vehicles. The Plaintiff also led evidence from Mr Makisi Finau, Revenue Officer at the Technical Division of the Revenue & Services Departments, who spoke to the correspondence with the Defendants following the reassessment. I accepted these witnesses as credible and reliable. The Plaintiff also produced relevant documents.

On the evidence before me, I found on the balance of probabilities that:

> The 1st Defendant considerably understated the CIF values on the customs entry forms for 32 Japanese used motor vehicles which it imported to Tonga in August 2002. This was discovered in routine auditing by the Compliance Improvement Division. When the CIF values were fairly reassessed by comparison with the values of similar vehicles imported by other importers, the resultant reassessment produced a balance of customs import duty and ports and services tax of $43,727.87 due by the 1st Defendant to the Plaintiff.

Prior to that figure being finalised, the Plaintiff had given the Defendants several opportunities between 11 November and 17 December 2002 to submit documents which would have clarified the position, but despite some correspondence the Defendants had not submitted any such documents.

The Plaintiff then on 19 December 2002 advised the Defendants of the amount due and gave them until 3 January 2003 to make payment. Along with that letter the Plaintiff sent full details of the reassessment.

On 28 January 2003 the 2nd Defendant Mr Pouanga wrote to the Minister of Finance offering to make a payment of $8,159.77, which he said was all he could afford to pay, and he sought the Minister's indulgence to be allowed to pay the balance before 30 April 2003. In doing so the 2nd Defendant impliedly admitted the Defendants' debt. That application for part payment was accepted on 30 January by the Minister as Chief Commissioner of Revenue and the 2nd Defendant made payment of $9,608.92 (which included sales tax).

No further payment was made by the Defendants and on 20 May 2003 the Plaintiff wrote to the 2nd Defendant pointing out that he had not honoured his earlier undertaking and giving the Defendants a final period until 26 May to pay the balance.

In response to that, Mr Nalesoni Tupou, Barrister, Auckland, wrote to the Plaintiff on behalf of the 1st and 2nd Defendants by fax on 26 May. He did not, on behalf of the Defendants, dispute that the balance due was outstanding, but asked for an extension of time due to financial difficulties. He also offered on behalf of the 1st and 2nd Defendants that they would continue payments of $8,159.77 every 2 months starting on 26 June 2003, with a final payment in January 2004. With reference to that letter, on 5 June 2003 the Plaintiff advised Mr Tupou that his instructions were to proceed with recovery.

I accordingly found that the Defendants were indebted to the Plaintiff for the outstanding amount of $34,118.95 ($43,727.87 - $9,608.92) in respect of the short-levied customs import duty and ports and services tax. The Defendants had earlier accepted that that debt was due, particularly as they had made one earlier payment towards their indebtedness.

The final result is thus that judgment is entered for the Plaintiff against the Defendants jointly and severally to pay to the Plaintiff the sum of $34,118.95; with interest at 10% per annum from 20 January 2005 until paid.

I also awarded costs as agreed or taxed to the Plaintiff against the Defendants jointly and severally.

Taufa v R

Court of Appeal, Nuku'alofa
Webster CJ
AC 17/2004

26 January 2005; 31 January 2005

Sentencing – application for stay of sentence and bail pending appeal – application refused

The appellant, Mataiasi Taufa, was convicted of two counts of grievous bodily harm and one count of bodily harm (all of which occurred on the same occasion) and sentenced by the trial Judge to 4½ years imprisonment concurrently on each of the counts of grievous bodily harm, the final 18 months of which were suspended for 3 years on conditions. On the count of bodily harm he was sentenced to two years imprisonment, again concurrent. He applied for stay of sentence and bail pending appeal. The appellant was not seeking to contest the length of the sentence, but rather sought to have it all suspended. The three sentences were all related to the intermittent explosive disorder from which the appellant suffered and he says that he was punished for something which he did not do deliberately or over which he had no control.

Held:

1. In deciding whether there was a reasonable prospect of the appeal succeeding the Court asked whether there was a real chance of that, rather than whether it was more likely than not.
2. If the whole sentence was to be suspended, the Court considered that the only punishment for three very serious offences would be the threat of a term of imprisonment, which in the circumstances would not be appropriate.
3. The Court considered that the appeal did not have a reasonable chance of succeeding.
4. There was a great difference between being on bail (even on strict conditions) and being on a suspended sentence, as breach of the latter automatically brought into force the whole of the suspended sentence, as well as any punishment for the new offence, and so was a very powerful sanction. But under the Bail Act 1990 the maximum sanction under section 9 appeared to be revocation of bail and punishment for the new offence, which did not have the same force. It was inappropriate to grant

bail to the appellant where the conviction and the length of the sentence were not appealed, but only that the initial part had not been suspended.

5. The application for stay of sentence and bail pending appeal was refused.

Cases considered:

Kafoa v R (App No 347,348,743/1996, 20 June 1997, Court of Appeal)
R v Misinale (Court of Appeal, CA 13/99, 23 July 1999)
Sefo & Tu'ipulotu v R [2004] Tonga LR 366

Statutes considered:

Bail Act 1990
Court of Appeal Act (Cap 9)

Counsel for appellant : Mr Niu
Counsel for respondent : Ms Simiki

Reserved Ruling on Application for Bail

This was an application for stay of sentence and bail pending appeal by the appellant, Mataiasi Taufa, who was convicted of 2 counts of grievous bodily harm and 1 count of bodily harm (all of which occurred on the same occasion) and sentenced by the trial Judge, McElrea J, on 19 October 2004 to 4½ years imprisonment concurrently on each of the counts of grievous bodily harm, the final 18 months of which were suspended for 3 years on the following conditions:

1. He will be under the supervision of a Probation Officer.
2. He will live and work where directed by his Probation Officer.
3. He is not to associate in any way with the victim Kalatiola.
4. He is to attend an anger management course as arranged by his Probation Officer.
5. He is to follow all directions of Dr Puloka or such other Medical Officer as Dr Puloka directs.

On the count of bodily harm he was sentenced to 2 years imprisonment, again concurrent.

The appellant's grounds of appeal are as follows:

> The Appellant will pray that that sentence be varied as follows:
>
> The Appellant is sentenced to 4 years imprisonment but suspended for 3 years and, during the period of suspension,
>
> (a) he is to comply with all directions of medication and treatment which the doctor in charge of the psychiatric ward at Vaiola hospital shall direct;

(b) he is to attend and carry out any programme of treatment which the Salvation Army shall see fit to prescribe for him.

Upon the following grounds:

1. The Appellant was and is suffering from a mental condition called "intermittent explosive disorder". It is caused by a low level of a substance in the brain called "serotonin" which is due to a disease of the mind. When a person has a low level of serotonin, he manifests a failure to resist aggressive impulses, resulting in serious assaults or destruction of property. The degree of aggressiveness is usually grossly out of proportion to any provocation (or precipitating psychological stressor) which sparks the explosive disorder.
2. Dr Puloka, who examined the Appellant stated that the Appellant was, at the time that he attacked and slashed the 3 victims with the machete, was not in control of the situation whatever he did.
3. The Appellant inflicted 5 deep cuts on his mother in law (her left hand and little finger, the right side of her neck and right check, her right shoulder blade and two on the back of her head). he inflicted 9 deep cuts to his wife's body (three on her hands, one on her forehead, one on the back of her head, and four around the back of her head). He inflicted only one cut, which was not deep on the right shoulder of a boy who happened to be there at the time.
4. Dr Puloka had prescribed Prozac, a medication which raised the level of serotonin, for the Appellant on 14/2/2002 but they were lost by the prison officers for several days, during which the Appellant had no medication, up to the 23/2/2002, when he suffered from the intermittent explosive disorder and slashed the victims as described above.
5. Having found that the mental condition of the Appellant was such that he was not legally insane, but that it would be very relevant for the purpose of sentencing him, the Learned Judge erred when he imposed the imprisonment sentence of 4 years, because he thereby held that the Appellant was responsible for his action whereas he was not. The Appellant was, as Dr Puloka correctly stated, overwhelmed, such that he could not resist the impulse caused by the low level serotonin (over which he had no control).
6. The sentence imposed is unjust and inappropriate in that:
   (a) the Appellant is being punished for something he did not deliberately or intentionally do or over which he had any control;

(b) the prison sentence will not serve any useful purpose for him or for the public because he is a special case of a disease of the mind.

(c) the Appellant needs the help and care of his wife, who has stood by him before the incident as well as afterwards up to now.

(d) he needs to be helped by programmes of the Salvation Army for persons with alcohol, drug and anger problems, as well as the ready access to the medication of Dr Puloka.

(e) the Appellant and his wife now have 3 young children who need him, and he needs them.

All 3 sentences were ordered to be cumulative on the sentence of 6 years imprisonment he was then serving for robbery, which has since been completed on 4 December 2004.

Under section 26(2) of the Court of Appeal Act (Cap 9) it is provided:

> (2) The Court of Appeal may, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal ...

It was agreed by Counsel that I should hear this application sitting as a single Judge of the Court of Appeal.

Under section 4B of the Bail Act 1990 as amended:

> 4B. (1) A person who has been convicted of and sentenced to imprisonment for a criminal offence and who has appealed or applied for leave to appeal against that conviction or sentence shall be granted bail if the Court is satisfied that –
>
> (a) there is a reasonable prospect of the appeal succeeding; or
>
> (b) the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; and
>
> (c) there are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will surrender to custody without committing any offence whilst on bail.
>
> (2) In taking the decision required by subsection (1), the Court shall have regard to all the relevant circumstances and in particular –
>
> (a) the nature of the offence and length of the sentence;
>
> (b) the grounds of appeal;
>
> (c) the character, antecedents, associations and community ties of the person; and

(d) his record in surrendering to custody at the trial and on other occasions.

I must emphasise that at this stage I am not hearing the appellant's appeal against sentence, which I do not wish to prejudge, and I do not wish to give any appearance of doing so.

In relation to the factors set out in section 4B(2), these were very serious offences for which the appellant was sentenced and he was given a long sentence, the length of which is not in itself being appealed. It is important that in the grounds of appeal the appellant is not seeking to contest the length of the sentence, but rather seeks to have it all suspended. These 3 sentences were all related to the intermittent explosive disorder from which the appellant suffers and he says that he was punished for something which he did not do deliberately or over which he had no control. In relation to the character of the appellant, I note that he is a serious offender with at least 1 serious previous conviction for robbery (which does not appear to me to be linked to his intermittent explosive disorder), for which he was serving a sentence of 6 years at the time these offences were committed. However I am pleased to note from a recent reference given for the appellant by the Superintendent of Prisons that his current behaviour has been excellent. There was no suggestion that there would be problems with the appellant surrendering to custody.

In terms of section 4B(1)(a), one condition for the granting of bail pending appeal is that the Court would have to be satisfied that there is a reasonable prospect of the appeal succeeding. The dictionary definition of "reasonable" is rational, or according to reason. When Ford J considered this section recently in *Sefo & Tu'ipulotu v R* [2004] Tonga LR 366 he did not seek to define the term "a reasonable prospect". I have only been able to find 1 definition of the term, in Stroud's Judicial Dictionary (5th Ed 13th Cum Supp), where in an English case concerning whether there was a reasonable prospect of obtaining planning permission, the Court held that the correct test was whether there was a real chance of that, rather than whether it was more likely than not that permission would be granted. In the circumstances of this case also I believe that is an appropriate definition, and that is the standard I shall apply, not just that there is an arguable case, as Mr Niu submitted for the appellant.

In judging whether there is a real chance of the appellant's appeal against sentence succeeding I shall use the well-established standard that such an appeal will only succeed if the sentence was wrong in principle or manifestly excessive. But I do not think that it is appropriate in an application such as this to go into too much detail.

As has already been mentioned, the main ground of this application and appeal is that the sentence should all be suspended, as the appellant's aggressive impulses could not be resisted by him and overwhelmed his judgment. However the trial Judge, who took great care in reaching his decision to convict the appellant of these offences, in his trial judgment dated 1 October 2004 did not accept on the evidence that the appellant's emotions did in fact overwhelm his understanding (Para 2 on page 12). I also find that the trial Judge's sentencing remarks on 19 October showed that he carefully considered all the relevant factors and I am not persuaded that his decision not to suspend the first 3 years of the sentences for these very serious offences was wrong in principle or manifestly excessive. Again I consider it relevant that the trial Judge took into account the appellant's previous conviction for robbery, which it

appears to me cannot be explained simply by an irresistible impulse resulting from the condition of intermittent explosive disorder.

In relation to a suspension of the sentences of imprisonment, I am alive to what has been said in *R v Misinale* (Court of Appeal, CA 13/99, 23 July 1999), but it is quite clear that the trial Judge did carefully consider the question of suspension, including the submission by Mr Niu that the whole sentence should be suspended, but rejected the latter possibility because he believed "that for reasons of public safety the prisoner needs to be kept in prison until there is a sustained period of a lack of any violence on his part", taking the view that it was too early to be able to say that the public could be safe if the appellant was released then simply on conditions. The trial Judge heard all the evidence in the trial and all the submissions and it does not appear to me that his exercise of that discretion is likely to be overturned. I am certainly not going to take a different view for the purposes of this application at this stage only some 3 months later.

Especially in this case, if the whole sentence was to be suspended, I consider that the only punishment for 3 very serious offences would be the threat of a term of imprisonment, which in the circumstances cannot be appropriate.

I must add that if what Mr Niu submitted is correct and that, if the appellant does not receive his Prozac medication to keep up his levels of serotonin, he has no control and cannot resist aggressive impulses, it appears to me most important for public safety that he is not released at present.

I am disturbed to hear from the Crown that the appellant still appears to come and go from Hu'atolitoli Prison, almost at will. If that is true, I hope the Superintendent of Prisons will take immediate steps for the safety of the public to ensure that it does not happen again. To this end I shall direct that a copy of this ruling is sent to the Minister of Police. However it is heartening to read the letter dated 27 January from the Superintendent reporting on the change in the appellant's behaviour and his current good conduct in the Prison.

For all these reasons, briefly stated, I therefore consider that this appeal does not have a reasonable prospect of succeeding.

Ground (b) of section 4B(1) is not relevant as the appeal is likely to be heard in July of this year before a substantial portion of the sentence has been served. In relation to ground (c), I am willing to accept that the appellant will surrender to custody, but in view of his history I cannot be sure that if granted bail he would not commit offences while on bail, even under onerous conditions.

There is one final point which, being part of the relevant circumstances referred to in section 4B(2), would in any event have overridden these other factors. There is a great difference between being on bail (even on strict conditions) and being on a suspended sentence, as breach of the latter automatically brings into force the whole of the suspended sentence, as well as any punishment for the new offence, and so is a very powerful sanction. But under the Bail Act 1990 the maximum sanction under section 9 appears to be revocation of bail and punishment for the new offence, which has not nearly the same force. It therefore appears completely inappropriate to grant bail to the appellant in these circumstances where the conviction and the length of the sentence is not appealed, but only that the initial part has not been suspended.

I also bear in mind the views on bail pending appeal expressed by the Court of Appeal in *Kafoa v R* (App No 347,348,743/1996, 20 June 1997, Court of Appeal).

While as I have said I am pleased to have such an excellent report on the appellant from the Superintendent of Prisons and hope he continues that way, for all the above reasons I therefore refuse this application for stay of sentence and bail pending appeal.

Tukuafu v Latu anors

Land Court, Nuku'alofa
Ford J and Assessor Mr George Blake
L 5/2002

1-3 and 5 November 2004: 31 January 2005

Land law – purported grant of allotment – Royal Estate – not valid grant

During the first half of 2000, the first defendant built a special-purpose resort on land at Kanokupolu which fronted onto a popular sandy beach. The plaintiff claimed that he was the duly registered holder of the allotment on Royal Estate land and that the resort was built on part of his tax allotment without his consent. The plaintiff sought an order for the building's removal. The first defendant disputed that the allotment belonged to the plaintiff. He contended that the land in question was part of the Kanokupolu Royal Estate and that His Majesty, who was named as third defendant in the proceeding, personally directed him to build the resort in question.

Held:

1. The scheme of the Land Act was that grants could be made only from hereditary estates and Crown land. Although the Royal Estates and Royal Family Estates came within the definition of Crown land, they were specifically set aside under section 10 of the Land Act for the Royal purposes described and, as such, there was no statutory authority authorising the granting of hereditary estates from such lands. The whole of the allotment in question was part of the Royal Estate and as such it was never land available for allocation as an hereditary estate.
2. There was no evidence before the Court, and no documentary evidence produced from the Land's Office, to show the basis upon which the widow became the registered titleholder. In any event there must be doubts as to the legality of the widow's registration as titleholder in respect of an allotment that was clearly situated on land belonging to the King.
3. (obiter) Even had the plaintiff persuaded the Court as to the validity of the purported hereditary grant to his great-grandfather, his claim still could not have succeeded because at the point in time when his older brother surrendered the land in question, title would have reverted to the King.
4. The plaintiff's application for an order requiring the defendant to remove all buildings from the land in question failed. The Court was not satisfied that he had title to the allotment. No cross orders were sought by the

Crown. The defendants were entitled to costs (one set of costs only as between the second and third defendants) to be agreed or taxed.

Cases considered:

Kalaniuvalu (Noble) v Minister of Lands (1937) Tonga LR 11

Minister of Lands v Manase Kamoto (1923-1962) 11 Tonga LR 132

Na'ati v Motu'apuaka (Supreme Court, 2 March 1998, No L3/91, Lewis CJ)

Vaea v Minister of Lands and Fetu'ufuka [1974-80] Tongan LR 13

Statutes considered:

Constitution 1875

Constitution of Tonga (Cap 2)

Land Act (Cap 132)

Land Act 1882

Land Act 1903

Land Act 1927

Counsel for plaintiff	:	Mr Niu
Counsel for first defendant	:	Mr Tu'utafaiva and Ms Mangisi
Counsel for second and third defendants	:	Miss Simiki

Judgment

On the "western side" of Tongatapu, as the area is referred to locally, there are a number of popular sandy beaches. During the first half of the year 2000, the first defendant built a special-purpose resort on land at Kanokupolu which fronts onto one such beach. In this proceeding, the plaintiff claims that the resort was built on part of his tax allotment without his consent and he seeks an order for the building's removal.

For his part, the first defendant disputes that the allotment belongs to the plaintiff. He contends that the land in question is part of the Kanokupolu Royal Estate and that His Majesty, who is named as third defendant in the proceeding, personally directed him to build the resort in question. The case raises a number of significant and rather unusual issues.

Probably the starting point for any consideration of those issues is section 3 of the Land Act (Cap 132) which declares all the land in the Kingdom to be the property of the Crown. Section 7 sets out the entitlement of male Tongans to grants of allotments and section 8 provides that grants of allotments are to be made from lands in hereditary estates or Crown Land. Section 9 of the Act then defines hereditary estates. They are said to be the lands listed in the First Schedule to the Act as hereditary estates held by the respective Nobles and Matapules whose names appear in the Schedule.

Section 10 of the Act is important in the context of the present case. It declares that all other lands, apart from the hereditary estates, are Crown lands and it goes on to provide that there shall be set aside from that Crown land the lands described in Schedule II of the Act as Royal Estates and the land described in Schedule III as Royal Family Estate. I set out section 10 in full:

"10. (1) All lands other than those described in Schedule 1 (the hereditary estates) are Crown lands and there shall be set aside therefrom the lands specifically described in Schedule II as the Royal Estates for the use of the Sovereign for the time being and there shall also be set aside therefrom the lands described in Schedule III as the Royal Family Estate. A life interest in any of the lands described in Schedule III or any portion thereof may be granted to such person as the Sovereign for the time being may appoint.

(2) Notwithstanding subsection (1), His Majesty may lease for projects of general public interest and benefit any of the lands or part thereof described in Schedule II and Schedule III."

There is no dispute that the land in question is part of the Kanokupolu Royal Estate. Kanokupolu is one of the Royal Estates listed in Schedule II of the 1927 Land Act. It is necessary now to see how it comes about that the plaintiff is able to claim, as he does, that he became the duly registered holder of an allotment on Royal Estate land. His claim has its origins back at the end of the 19th century when the 1875 Constitution of Tonga was still in its infancy.

In his statement of claim the plaintiff pleads that he is a great-grandson of one, Viliami Lomu. His pleading continues:

"2. Viliami Lomu was a substantial resident of Kanokupolu and like the people of Kanokupolu, was a loyal and faithful follower and supporter of King George Tupou I. The men of Kanokupolu were granted hereditary tax allotments by the King out of his land of Kanokupolu, the sizes of which varied according to (the) wishes of those men. Viliami Lomu was accordingly granted an hereditary tax allotment of 10 acres 3 roods 1.5 perches.

3. Upon Viliami Lomu's death, his widow Fie'alu Lomu, posthumously registered the allotment in her name on 7/8/1917.

4. Upon her death, the allotment was transferred and registered in Viliami Lomu's son and heir, Taniela Ngahe, on 30/4/1924. He died on 25/5/1974 and his widow Pauline Ngahe died on 16/6/1974. The allotment was accordingly registered in the widow's name and transferred and registered in Taniela Ngahe's son and heir, Aisea Tukuafu, on 12/4/1975. He died on 7/11/1985 and the allotment was registered in the name of his widow, Mele Mapa Tukuafu, on 30/10/1986. She died on 21/9/1995. Aisea Tukuafu's son and heir, Tevita Kaufono Tukuafu, claimed the allotment on 1/4/1996.

5. On the same date, 1/4/1996, Tevita Kaufono Tukuafu conveyed his election to the Minister of Lands at the time to

> retain his own tax allotment at Holonga and also the election of his next brother, the Plaintiff, to give up his own tax allotment at Holonga and succeed to the allotment (in question) instead. He, the Plaintiff, was duly registered as holder of the allotment on 8/8/1997."

The 58-year-old plaintiff, who I will refer to often simply as "Tevita" told the court that he is domiciled in Sydney, Australia. He retired early from his job as a security officer because of an eyesight problem. He first moved to Australia from Tonga in 1974 and he became a permanent resident of that country in 1976. He married his Tongan born wife in New Zealand in 1980 and they have four children. Tevita said in evidence that after he acquired the Kanokupolu allotment in 1997, following on from his older brother's surrender of the land, he left it for the use of his father's sister, Latu Makamoeafi, and her husband and family.

In late February or early March 1997 Tevita received a letter from the Palace Office inquiring about the land at Kanokupolu. The letter is written almost six months prior to when Tevita became the registered holder of the allotment in question but nothing appears to hinge on that point. Presumably, the Palace Secretary had made inquiries at the Land Office and found out that Tevita was in the process of becoming the registered holder of the allotment. The letter, as translated, reads:

> "26 February 1997
>
> Dear Sir,
>
> Thank you for working from there. This letter may appear surprising but because it is to convey to you the desire of His Majesty. Survey was carried out at Kanokupolu in order to find a place that is beautiful and suitable for the establishment of the development construction of the King and he has desired that it is beautiful to put up in your tax allotment. Therefore this letter is made to you to convey to you that a 3 acre piece of land be please taken out from your tax allotment for the establishment of His Majesty's work.
>
> It is possible to exchange this piece if you want. Would you please write to us a letter to state if you would agree to this communication in order for us to forward it right away to the Survey Department to proceed with their work on this position to enable this construction to start.
>
> Hope that you understand this communication and we await your confirmation.
>
> Yours faithfully
> Edwin Mo'ungaloa
> Acting Secretary for His Majesty."

Although the response was not produced, it appears that on 19 March 1997 Tevita replied to the Acting Secretary saying that he was sorry that he would not agree to the proposal.

On 14 April 1997 the Acting Secretary for His Majesty again wrote to Tevita. After acknowledging his response of 19 March 1997, the letter continued:

> "It is clear to me the condition of your mind and you're willing to help the work (of His Majesty) that is about to carry out. It is only 3 poles that is required to be taken from your tax allotment of the beach because of development construction in preparation for the new millennium. I expect that you would help us as I believe that everything will be advantageous to you, as you would also help as such to the development of our country especially Kanokupolu. I hope that you will clarify to us at the first opportunity so that the work of the Ministry of Lands and Survey will proceed.
>
> Hope that you understand this communication.
>
> Yours etc."

On 16 April 1997 Tevita replied:

> "Acting Secretary for His Majesty
>
> Etueni Mo'ungaloa
>
> Dear Sir,
>
> Thankful to God for leading the way for us. I have received your letter (fax) on 14th of April 1997.
>
> I apologise Sir and please bear the trouble, this letter may seem disrespectful but I do not agree to this request. I hope that you understand my commoner's heart, and hope that the Lord will partake in the visions and plans which you make.
>
> Hope that you understand this letter.
>
> Yours etc."

Tevita heard no more. The next development in the narrative was revealed in the evidence of Tevita's wife, Katinia. Katinia told the Court that around the time of His Majesty's birthday in July 2000 she heard over Radio Tonga in Sydney a broadcast about His Majesty opening a new resort building at Kanokupolu. She said that on the same day they received a telephone call from Tevita's sister asking if they knew about the resort that had been built on the land at Kanokupolu. They told the sister to check out the story. Katinia explained in evidence that Tevita was very upset over the news. She said that, although it did not mean a great deal to her, her husband loved the land at Kanokupolu and it was very important to him.

Katinia was asked why they did not do something about the situation immediately instead of then waiting until 6 August 2002 to issue the court proceedings. She explained quite graphically and convincingly how they simply did not have the money to travel back and forth or to instruct lawyers in the matter. She said that they were not well off. Her husband had had ongoing problems with his eyesight which in turn affected his work; they have a high interest mortgage on their

house and they have paid for their children to attend a private Catholic school. Katinia said that it was a big effort financially for them to even be able to travel to Tonga for the trial so back in July 2000 when they suspected that they had a problem with the allotment at Kanokupolu, they ignored it and hoped that it would go away. It didn't.

On 6 September 2000, the Minister of Lands & Survey, Hon Tu'i'afitu wrote to Tevita. The letter has been translated as follows:

> "Dear Sir,
>
> Tax Allotment at Kanokupolu.
>
> I respectfully relate to you in this letter some information relating to your tax allotment currently registered in you at Kanokupolu.
>
> DETAILS OF THE ALLOTMENT
>
> Name -- Vakaloa
>
> Area -- 10a 3r 1.5p
>
> Location -- Lot 6 Blk 83/85
>
> Registration date -- 7/8/1917
>
> I believe that it has been imparted to you with regards to the work and development construction of His Majesty on the part towards the sea of your Tax Allotment. And there has not been any land (or survey) work done to that part, but I ask and invite you to make representation to me in relation to this work.
>
> There is a hope that it would be possible for you to be kind to give up the 2 acres on the side to the sea. However, I will leave you to be at liberty to give your arrangement to me in relation with the development construction which has been carried out.
>
> I believe and expect that you would agree to reply to this letter. Yours etc."

Tevita immediately responded. The letter (undated) was composed by Tevita and his wife but typed in Tongan by their son. The translated version reads as follows:

> "Dear Sir,
>
> I respectfully write this letter in connection with the letter sent to me on the 6 September 2000 relating to my tax allotment at Kanokupolu. Sir, contact was made to me in 1997 from the Palace Office in connection with the request stated in your letter. I had made it clear to you that I **do not agree** but news was surprisingly sent to me that work had already been done on the allotment and the business of a man called Sione

> Tualau Latu is operated on it. And there is nothing missing from me, hence due to the unlawful action carried out on my allotment I am greatly aggrieved by it. Therefore, I will make it clear again to you that I do not consent to the establishment being made on my allotment and I want, upon receiving of this letter, to remove forthwith the work being carried out on my allotment as I will contact my legal representative to take best action on these misunderstandings which have happened.
>
> My apology if this letter appears disrespectful but it is due to my great grievance in the unfounded communications already happened.
>
> Yours etc."

Tevita said that on 7 November 2000 he wrote to the defendant asking him to vacate the allotment but the defendant told the court that he never received such a letter. I accept what the defendant says. The copy produced to the Court does not give any address for the defendant.

The final development occurred on 18 February 2002 when the present Minister of Lands, Fielakepa, wrote to Tevita. I will not set out the contents of that letter. After referring to some of the background matters, the Minister, wisely, suggested that Tevita might wish to take legal advice. Shortly after that, Tevita travelled to Tonga and sought advice from his present counsel, Mr Niu.

That, in essence, is the plaintiff's case. It was not really challenged by the defendants. Mr Niu also called evidence from Makakaufala Matekitonga, the Land Registration Officer with the Ministry of Lands, Survey & Natural Resources. He confirmed the various entries in the Register Book for the land in question going back to the first registration in the name of the widow Fie'alu Lomu on 7 August 1917.

Mr Matekitonga told the court that, according to the Register Book, Tevita has been the registered holder of the allotment since the 8th of August 1997 but, for some reason which the witness was unable to adequately explain, neither Tevita nor any of his predecessors had ever been issued with a Deed of Grant to the land.

The first defendant, 66-year-old Sione Tu'alau Latu, told the Court that he has been a businessman all of his life running an assortment of businesses at different stages including importing and exporting, fast food, construction and even a mortuary business. He explained how one day in the second or third week of January 2000 he received a visit from Vilai Kupu of the Palace Office, who told him that the King wished to see him. Tu'alau said in evidence that he had met the King before but never in relation to business matters. On this occasion, however, His Majesty told Tu'alau that he wished him to set up a Hawaiian lu'au Centre (feasting place) on the land in question. It appears from the evidence, and I accept, that His Majesty saw the construction of the Hawaiian lu'au Centre as an appropriate public project for the new millennium and he wished to have it ready for opening on his birthday, viz, the 4th of July 2000.

The King explained to Tu'alau that he had some time previously asked a local Kanokupolu man, Manoa Fifita, to build the resort and Manoa was proposing to undertake the project with two colleagues but in the end the two other men returned to Hawaii and Manoa had to tell the King that he was unable to go ahead with the

project. Manoa had, however, cleared the land in question and had fenced it off from the rest of the allotment.

Immediately after his meeting at the Royal Palace, Tu'alau was taken by Vilai Kupu to Kanokupolu to inspect the land. His Majesty had said to Tu'alau: "You go with that man and build on the spot that he shows you." Vilai duly showed Tu'alau the land in question at Kanokupolu and then Tu'alau had a meeting with Manoa Fifita who had been looking after the property. Manoa confirmed to Tu'alau that he had been intending to carry out the Hawaiian lu'au project for the King but his two partners had not been able to go ahead with it. He commented to Tu'alau, "it will be good if you can help the King."

Following his inspection of the site, Tu'alau set about working on the project with commendable speed. He told the court that he immediately began preparing drawings for the resort and a few days later he returned to the Palace and presented them to His Majesty for approval. He said that the King inspected them and then said: "Very good. Go and build."

Tu'alau said that at that stage nothing had been mentioned about finance for the project and so he asked Vilai Kupu whether funding had been arranged. Tu'alau told the Court it was at that point he realised that what was meant was for him to go and build the resort himself -- there would be no assistance with finance. For his part, he was happy to accept the challenge. He explained:

> "I wanted to do the King a favour. He had asked someone else and they did not do it. I thought I would try to do a good deed for His Majesty. He is a good man. I was thinking it was his land."

Although the start date was not disclosed, it is apparent from the evidence that building work on the resort must have commenced almost immediately following His Majesty's approval of the plans. Tu'alau produced a Savingram which he said authorised him to develop and build on the beachfront site. The letter is dated 29 February 2000 and is addressed (for some reason which was not clearly explained) to the Minister of Labour, Commerce & Industries and Tourism. It reads:

> "RE: Mr Sione Tu'alau Latu
>
> I am commanded by His Majesty to inform that His Majesty has given permission for Mr Sione Tu'alau Latu to develop His Majesty's land at the beachfront at Kanokupolu.
>
> 'Eleni 'Aho
> Private Secretary to His Majesty."

Tu'alau said in evidence that in April 2000 His Majesty inquired as to whether the building would be completed by July and he had responded that he would be rushing to have it finished by 4 July. He then told the Court about an incident that occurred during the second week in June when he received a site visit from the plaintiff's brother, Ngahe. Ngahe had asked Tu'alau whether he realised that the property he was building on belonged to his family. Tu'alau responded that he did not know anything about that but the King had sent him and if he (Ngahe) had a problem then he should go and see the King. There is no evidence that Ngahe ever did go to see His Majesty but Tu'alau visited the Palace again and explained to the King about Ngahe's visit.

Tu'alau told the Court that His Majesty simply told him to go ahead with the work because he had not signed any papers and there had been a mistake by the Minister of Lands and a man in Australia. Tu'alau said he assumed that the King was talking about papers relating to the ownership or registration of the property. In any event, he said that he felt reassured by what His Majesty had told him.

In cross-examination, Tu'alau said that by the time of Ngahe's visit he had already expended about $300,000 on the resort and he estimated that, all up, the project had cost him approximately $500,000. He explained how he had used all his own funds on the project and had taken out a loan of $100,000 from the Tonga Development Bank. The bank had released $35,000 of the funds but when he subsequently asked the bank to release more of the loan money to pay an account from Tonga Timber & Hardware Ltd of approximately $40,000, the bank declined until such time as he had acquired a lease of the property.

Tu'alau told how, because of the present dispute before the Court, he has never been granted a lease of the property and the Tonga Timber & Hardware account is still outstanding. He said that they had always expected to obtain a lease of the land in question from His Majesty and the Palace Office had actually drawn up the lease papers but then everything had been put on hold because of the dispute before the Court.

Tu'alau was asked questions about his understanding of the land ownership position. He reaffirmed in cross-examination that all along he believed that he was building on land that belonged to the King and the King had reassured him to that effect when he had visited the Palace Office in June following Ngahe's visit. Tu'alau explained in evidence that the King had suggested the project; he was happy to build the resort for him and even today he still refers to it as the King's project. It was put to him that His Majesty had not contributed financially to the project. Tu'alau agreed but explained that he believed that the land the King was going to be leasing to him was His Majesty's contribution.

That, essentially, is a summary of the first defendant's evidence. Unfortunately, no witnesses were called from the Palace Office and much of the evidence was, therefore, hearsay but it was not objected to and there is a long standing practice in the Land Court, recognised by Ragner Hyne LCJ in *Kalaniuvalu (Noble) v Minister of Lands* (1937) Tonga LR 11, and Lewis CJ in *Na'ati v Motu'apuaka* (unreported) No. L3/91 (judgment dated 2 March 1998), that hearsay evidence is admissible in land dispute cases.

The reason why I say it was "unfortunate" that no witness was called from the Palace Office is because, in reality, this is a dispute about title between the plaintiff and His Majesty -- not the first defendant. The first defendant does not claim to be the landholder of the allotment. His reason for carrying out the work and for being in occupation of the land is because of the directions he received from His Majesty.

It is clear from the first defendant's evidence, which I accept completely, that His Majesty strongly believed the Ministry of Lands or the Minister at the time had made a mistake in dealing with the man from Australia and that he (His Majesty) had not signed the papers that he obviously considered needed to be signed before the plaintiff could claim title. Evidence should have been called from someone at the Palace Office to enlighten the Court on these matters. The Court should not be left to speculate. As it was, no evidence was called on behalf of either the second or third defendants.

I say at once that I found the plaintiff and the first defendant completely truthful and credible witnesses. That cannot be said often about adversaries in a court case. They appeared to be genuine, honest men who have, rather tragically, become caught up as innocent parties in a web of legal entanglement which is quite beyond them both.

The case for the plaintiff, put most succinctly by Mr Niu, is that the whole of the 10 acre allotment at Kanokupolu was land that had been granted to the plaintiff's great-grandfather, Viliami Lomu, by King George Tupou 1 sometime between 1882 and 1893, as Viliami's hereditary tax allotment and, as such, no subsequent King or Queen could deal with the land unless it reverted to them lawfully.

In this regard, the plaintiff relies upon clause 52 (now clause 48) of the 1875 Constitution which provided:

> "52. Inheritances of the King and the property of the King is his, to do with as he pleases. The Government shall not touch it, nor shall it be liable for any Government debt. But all houses built for him by the Government and any inheritance which may be given to him as King shall descend to his successors as the property and inheritance of the Royal line."

As Mr Niu pointed out, the words used in the Tongan version of clause 52 for "inheritances" is "ngaahi tofi'a" meaning estates. The word "lands" has replaced "inheritances" in the present version of the clause (now clause 48). Mr Niu also referred to section 6 of the first Land Act in 1882 which provided:

> "All such tax lands shall be hereditary, and on the death of any man, his widow shall possess such tax land while she lives and does not marry again, but should she marry again or commit adultery, such tax land shall be forfeited and shall become the property of the next heir.
>
> Counsel relies upon that section in support of his submission that the grant made by Tupou 1 to Viliami Lomu would have been an hereditary grant."

Although the allotment at Kanokupolu was never registered in Viliami's name, Mr Niu points to section 566 of the Land Act 1903 which provided:

> "566. Any person who shall at the passing of this Act already hold a tax allotment shall continue to hold such allotment and shall apply to the Minister of Lands or his Deputy for a deed which shall be forthwith registered."

Counsel submitted that section 566 confirmed the validity of grants already made prior to the 1903 Act and that the Minister of Lands must have been satisfied as to all aspects of the grant when he registered Viliami Lomu's widow, Fie'alu Lomu, as holder of the tax allotment on 7/8/1917.

It was recognised in *Minister of Lands v Manase Kamoto* (1923-1962) 11 Tonga LR 132, that under the 1903 Land Act tax allotments were registerable although the failure to register could not invalidate a title. The onus of registering an allotment was said to be placed on the Minister and not on the allotment holder.

The defendants submit that, whatever happened prior to the Land Act 1927, the position now under section 10 of the 1927 Act is that the allotment in question is part of the Royal Estate of Kanokupolu and, as such, it cannot be held by any individual as an hereditary allotment. Both defence counsel referred to the Privy Council decision in *Vaea v Minister of Lands and Fetu'ufuka* [1974-80] Tongan LR 13, which they submitted held that an allotment cannot be granted from land which is part of a Royal Estate.

Mr Niu takes issue with that submission and challenges the accuracy of the head note to the report from which the statement is derived. I agree with Mr Niu. The head note is inaccurate and the case is not authority on the point defence counsel seek to rely upon. Moreover, it appears to me to be doubtful whether the tax allotment in question in that case was situated on Royal Estate land as the appellant had argued. The land was said to have been at Kolomotu'a but the only Royal Estate land in Kolomotu'a, according to Schedule II of the Land Act is "Loto'a, Sia ko Veiongo" which is specifically defined and refers to the Palace Land and the block of land across the road from the Royal Palace dominated by the British High Commission complex extending South to Wellington Rd and West to Sipu Rd

Be that as it may, I do find Miss Simiki's other submissions relating to the general status of Royal Estate land to be compelling. As I indicated at the outset of this judgment, the scheme of the Land Act is that grants can be made only from hereditary estates and Crown land. Although the Royal Estates and Royal Family Estates come within the definition of Crown land, they have been specifically set aside under section 10 of the Land Act for the Royal purposes described and, as such, there is no statutory authority authorising the granting of hereditary estates from such lands.

Mr Niu's response to the proposition just stated is that section 10 of the Land Act must be read subject to clause 48 of the Constitution which allows the King to dispose of his land as he pleases and as Tupou 1 had disposed of the allotment in question to Viliami Lomu that is really the end of the matter. The present Monarch, Mr Niu submits, is unable to deal with the land in any way unless it reverts to him by law.

Mr Niu referred to what he described as an apparent inconsistency between clause 48 of the Constitution and section 10(1) of the Land Act. He submitted that whereas clause 48 allows the King to dispose of the land of the King as he pleases, section 10(1) of the Land Act provides that, except as provided for in subsection (2), Royal Estates are for the use of the "Sovereign for the time being." Mr Niu submits that if the effect of section 10(1) of the Land Act 1927 was to restrict the ability of the King Tupou 1 to do as he pleased with his lands then section 10(1) was ultra vires clause 48 (formerly 52) of the Constitution.

I am afraid that I cannot accept that synopsis of the position. Clause 48 of the Constitution does not speak about the Ruling Monarch being able to "dispose" of his land and property as he pleases. It certainly allows him to **use** his land as he pleases but the wording of the final part of the clause makes it clear that all Royal property is to descend to the King's successor and I find that constitutional provision quite inconsistent with Mr Niu's basic submission that King Tupou 1 was free to dispose of the land in question in such a way that it could no longer descend to his successors. To take Mr Niu's submission to its logical conclusion, it would mean that at any given point in time the Ruling Monarch could dispose of all the recognised Royal Estates

and there would then be no such land left to descend to his successor. That scenario, in my view, is clearly not the intendment of clause 48 of the Constitution.

Contrary to plaintiff counsel's submission, I find the provisions of section 10 of the 1927 Land Act consistent with the provisions of clause 48 of the Constitution. As I see it, section 10 simply gives effect to and restates in a more focused manner the more general provisions of clause 48 of the Constitution relating to Royal land.

My principal finding, therefore, is that the whole of the allotment in question is part of the Royal Estate of Kanokupolu and, as such, it was never land available for allocation as an hereditary estate.

Even had I found substance, however, in Mr Niu's submission that section 10 of the Land Act was ultra vires clause 48 of the Constitution, I still would not have been prepared to uphold the plaintiff's claim because I am not satisfied that he is entitled to be registered as titleholder to the land. No documentary evidence was produced to show that King George Tupou 1 had made the original grant to the plaintiff's great-grandfather, Viliami Lomu. Mr Niu certainly made that statement numerous times in his submissions but not one word was said about it by any of the witnesses -- not even the plaintiff. When the plaintiff was asked where his grandfather had got the tax allotment from, he replied:

> "I was told by Ngahe (the grandfather) that it was originally owned by his parents."

So there is nothing before the Court, apart from Counsel's submissions (which do not amount to evidence) as to the circumstances surrounding the original grant or its terms. Mr Niu invited the Court to conclude that the Minister of Lands must have been satisfied that the grant by King George Tupou 1 to Viliami Lomu was an hereditary grant otherwise the Minister would not have registered Viliami's widow as the titleholder in 1917. Counsel, however, is inviting the Court to make and act upon an assumption. There is simply no evidence before the Court, and there was certainly no documentary evidence produced from the Land's Office, to show the basis upon which the widow became the registered titleholder. In any event, for the reasons already discussed, there must be doubts as to the legality of the widow's registration as titleholder in respect of an allotment that was clearly situated on land belonging to the King.

There is another difficulty with the plaintiff's claim which relates to the way in which he acquired title to the property upon the surrender of the land by his older brother. There is evidence before the Court that by 1997 when the plaintiff was registered as titleholder to the whole 10a 3r 1.5p allotment at Kanokupolu, the estate had already been broken down into a town allotment and a tax allotment but, rather surprisingly, the plaintiff's application for the allotment or allotments was never produced as an exhibit and, in the absence of the issuance of any deed of grant, I found the evidence as to the partition of the original allotment rather inconclusive.

Accepting, however, that the plaintiff took title to the whole of the Kanokupolu allotment following on from his older brother's surrender of the land, there is no evidence that the original grant to the plaintiff's great-grandfather ever included conditions relating to election and surrender. It appears that the legislative provisions giving an heir the option to surrender one allotment in favour of another appeared for the first time in the 1927 Land Act. It is highly improbable, therefore, that an hereditary grant made towards the end of the 19th century would have included

conditions relating to surrender. The Assessor informs me that the election and surrender provisions provided for in the Land Act 1927 were never part of the customary land law of the Kingdom.

Even had the plaintiff, therefore, been able to persuade the Court as to the validity of the purported hereditary grant to his great-grandfather, his claim still could not have succeeded because at the point in time when his older brother surrendered
530 the land in question, title would have reverted to the King. For the avoidance of doubt, however, I repeat the Court's principal finding is that the allotment in question is part of the Kanokupolu Royal Estate and, as such, it was never land available for allocation as an hereditary estate.

For these reasons, the plaintiff's application for an order requiring the defendant to remove all buildings from the land in question must fail. I am not satisfied that he has title to the allotment. No cross orders were sought by the Crown. The defendants are entitled to costs (one set of costs only as between the second and third defendants) to be agreed or taxed.

Cauchi v Air Fiji anor

Supreme Court, Nuku'alofa
Ford J
CV 440/2001

22 and 22 November 2004, 10 December 2004; 1 February 2005

Practice and procedure – interlocutory applications – application to strike out action against one defendant – struck out
Practice and procedure – admissibility of document – not public document and hearsay – not admissible
Practice and procedure – interlocutory applications – application to strike out cause of action – Convention was comprehensive code – action struck out

On Saturday 24 July 1999 the plaintiff's wife boarded an Air Fiji flight from Nausori airport in Suva to Nandi. Approximately ten minutes into the flight the plane crashed. There were no survivors. The journey the plaintiff's wife was making at the time of her death involved using both the first defendant, Air Fiji, and the second defendant, Air Pacific. At the time of the air crash she was travelling on board a plane of the first defendant. The plaintiff commenced legal proceedings for damages. The plaintiff's claim was based on two alleged causes of action, first, a next-of-kin claim under the Warsaw Convention 1929 and, second, a common law cause of action for damages resulting from nervous shock. It was common ground that the deceased was travelling on an international carriage by air which was to be performed by successive carriers. As such, the plaintiff's claim was governed by the provisions of the Warsaw Convention 1929, as amended by The Hague Protocol 1955. Both the Convention and the Protocol were incorporated into the domestic law of Tonga by virtue of the provisions of the Carriage by Air Act 1991. The Convention provided that where there were successive carriers then a plaintiff could bring an action only against the carrier who performed the carriage during which the accident occurred. However, the plaintiff alleged that the second defendant (as the first carrier) had, by express agreement, assumed liability for the whole journey. The plaintiff's allegation was one of agency, that Air Fiji was the interline carrier for Air Pacific. Those allegations were denied by the defendants and representatives from both had sworn affidavits that no such agreement existed. An accident investigation report released by the Government of Fiji was sought by the plaintiff to be admitted into evidence on the ground that it was a public document under Part V of the Evidence Act or alternatively on the ground that it fell within one or more of the exceptions to the hearsay rule set out in s 89 of the Evidence Act. Article 17 of the Convention created

a presumed liability on the part of a carrier for damages sustained in the event of the death of a passenger but Article 22(1) then limited the carrier's liability. The order specified the equivalent to the sums expressed in art 22 of the Convention limiting the amount of damages able to be claimed for death due to recklessness. The defendants sought an order striking out those parts of the statement of claim which were in excess of the limits payable under the Currency Equivalent Order 2003 or, alternatively, that damages should be limited in accordance with the order. The plaintiff claimed that the order was not in force when his wife died and could not be given retrospective effect. Article 29(2) of the Convention stated that questions of procedure should be governed by the law of the court seized of the case. It had previously been agreed that the trial would be dealt with in two parts, dealing first with liability and then, if necessary, quantum. Both parties raised interlocutory matters upon which they sought the Court's rulings prior to trial. These matters were: (i) the defendants' application to strike out the second defendant; (ii) the defendants' application for a ruling that the accident investigation report was inadmissible; (iii) applications by both parties for orders in relation to the Currency Equivalent Order 2003; and (iv) the defendants' application for an order striking out the nervous shock cause of action.

Held:

1. The onus was on the plaintiff to prove the assumption of liability by the second defendant as the first carrier. Under Article 30(2) of the Warsaw Convention a passenger or representative could only take action against the first carrier, who had not performed the carriage under which the accident had occurred, if by express agreement the first carrier had assumed liability for the whole journey. If the second defendant could make out a prima facie case that the claim as pleaded could not possibly succeed and the plaintiff was unable to rebut that prima facie case then the defendant was entitled to have a striking-out order; he did not have to wait until trial. The plaintiff had already had over five years in which to sort out his case. The plaintiff had no prospects of proving his contention that the second defendant entered into an express agreement to assume liability for the whole journey. The cause of action against the second defendant could not possibly succeed and the second defendant was, accordingly, struck out as a party.
2. The definition of "public document" was not broad enough to encompass a document such as the investigation report. Even if the report could be classified as a public document, however, the report was riddled with hearsay. The investigation report was not a public document either under the Evidence Act or at common law. Nor did it fall within any of the recognised exceptions to the hearsay rule as set out in s 89 of the Evidence Act. The report was, therefore, inadmissible.
3. The Court was not prepared to make the declaration sought by the defendant with regard to the Currency Equivalent Order 2003 as those issues were relevant to quantum rather than liability and it had been agreed that the instant proceedings related only to liability.
4. The Warsaw Convention was a comprehensive code which excluded any other form of domestic remedy by passengers or non-passengers. If air

carriers were to be exposed to damages claims falling outside the Convention by non-passengers based on causes of action such as nervous shock and psychological injuries, the floodgates would surely tumble and the Convention rules relating to international carriage by air would soon be subverted. The nervous shock cause of action was struck out.

Cases considered:

Application under cl 85 of the Constitution, Re [1908-1959] Vol 1 Tongan LR 9
Beatty, In the Estate of [1919] VLR 81
Caines (deceased), Re [1978] 2 All ER 1, [1978] 1 WLR 540
Franklin Mint v Transworld Airlines Inc [1984] 1 Lloyd's Rep 220 (CA)
Fulivai v Kaianuanu Tonga LR (1923-1962) Vol II, 178
Garton v Hunter [1969] 1 All ER 451, [1969] 2 QB 37 (CA)
Ioannou v Demetriou [1952] 1 All ER 179, [1952] AC 84 (PC)
Morris v KLM Royal Dutch Airlines [2002] 2 All ER 565, [2002] 2 AC 628
Nugent v Michael Goss Aviation [2000] 2 Lloyd's Rep 222, [2000] 2 WLR 222
Saumi v Air Fiji Ltd (29 October 2003, No HBC0500 of 2000S, unreported)
Sidhu v British Airways plc [1997] 2 LRC 149, [1997] 1 All ER 193, [1997] AC 430
South Pacific Air Motive Pty Ltd v Magnus (1998) 87 FCR 301, 157 ALR 443
South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282 (CA)
SS Pharmaceutical Co Ltd v Qantas Airways Ltd [1989] 1 Lloyd's Rep 319
Stollery, Weir, Re v Treasury Solicitor [1926] Ch 284, [1926] All ER Rep 67 (CA)
Sturla v Freccia (1880) 5 App Cas 623, [1874-1880] All ER Rep 657 (HL)
Te Runanga o Muriwhenua Inc v A-G [1990] 2 NZLR 641 (CA)
Wilton & Co v Phillips (1903) 19 TLR 390

Statutes considered:

Carriage by Air Act 1991
Carriage by Air Currency Equivalent Order 2003
Civil Aviation (Carriers Liability) Act 1959 (Australia)
Civil Evidence Act 2002 (Fiji)
Constitution of Tonga 1875
Evidence Act (Cap 15)

Counsel for plaintiff : Mr Garrett and Mr O'Brien
Counsel for defendants : Mr Gedye

Judgment

Early on the morning of Saturday 24 July 1999 the plaintiff's wife, Clare Bleakley, boarded an Air Fiji flight from Nausori airport in Suva to Nandi. Approximately ten minutes into the flight the Embraer Bandeirante aircraft impacted into the side of a rugged and steep ridge with the loss of 17 passengers and two crew. There were no survivors.

At the time of the fatal accident, the plaintiff and his wife, who were both Australian citizens, were living and working in Tonga. The 44-year-old deceased was employed by Ausaid as a programme manager. She was well qualified for the task having been in the process of completing a doctorate with her thesis subject being philosophy, applied anthropology and development studies as it applies to third world foreign aid. On her eventual return to Australia from Tonga the deceased had planned to establish a business in foreign aid consultancy.

The deceased had travelled from Tonga to Fiji on 17 July 1999 on Ausaid related work. She had purchased her tickets from the office of Jones Travel Agency in Nuku'alofa, Tonga. Her return booking from Tonga to Nadi had been made with the second defendant, Air Pacific. Her return booking from Nadi to Suva was with the first defendant, Air Fiji. The deceased's original return flight had been booked for Friday 23 July but whilst she was in Suva she changed that booking to Air Fiji flight PC 121 scheduled to depart from Suva for Nadi at 5.25 am on Saturday 24 July 1999.

It is common ground that the deceased was travelling on an international carriage by air which was to be performed by successive carriers. As such, the plaintiff's claim is governed by the provisions of the Warsaw Convention 1929, as amended by the Hague Protocol of 1955. Both the Convention and the Protocol were incorporated into the domestic law of Tonga by virtue of the provisions of the Carriage by Air Act 1991.

The Convention prescribes a set of rules governing the rights and liabilities of carriers performing international air carriage. It is well established that the Convention embodies a comprehensive uniform international code which supersedes domestic law and common law rules relating to the nature and standard of liability of airline carriers.

The uniqueness of the Warsaw Convention is rather dramatically illustrated through s 3(6) of the Carriage By Air Act, which provides that if there is any inconsistency between the text of the Warsaw Convention in English or the text in Tongan as set out in the schedules to the Act and corresponding text in French (which is not included in the schedules), then the text in French shall prevail. As it happens, there is a rather obvious error in art 20(1) of the English text which, as it reads, allows a carrier to avoid liability if it is possible for him to have taken measures to avoid the damage. The word highlighted, of course, should read 'impossible'.

By virtue of art 28(1) of the Convention, proceedings were able to be issued by the plaintiff in Tonga at his option because the deceased had purchased her airline tickets in this country. The present action was commenced on 19 July 2001.

For completeness, and by way of background, I should record that the plaintiff also issued identical proceedings in Fiji against both defendants. The Fiji writ was filed on 25 July 2001. An application was made by the defendants to have that proceeding struck out because the action had been filed one day after the two-year limitation period had expired. As I understand it, there was a delay in obtaining a judgment from the court on the strike out application and, after some 18 months, the plaintiff discontinued the Fiji proceedings.

Fixtures that had been made for the hearing of this case in September 2002 and February 2004 were adjourned by consent. It was clear that there were going to be interlocutory matters that needed to be resolved prior to trial. It took time for the parties to sort out the issues involved. Both parties have now raised interlocutory matters upon which they have sought the court's rulings prior to trial. There are

several such matters and I will consider them in the same chronological order that they were dealt with by counsel at the hearing.

They are:

1. Defendants' application to strike out second defendant;
2. Defendants' application for a ruling that the accident investigation report is inadmissible;
3. Applications by both parties for orders in relation to the Currency Equivalent Order gazetted on 21 February 2003 and
4. Defendants' application for an order striking out the nervous shock cause of action.

1. Defendants' Application to Strike Out the Second Defendant

The stated ground of the application is that whenever there are successive carriers then, in terms of art 30(2) of the Warsaw Convention, a plaintiff can bring his action only against the carrier who performed the carriage during which the accident occurred. In this case, the performing carrier was the first defendant, Air Fiji.

Article 30(2) reads:

> 'In the case of carriage of this nature (by successive carriers), the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.'

The plaintiff does not challenge the application of art 30(2) but he relies upon the savings provision and claims that by express agreement the first carrier, Air Pacific, assumed liability for the whole journey.

The plaintiff also claims, and counsel acknowledges, that this is the reason why he is anxious to retain Air Pacific as a defendant, that he has evidence which suggests that Air Pacific has taken steps to waive the compensatory limits payable under the Warsaw Convention. If accepted, such evidence would mean that the plaintiff would be entitled to a significantly higher amount than the sum he otherwise would have been entitled to recover under the Convention. The plaintiff does not claim to have any such evidence in respect of Air Fiji.

Article 29(2) of the Convention states that questions of procedure shall be governed by the law of the court seized of the case. The defendants do not dispute the application of the Tonga domestic procedural rules for determining strike out applications. As the plaintiff submitted, the general a common law principles in relation to the strike out of a party parallel those applicable to the strike out of a cause of action. They are well documented and were comprehensively reviewed by the New Zealand Court of Appeal in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] LRC (Comm) 91, [1992] 2 NZLR 282. The NZLR headnote sums up the position:

> 'The discretion to strike out is one to be sparingly exercised, and would be justified only, if on the material before the

> Court ... the case as pleaded was so clearly untenable that the plaintiff could not possibly succeed. If the Court was left in doubt whether a claim might lie, or if disputed questions of fact arose, the case must go to trial. If the claim depended on a question of law capable of decision on the material before the Court, the Court could determine the question even though extensive argument might be necessary to resolve it.'

In his original statement of claim the plaintiff made the allegation that the second defendant had by express agreement assumed liability for the whole journey. His allegation at that stage was one of agency. It was alleged that Air Fiji was the interline carrier for Air Pacific and that, at all material times, Air Pacific was acting as an agent for Air Fiji. Those allegations were denied. An amended statement of claim filed on 7 October 2002 contained the same allegations.

The next development in relation to this particular issue occurred on 7 July 2003 with the filing by the defendants of an application to strike out the second defendant. The ground of the application was then said to be:

'The first defendant was a carrier as contemplated by article 17 of the Convention. There is no possible cause of action against the second defendant and no need to proceed against it. It should be removed from the proceeding.'

That stated ground was consistent with the pleadings as they then stood. At that stage, there was no suggestion in the statement of claim that the second defendant had, by express agreement, assumed liability for the whole journey.

On 30 October 2003 the plaintiff was granted leave to issue interrogatories against both defendants which were duly complied with. There then seemed to be something of a lull in the proceedings until June 2004 when the court ordered a directions hearing to try and deal with the outstanding interlocutory matters. It was not until the second amended statement of claim was filed on 4 October 2004 that the plaintiff abandoned the agency pleading and expressly pleaded that the second defendant had assumed liability for the whole journey. The defendants immediately filed a further statement of defence in which they denied that particular allegation.

I mention these matters because one of the submissions made by plaintiff's counsel in response to the strike out application relates to the delay on the defendants' part in seeking such an order. The submission states: 'The presence of the second defendant went unremarked for a considerable period after the claims were filed.' It is not suggested that such delay is fatal to the application and no authority is cited to that effect but, in any event, the reality is that the 'express agreement' pleading has only surfaced at a very late stage and so it cannot reasonably be claimed that the particular issue I now need to determine has gone 'unremarked' for any length of time.

The authorities make it clear that the onus is on the plaintiff to prove the assumption of liability by the second defendant. Shawcross and Beaumont *Air Law* Issue 97, September 2004, para 727, states:

> 'In the case of successive carriage, the passenger (or the personal representative of a deceased passenger) can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has

> assumed liability for the whole journey. The plaintiff must prove the existence of any such express agreement.'

The plaintiff does not dispute that proposition. As I understand Mr O'Brien's submissions on this point, he frankly conceded that he does not have evidence of the existence of any such an express agreement at this stage but in addressing the court orally counsel said 'I believe there could well be documentation in existence that shows this express agreement'.

In his written submissions on this aspect of the case Mr O'Brien said:

> 'It also follows that the outcome of such a claim (the plaintiff's claim against the second defendant) will stand or fall on the evidence regarding an express agreement that the plaintiff is able to adduce at trial ... The plaintiff is in the process of gathering evidence on all the issues for trial including the issue of an express agreement by the second defendant. It is accepted that if, at trial, in the context of all the evidence then before the Court and the legal argument on that evidence, the Court is not satisfied on the balance of probabilities that there was any such express agreement, then Mr Cauchi's claim against the second defendant must fail. It is not accepted that Mr Cauchi can be required to demonstrate conclusively at this stage that such evidence is in existence. Provided there is a realistic possibility - as distinct from a vain hope-of producing such evidence on this aspect of his claim against the second defendant, Mr Cauchi should not suffer the terminal and irrecoverable consequences of having his claim against the second defendant struck out now. There is simply no basis in law or on the facts for denying him the opportunity to prove his case at trial in due course.' (My emphasis.)

In response, Mr Gedye submitted that there is not even a 'vain hope' of the plaintiff being able to adduce evidence to demonstrate the existence of an express agreement. Mr Gedye noted that, in his interrogatories, the plaintiff had specifically asked the defendants this very question and in their affidavits in reply Air Fiji's Finance Manager and Air Pacific's Executive General Manager, Corporate Support, had both sworn that no such express agreement existed. 'Either they have both committed perjury' Mr Gedye concluded, 'or there is, in fact, no such documentation'. Defence counsel also posed the rhetorical question, why, in any event, would the second defendant want to assume liability for the actions of the first defendant. There was nothing in it for the second defendant, he submitted, and the proposition a defied commercial common sense.

Plaintiff's counsel objected to the reference by Mr Gedye to the affidavits he had referred to because the rules provide that no evidence shall be heard on a strike out application. Whilst an applicant cannot put in evidence to support a strike out application and the respondent cannot put in evidence to rebut such an application, a party is able to have recourse to affidavits that have already been filed in the proceeding for some other purpose - Megarry V-C in *Re Caines (deceased)* [1978] 2

All ER 1 at 4. In this case the affidavits referred to had been filed in response to the earlier request for interrogatories.

The authorities make it clear that on a strike out application, if the defendant can make out a prima facie case that the claim as pleaded cannot possibly succeed and the plaintiff is unable to rebut that prima facie case then the defendant is entitled to an order there and then; he does not have to wait until trial.

In the English case of *Nugent v Michael Goss Aviation* [2000] 2 Lloyd's Rep 222 the Court of Appeal had to consider a strike out application in a case where, in order to overcome the damages limitation imposed by art 25 of the Warsaw Convention, the claimants needed to establish recklessness on the part of the pilot. Auld LJ noted that the pleadings were not capable of allowing the extreme inference necessary in a pilot error case that he knew that he was going to kill or severely injure his passengers and himself. In reference to the strike out application his Lordship said:

> 'Certainly there would need to be some indication in the pleading or outside it of the availability of evidence or facts sufficiently compelling to support such inference, and the claimants have produced none here. There is also the point that Mr. Shepherd advanced as a revealing weakness of the claimants' case-they have not, as they should have done, particularised adequately so serious an allegation ...' (See [2000] 2 Lloyd's Rep 222 at 230.)

His Lordship held that the case was 'doomed to fail' and had 'no real prospect of success'. The appeal against the strike out order made in the court below was dismissed. In the present case, likewise, no particulars have been provided in support of the pleading that the second defendant had expressly assumed liability for the whole journey.

In his submissions, Mr O'Brien indicated that, given time, the plaintiff may wish to issue further interrogatories and he may also wish to make inquiries of IATA in Washington in relation to the conditions of carriage in order to ascertain whether they might reveal the existence of an express agreement. The reality, however, is that the plaintiff has already had over five years in which to sort out his case. The plea from counsel sounded a rather desperate measure and a litigant cannot, of course, base a cause of action on a forlorn hope.

The court, nevertheless, did offer counsel an opportunity of making the further inquiries he referred to. The proposition put to counsel was that the plaintiff would be given an option. He could either have until the end of February 2005 (effectively over three months from the hearing date) in which to undertake whatever further inquiries he wished and then file an amended statement of claim particularising the matters relied upon to show the existence of an express agreement or, in the alternative, the court would proceed to determine the strike out application on the papers as they now stand. After reflecting on the matter over a luncheon adjournment and taking instructions from his client, counsel advised the court that the plaintiff wished the application to be determined on the papers as they stand.

Against that background, I have been left with little choice in the matter. I have reached the clear conclusion that the plaintiff has no prospects of proving his contention that the second defendant entered into an express agreement to assume

liability for the whole journey. His cause of action against the second defendant, in other words, cannot possibly succeed and the second defendant is, accordingly, struck out as a party.

2. Admissibility of Accident Investigation Report

Before the court is a 32-page accident investigation report which has a foreword dated 16 December 1999. The court was told from the Bar that it was released by the Government of Fiji, apparently along with other reports unrelated to this case, 'in a spirit of openness'. The report is attached to an affidavit filed on behalf of the defendants, sworn by Jayant Singh, who is described as Manager Corporate Services employed by the Civil Aviation of the Fiji Islands (CAAFI).

Mr Singh explained that the report was prepared by the Australian Transport Safety Bureau at the request of the Fiji Ministry of Tourism and Transport because the ministry did not have the resources to undertake such a large-scale investigation. A feature of the report is that it is unsigned and its author, as well as the investigators and witnesses it refers to, are all undisclosed. An affidavit from Alan Stray, Deputy Director of Air Safety Investigations at the Australian Transport Safety Bureau, shows that the omissions were deliberate because of the perceived need to be able to demonstrate to industry sources, in particular, that frank disclosure of information to the Bureau in accident investigations will be kept confidential.

The plaintiff seeks to have the report admitted into evidence either because it is a public document in terms of Pt V of the Evidence Act (Cap 15) or because it falls within one or more of the exceptions to the hearsay rule set out in s 89 of the Evidence Act.

The defendant (for the rest of this judgment I will proceed on the basis that the second defendant has been struck out of the proceeding) seeks a ruling that the investigation report is inadmissible as proof of its contents because:

> '- It is hearsay and none of the exceptions in section 89 of the Evidence Act apply;
> - It is opinion evidence which does not qualify for admission;
> - It is subject to public interest immunity which in this case outweighs any competing needs (of the nature of shortcutting proper proof by a plaintiff) in the Civil Court system.'

In response to the plaintiff's 'public document' submission, Mr Gedye relies upon a finding by Scott J in an unreported Fijian case *Saumi v Air Fiji Ltd* (29 October 2003, No HBC0500 of 2000S, unreported), relating to the same accident and the same investigation report that this case is concerned with, where His Honour held that the report was not a public document under the relevant legislation in Fiji and, therefore, without production by its authors, it was inadmissible to prove its contents.

Mr Garrett made no secret of the fact that the plaintiff's case relies heavily upon the report. To understand its significance from the plaintiff's perspective, it is necessary to again return to the provisions of the Warsaw Convention. Relevantly, art 17 creates a presumed liability on the part of a carrier for damages sustained in the event of the death of a passenger. Article 22(1) then limits the carrier's liability to the sum of 250,000 francs unless, pursuant to art 25, it can be established that the 'damage resulted from an act or omission of the carrier, his servants or agents, alone with intent to cause damage or recklessly and with knowledge that damage would

probably result'. In that event, the carrier is unable to avail himself of the 250,000 francs limitation.

In the present case the plaintiff pleads that the defendant is not entitled to rely upon the limitation prescribed in art 22 of the Convention because he will be able to prove (for ease of reference what I shall simply call) 'recklessness' in terms of art 25.

It is clear that many of the allegations of recklessness set out in the plaintiff's statement of claim mirror findings contained in the investigation report. Mr Garrett conceded that, in order to establish recklessness, the plaintiff was entirely dependent upon the findings made in the report. As counsel put it, there were no survivors from the accident and, hence, no one left to tell the tale. The only witness apparently was a resident of a nearby village. She heard the noise of the aircraft overhead; she went outside and watched it until it disappeared from her field of vision and then, several seconds later, she observed a bright flash and heard the sound of an explosion.

In rather colourful language, Mr Garrett submitted that even if Mr Cauchi was a billionaire, there was no way that he would have been able to carry out his own investigation and obtain the evidence set out in the investigation report. The report details the pilot's movements during the 12 hours or so prior to the flight and concludes that he would have had only two hours sleep the preceding night. The report also speaks about traces of alcohol being found in his body. In *Saumi* Justice Scott observed, in reference to the findings made in the report: 'As will be readily appreciated these allegations are high1y damaging to the defendant.'

For his part, Mr Gedye was quite scathing in his condemnation of the report. He described it as a 'shoddy piece of work', a 'very hurried and shallow job ... riddled with speculation'. Counsel submitted:

> 'To establish proof of these types of allegations by a written document in the absence of its author, and the persons quoted in it, would be fundamentally unjust to the defendants. It would have the effect of reversing the onus of proof by placing all of the burden of proof (i.e. disproof) on the defendants.'

As I have indicated, the plaintiff's primary submission in relation to the investigation report is that it is admissible as a public document under Pt VI of the Evidence Act. It appears to me, however, that this submission proceeds on a false premise. In his written submissions, Mr Garrett correctly noted that the starting point was s 91 of the Evidence Act, which defines a public document, but counsel went on to submit that the definition was 'not' inclusive. From that premise he submitted, by reference to reported decisions, that the investigation report came within the common law definition of a public document and, to that extent, it was admissible.

The definition in s 91, however, appears to me to be an all-embracing definition. The section reads:

> 'The following documents are public documents:
>
> (a) Documents forming the acts or records of the acts of-
> (I) the Sovereign authority,
> (II) official bodies and tribunals,
> (III) public officers, legislative, judicial and executive;
> (b) public records of private documents;

(c) registers of births, marriages and deaths kept in obedience to any law'

Section 94 then explains how the various categories of documentation identified in s 91 may be proved in evidence.

It is clear from the wording of s 94 that the reference to 'Sovereign Authority' in s 91(a)(I) is broad enough to encompass the respective 'Sovereign Authority' in Tonga or the government of any Commonwealth territory or a foreign state, depending upon the context.

The use of the word 'are' in the first line of s 91 indicates that the definition was intended to be exhaustive. No exceptions are provided for. In other words, the only public documents recognised in the Evidence Act are those listed in s 91. Mr Garrett did not focus on any particular limb of s 91. Instead he submitted that, as the report had been accepted by the Ministry of Tourism and Transport in Fiji, it was 'the very epitome of a public document as defined in the Evidence Act and at common law'. He also noted and stressed that the cover of the report bears the Republic's coat of arms.

Although it is not spelt out in the Evidence Act, public documents are generally admissible as to the truth of their contents-Wilton & Co v Phillips (1903) 19 TLR 390. Whilst the definition of a public document in s 91 largely codifies the common law position as stated in *Sturla v Freccia* (1880) 5 App Cas 623 (HL), approved by the UK Privy Council in *Ioannou v Demetriou* [1952] 1 All ER 179, it does not fully embrace the common law definition.

In *Sturla v Freccia* (1880) 5 App Cas 623 Lord Blackburn considered whether a report of a committee appointed by a public department of a foreign state and acted on by the government of that state, was admissible as evidence of the age of an appointee. Although he found that the report was inadmissible as it did not meet the conditions for admissibility, his Lordship stated (at 643-644):

> 'Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.'

In *Ioannou v Demetriou* [1952] 1 All ER 179 the Privy Council, on an appeal from Cyprus, considered whether a report of an inquiry by a surveyor of the land registry was admissible as evidence of customary rights. Their Lordships held that the report was inadmissible as it was not at all times open to public inspection. In reaching their conclusion, their Lordships applied the dictum of Lord Blackburn in *Sturla*. They characterised (at 185) the *Sturla* test as having 'dual requirements': 'the document should not only in fact be available for public inspection but it should also have been brought into existence for that very purpose ...'

The questions that determined the outcome of the case in *Ioannou* were:

(a) Was a judicial or semi judicial inquiry held?
(b) Was the inquiry held with the object that the report would be made public?
(c) Was the report at all times open to public inspection?
(d) Were the statements made in the report made with regard to matters which it was the duty of the public officer holding the inquiry to inquire into and report upon?

Significantly, in terms of the present case, the s 91 definition of a 'public document' omits any reference to the 'quasi judicial duty to inquire' category of documents identified by Lord Blackburn.

In the New Zealand case, of *Te Runanga o Muriwhenua Inc v A-G* [1990] 2 NZLR 641 the Court of Appeal had to consider whether the Muriwhenua Fishing Report was a public document exempted at common law from the hearsay rule, as had been found by the High Court. Cooke P (as he then was) delivering the judgment of the court concluded (at 652):

> 'With respect, we differ from the High Court Judges on this point. As they said, the report is publicly available and open to scrutiny and criticism; but we are unable to share their view that this is enough to satisfy the rationale of the exception. The report is a far cry from the entries in parish registers etcetera of which Lord Blackburn spoke. It was not brought into being 'with the intent that it should be retained and kept as a register to be referred to, ever after ...' Availability for public reference was an incidental result more than a purpose. The Courts are not constrained to hold that it was brought into existence for the very purpose of public reference. Accordingly, we accept the Crown's submission that the report is not admissible at common law'

In the present case, I am satisfied that the accident investigation report was b brought into being for the stated purpose of air safety. The fact that it is now in the public arena is, to use the terminology from *Muriwhenua*, an incidental result rather than a purpose.

In general, the definition of 'public documents' in s 91 relates to documents such as birth/death certificates, registers of marriage, business records, court orders, legislation and the like. The definition is not broad enough, in my view, to encompass a document such as the investigation report in the present case.

Even if the report could be classified as a public document, however, there is an even more fundamental objection to its admissibility and that relates to its hearsay contents. The report is riddled with hearsay - in some cases double hearsay. Section 89 of the Evidence Act prohibits the admissibility of hearsay evidence unless it falls within one or other of the exceptions listed.

Mr Gedye describes the defendant's hearsay objection as 'not a mere technicality' but-

> 'a basic tenet of evidence law which is based on fundamental fairness and justice. The defendants cannot test or cross-examine the authors. They have no way of identifying or testing the various anonymous persons whose alleged statements are recorded in the report.'

Counsel further submitted:

> 'One key matter in the document is the reported results of toxicology testing (of the pilot). This too is 'double hearsay': a report by ATSB of what an unnamed, unidentified doctor told the investigators. The basic facts relevant to the toxicology tests are not supplied. The statement is extraordinarily brief. With scientific or medical testing of this nature, the timing and circumstances in which the samples were taken, and the chain of custody of the samples from Fiji to Melbourne and the precise details of the testing are all critical. Neither the defendants nor the plaintiff can access the medical records or call the Australian pathologist(s) as witnesses. Air Fiji does not accept that the medical procedures were carried out properly.'

Mr Garrett suggested that the report could fall within any one of several exceptions to the hearsay rule listed in s 89 but I do not accept that submission. Perhaps the most relevant of the exceptions Mr Garrett referred to is sub-s (f), which reads:

> 'Where the statement refers to a fact in issue or a fact relevant to a fact in issue and is contained in any official book, register or record and was made by a public servant in discharge of his official duty or by any other person in performance of the duty enjoined by the law of the country in which such book, register or record is kept.'

The first criterion - that the statement refers to a fact in issue or a fact a relevant to a fact in issue, narrows the inquiry to a 'fact in issue'. The authorities indicate that such facts are usually discreet and concern matters like dates, legal status of persons or places (see *Re Stollery, Weir v Treasury Solicitor* [1926] Ch 284 (relating to birth certificates), In the *Estate of Beatty* [1919] VLR 81 (fact of baptism) and *Sturla v Freccia* (1880) 5 App Cas 623 (HL) (age)). They would not include highly controversial facts such as those which the plaintiff seeks to rely upon in the present case. Nor can I accept that the report is a statement contained in an 'official book, register or record' as is required by the subsection. The investigation report is very

much a stand-alone document. I do not accept, therefore, that the report falls within exception (f).

The other exception Mr Garrett sought to place particular reliance upon was sub-s (a), which reads 'Where the statement forms part of the facts or transaction which is being investigated by the Court'. Counsel submitted that the report in this case 'is surely concerned with the fact which is being investigated'. That may well be the case but the exception does not say 'concerned with'. The court can only interpret the actual words used in the statute and the words used are 'forms part of. There is a significant difference in meaning and it cannot be said that the report falls within that category of documentation.

My conclusion, therefore, is that the investigation report is not a public document either under the Evidence Act or, for that matter, at common law. Nor does it fall within any of the recognised exceptions to the hearsay rule as set out in s 89 of the Evidence Act. The report is, therefore, inadmissible.

Having reached that conclusion, I note in passing that in Fiji recent changes have been made to the law relating to the admissibility of hearsay evidence. Section 3(1) of the Civil Evidence Act 2002 provides:

> 'In civil proceedings, evidence must not be excluded on the ground that it is hearsay.'

That, if I may say so, appears to be a commendable development in the law of evidence. It is consistent with the observation made by Lord Denning MR in *Garton v Hunter* [1969] 1 All ER 451 at 453:

> 'Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.'

In Tonga the Land Court has traditionally admitted hearsay evidence in land title cases. It may be timely for the law makers in the kingdom to follow the lead of the Republic of Fiji and review, generally, the statutory provisions relating to the hearsay rule in all civil proceedings.

Applications for Orders Relating to the Currency Equivalent Order 2003

There are two applications before the court relating to the Currency Equivalent Order 2003. The first, filed by the defendant on 7 July 2003, is expressed in the alternative. The defendant seeks an order striking out those parts of the statement of claim which are in excess of the limits payable under the Currency Equivalent Order 2003. In the alternative, it seeks a declaration that the plaintiff's damages claim is limited to the Currency Equivalent Order 2003.

The second application is filed by the plaintiff and is dated 27 September 2004. It seeks 'a declaration that the Currency Equivalent Order made by the Government of Tonga and gazetted on 22 January 2003 be deemed, for the purposes of these proceedings, not to have been made'.

To understand what the applications are all about, it is necessary to again return to the Warsaw Convention. As indicated earlier in this judgment, unless the plaintiff is able to establish what, for ease of reference, I have referred to as 'recklessness' on

the part of the carrier or his servants or agents under art 25, then, under art 22, he is unable to recover in a death claim, such as the present, more than 250,000 francs.

Article 22(5) then provides:

> 'The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness 900. The sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.'

The interesting background to this provision is described in the following passage of the United States Court of Appeals decision in *Franklin Mint v Transworld Airlines Inc* [1984] 1 Lloyd's Rep 220:

> 'Defining recoveries in terms of a specified amount of gold was intended to produce stability and uniformity. Such a common standard allowed the conversion of liability limits into national currencies and insulated recoveries from the vicissitudes of currency fluctuation and devaluation. In drafting the Convention, a proposal to fix recoveries purely in terms of the French franc was rejected by Switzerland on the ground that use of a single national currency rendered the liability limits subject to change by the act of one government ... Accordingly, the Swiss pressed for a standard which tied the limitation to a gold value regardless of the national currency actually named in the article ... The conferees accepted the Swiss position and stated the limitation in terms of the Poincar'e frank defined as ... 651/2 milligrams of gold at a standard fineness of nine hundred thousandths.'

It is basically for this reason that art 22 does not speak about French francs. The currency referred to is simply 'francs'. The court was told from the Bar that the 'Poincar'e' franc, no doubt named after Raymond Poincar'e the French premier who had stabilised the franc on a gold basis in late 1926, was a mythical currency that never, in fact, existed. While the gold price continued to be set by law it was always possible to calculate the Convention limit simply by converting the gold value of the specified unit into the value of the national currency. The reference to gold of a 'standard fineness of nine hundred thousandths' is a reference to gold of a purity of 90%.

It appears that all worked well with the conversion formula until 1978 when gold was abandoned as a currency and the official price of gold was abolished. The *Franklin Mint* case referred to this development as a 'plain but highly troublesome fact'. The issue that then arose, of course, was how the value of the Poincar'e frank was to be determined.

That was the matter in contention in *Franklin Mint*. The plaintiff, Franklin Mint, had contracted with the defendant, Transworld Airlines Inc, for the carriage from the United States to England of 714 lbs of numismatic materials with a value in excess of

$6,500. The items were either lost or destroyed in transit. Article 22(2)(a) of the Warsaw Convention limited the plaintiff's claim to 250 Poincar'e francs per kilogram. The headnote to the case continues:

> 'The dollar value of that limit was calculated by converting the gold value of the specified unit into US dollars. However, by international agreement and United States domestic legislation gold had now lost its monetary function and no longer had an official price but since the term of article 22 of the Convention continued to write gold as the unit of conversion, the issue raised was what unit of account was now to be used to convert judgments under the Convention into US dollars. Four alternatives were put forward by the parties: (I) the last official price of gold in the United States; (II) the free market price of gold; (III) the Special Drawing Rights (SDR), a unit of account established by the International Monetary Fund (IMF) and recently proposed as a substitute for gold in the as yet unratified Montreal Protocols to the Convention and (IV) the exchange value of the current French franc.'

The judge in the court below in Franklin Mint had held that the last official price of gold was the appropriate standard and, on that basis, he awarded the plaintiff $6,475.98. The plaintiff appealed, claiming that the limit should have been calculated by other methods. After carefully reviewing each of the stated four alternatives the US Court of Appeals concluded, as summarised in the headnote:

> 'That while the Convention had not been formally abrogated, enforcement by national judicial tribunals was impossible without their picking and choosing among alternative units of conversion according to their view of which was best as an initial policy matter; the Court here had no power to select a new unit of account and the Convention's limitation of liability was unenforceable in the United States.'

The judgment noted that different countries were applying different units of conversion and the alternatives the court was being invited to consider yielded limitations on TWAs liability ranging between $6,500 and $400,000. The court said (at 223):

> 'The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which provides judgments of equal value in different currencies ... it is thus clear that neither international nor domestic sources of law specify a unit of account for the purposes of this Convention.'

At the time of Clare Bleakley's untimely death, the position in Tonga in relation to the application of art 22 of the Warsaw Convention stood as it did in the USA at the time of the *Franklin Mint* decision. Had that remained the position then it would have been necessary at the appropriate time for this court to rule on the unit of account required

to convert any judgment under the Convention into Tongan pa'anga or, in terms of the *Franklin Mint* decision, to declare that the Convention limitation was unenforceable.

On 22 January 2003 there came a significant relevant development when the Minister of Finance in Tonga made what is described as the 'Carriage by Air Currency Equivalent Order 2003'. Notice of the order was published in the Tonga Government Gazette dated 21 February 2003. In the order, which was made pursuant to s 3(5) of the Carriage by Air Act 1991, the Minister of Finance specified the amounts in Tongan pa'anga which were equivalent to the sums expressed in francs in art 22 of the Warsaw Convention. The sum of 250,000 francs was expressed as being equivalent to $40,663.85 Tongan pa'anga.

The defendant claims that the figure of $TOP40,663.85 is, thus, the maximum amount of its liability under the Convention. It has already openly paid that sum into court.

The plaintiff does not agree. He claims that his entitlement falls to be considered in terms of the position as it stood at the date of his wife's death. At that stage there was no Currency Equivalent Order in force. The January 2003 Order, Mr Garratt submits, cannot be given retrospective effect.

The plaintiff has another concern about the 2003 Currency Equivalent Order. It is fair to describe it as a major concern. It has led, unfortunately, to an acrimonious and vitriolic exchange of correspondence, affidavits and memoranda between the plaintiff and his counsel on the one part and Mr Gedye on the other. It led to complaints, counter-complaints and threats of complaints being made to more than one law society and a formal application was filed with the court at one stage seeking an order preventing Mr Gedye from continuing to act in the proceeding.

The claimed basis for the plaintiff's concern was the alleged active involvement of Mr Gedye in the making of the Currency Equivalent Order in question. It was contended that the Order was made by the Minister of Finance 'with the active assistance and, in effect, on the instructions of Mr Gedye'. It was further alleged that Mr Gedye's involvement was improper given his 'vested interest' in the outcome.

Fortunately, the application to have Mr Gedye precluded from acting as counsel in the matter was resolved prior to the hearing and that issue is no longer before the court. It is still necessary, however, for me to refer to these matters because they form the basis of the plaintiff's application in relation to the Currency Equivalent Order.

In fairness, I should promptly point out that, for his part, Mr Gedye strongly denies any allegation of impropriety whatsoever. In responding to a formal complaint that had been lodged against him with the Tonga Law Society, Mr Gedye suggested that the problem had arisen because, as Mr Garratt admitted, he 'quite frankly had no knowledge of the significance of the request being made to the minister.'

The dispute I have been referring to has its origins in s 3(5) of the Carriage by Air Act 1991, which reads:

> 'The Minister of Finance shall from time to time by notice in the Gazette specify the respective amounts which for the purposes of Article 22 of the First Schedule (the Warsaw Convention) are to be taken as equivalent to the sums expressed in francs which are mentioned in that Article.'

On 7 August 2002 Mr Gedye sent a letter to the Minister of Finance (copied to plaintiff's counsel) explaining his involvement in the present case. He then went on to

point out to the minister that no notice had ever been issued as required by s 3(5) of the Carriage by Air Act 1991 and he enclosed a formal request for that step to be taken. His request was in the form of a detailed submission and it concluded with a recommendation that the minister should adopt the international Monetary Fund's Special Drawing Right (SDR) as the unit of conversion.

Mr Gedye set out the detailed conversion calculations which, relevantly for a death claim, showed that 250,000 francs equalled 16,600 SDRs and, in turn, 16,600 SDRs equalled Tongan pa'anga $40,633.85. The minister appears to have acted on Mr Gedye's recommendation and issued the Currency Equivalent Notice in question, adopting counsel's precise figures.

The thrust of the plaintiff's objection to these developments appears in his two affidavits dealing with the matter. He first acknowledges that neither of his counsel had appreciated the significance of Mr Gedye's request to the Minister of Finance. He also accepted that Mr Gedye was entitled to ask the minister to issue a notice under the Act. The plaintiff, however, goes on to depose that Mr Gedye's involvement should have ceased at that point and he should not have forwarded the minister the additional detailed information and currency calculations. The plaintiff also queried whether the minister consulted or obtained advice from any other source before issuing the formal notice.

In relation to the conversion calculations, the plaintiff attached as an exhibit to one of his affidavits a letter from a gold bullion dealer which showed that if the conversion calculations had been based on the current value of gold instead of SDRs then, as at 17 August 2004, the currency equivalent figure would have amounted to Tongan pa'anga $348,000 compared with the figure in the Currency Equivalent Order of $40,663.85.

Against that rather convoluted background, I now turn to consider the applications before me. I find that I can dispose of them in relatively short time.

Mr Garratt was unable to produce any authority, and I know of none, that would allow the court to make the type of deeming order he seeks. Mr Gedye submitted that an order for a declaration striking down the Currency Equivalent Order could only be made in the context of a successful application for judicial review and the minister would need to be heard on such application. I accept that submission. Any application for judicial review at this stage, of course, would be well out of time.

The bulk of Mr Garratt's submissions addressed the unfairness of retrospective effect being given to the Currency Equivalent Order. That, however, is a different question going to the construction and interpretation of the order. It does not allow the court to simply deem the order never to have been made for the purposes of this particular piece of litigation. I, therefore, reject the plaintiff's application.

The defendant then seeks an order striking out those parts of the statement of claim 'which are in excess of the limits payable under the Currency Equivalent Order 2003', but it has not been able to identify any particular part or parts of the statement of claim which are said to be in excess of the order's limits. The statement of claim, in fact, appears to make no reference to the Currency Equivalent Order.

In the alternative, the defendant seeks a declaration that the plaintiff's damages claim is limited to the Currency Equivalent Order 2003. I am not prepared to make such a declaration, however, for two reasons. First, as I reminded counsel at the interlocutory hearing, it was agreed some time ago that the trial would be heard in two parts dealing with liability first and then, if necessary, quantum. An order was

made to that effect on 1 August 2003 and it is still extant. The issues relating to the Currency Equivalent Order are relevant to quantum rather than liability.

Secondly, I am not satisfied that I have heard all relevant argument on the topic. The explanation for this may have been pressure of time because towards the end of the second day of the hearing one of the counsel had to depart early to catch an international flight but, whatever the reason, virtually no submissions were presented to the court by either counsel in relation to this specific application by the defendant. Mr Garratt did refer to one authority, *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* [1989] 1 Lloyd's Rep 319, which did seem to have relevance and he produced a copy of the judgment of Rogerson J in the Supreme Court of New South Wales but it appears that the case was later taken on appeal. The appeal judgment was neither produced or commented upon. It should have been; even though it may not have dealt with the point counsel was seeking to rely upon.

Without wishing to prejudge my decision after I have heard full argument, I can indicate that I have two basic concerns about the court simply being invited to adopt the Tongan pa'anga figure stated in the Currency Equivalent Order. First, there is the fundamental abhorrence shared by most courts and embodied in cl 20 of the Constitution, against any form of retrospective legislation Cause 20 of the Constitution of Tonga reads:

> 'it shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws.'

As long ago as 1911 Skeen CJ observed, in *Re an Application under cl 85 of the Constitution* [1908-1959] 1 Tonga LR 9, in relation to an ordinance which appeared to have retrospective effect:

> 'Here in Tonga we are governed by and circumscribed by a written Constitution (and laws enacted thereunder). The Constitution is precise and clear in its language and it expressly forbids any retrospective a legislation, and guards in a far more determined manner than English law any vested rights.'

Subsequently the Privy Council, referring to cl 20 of the Constitution, said in *Fulivai v Kaianuanu* (1923-1962) Tonga LR 178 at 183 Vol II:

> 'What it does do (clause 20) however is to forbid the enactment of laws which are both (a) retrospective in effect; and (b) affect the rights of persons which exist at the time the laws are enacted.'

The court has not resiled in any way from either of those statements of principle and they are equally applicable today. As I see it, they pose a formidable obstacle for the defendant in its stand over the Currency e Equivalent Order.

Secondly, the final sentence in art 22(5) of the Warsaw Convention reads:

> 'Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according

> to the gold value of such currencies at the date of the judgment.'

Mr Gedye relies upon the final words of that sentence to rebut Mr Garratt's submission that the Currency Equivalent Order is retrospective in effect but, even accepting that approach (and I express no final views on the matter at this stage), it still leaves open the earlier words in the sentence. Those words appear to be a mandatory direction to the court in judicial proceedings to convert the figure of 250,000 francs into the national currency as at the date of judgment. Such a mandatory direction to carry out the conversion exercise as at the date of judgment (whenever in the future that is going to be) does not sit easily alongside a Currency Equivalent Order prescribing a figure which was the outcome of a particular conversion exercise carried out back on 1 August 2002. The fluctuating currency situation can easily be seen simply by recalculating Mr Gedye's August 2002 figures as at today's exchange rates. As I understand the calculations, even if the court could be persuaded to accept the SDR unit of conversion, if the conversion exercise carried out on 1 August 2002 was to be repeated as at 31 January 2005, instead of $TOP40,633.85, the limitation figure would amount to approximately $TOP48,206.50.

I say no more on these matters but they will need to be the subject of more focused argument before me in due course. In the meantime, I decline to make any orders in relation to the Currency Equivalent Order 2003.

Defendant's Application for an Order Striking Out the Nervous Shock Cause of Action

The plaintiff's claim is based on two alleged causes of action. First, a next-of-kin claim under Ch III of the Warsaw Convention in which he seeks damages for economic loss and other heads of claim including nervous shock. Secondly, and in the alternative, there is a common law cause of action in negligence for damages resulting from nervous shock. Exactly how the plaintiff sees the two causes of action overlapping is something that was not fully explored before me.

The allegations made in respect of the nervous shock claim under the Convention and at common law are identical. In summary, the plaintiff alleges that he never received any communication from the defendant regarding the accident. He had to make his own inquiries and he received conflicting advice. In the end, he telephoned the Suva police only to be told that there were no survivors. The plaintiff immediately travelled to Fiji. He was unable to visit the crash site and he was advised not to try and identify his wife's body. He was, however, shown a display of photographs of the crash site including photos of the victims. In one of photographs, he was able to recognise one of his wife's arms protruding from a gash in the fuselage. He was able to recover some personal items including rings worn by his wife. In his statement of claim the plaintiff describes his ordeal as 'horrific' and he alleges that it caused him to suffer 'extreme stress'.

The defendant does not object to the nervous shock claim being included in the Warsaw Convention cause of action. Article 24(2) allows a claimant a certain amount of flexibility in settling the precise nature of the suit he decides to bring under Pt III of the Convention. Although it does not appear from the pleadings, the defendant no doubt takes the pragmatic view that, as it has accepted liability and is prepared to pay

the plaintiff what it claims is his full lump-sum entitlement under the Convention, it is up to the plaintiff how he wants to label the lump sum proceeds.

In all events, there is no dispute over the nervous shock head of damages claim under the Warsaw Convention. The situation regarding the nervous shock common claim, however, is vigorously opposed by the defendant. The primary submission Mr Gedye makes on behalf of the defendant is that, under the scheme of the Warsaw Convention, a plaintiff cannot bring a concurrent common law action in negligence. 'It is well settled law' Mr Gedye submitted 'that the Convention is an exclusive cause of action and if a remedy cannot be claimed under the Convention, it cannot be claimed at all'.

The defendant made some other submissions in the alternative, two of which I can deal with briefly. First, it is alleged that the nervous shock cause of action was pleaded in an amended statement of claim filed outside the two-year limitation period prescribed by art 29 of the Convention. That submission is correct but it is not an answer if the plaintiff is able to pursue the claim in a common law action outside the Convention. He is still within the six-year limitation period for common law claims.

Secondly it is alleged that claims for pure mental injury such as nervous shock are not permitted under the Convention. That would appear to be the case but, again, it is no answer if a claim is able to be brought at common law outside the Convention.

I return to the defendant's principal submission that the Warsaw Convention provides the exclusive cause of action and sole remedy for a plaintiff against a carrier. As authority for this proposition, the defendant relies upon certain passages from the authoritative text on carriage by air - Shawcross and Beaumont *Air Law* and two relatively recent decisions of the House of Lords. The passages from Shawcross and Beaumont, appearing respectively at paras 405 and 407, read as follows:

'Two types of issue can be distinguished. The first concerns cases in which the carrier is clearly liable under the Convention rules. In such a case must the claim be framed in terms of the Convention or can it be based on some other cause of action? This issue can be described for convenience as 'the cause of action issue'. A second concerns the possibility of using non-Convention causes of action to circumvent the limitations on the carrier's liability set out in the Convention; it is clear that this is not to be permitted ...

What is clear is that if the carrier is liable under the Convention, there can be no liability on any other basis. If, for example, the claim under the Convention is time-barred as a result of the two-year limitation period in article 29, the plaintiff cannot invoke any other basis of liability. Where the Warsaw Convention applies, its limitation and theories of liability are exclusive.'

The first of the House of Lords decisions relied upon by the defendant is *Sidhu v British Airways plc* [1997] 2 LRC 149. That case involved a British Airways flight from London to Malaysia on 1 August 1990. While the passengers were in transit at Kuwait airport terminal during a fuel stopover the airport was attacked by Iraqi forces who had invaded Kuwait four hours previously. The passengers were taken to Baghdad as prisoners and released several weeks later. The appellants, who numbered four of the passengers, failed to bring a claim under the Warsaw Convention within the prescribed two-year limitation and so they proceeded to issue proceedings against the airline at common law based on negligence. The common law action had been struck out in the court below and that decision was upheld by the House of Lords on

appeal. After reviewing the history of the Convention and the authorities Lord Hope concluded his speech with the oft-quoted passage (at 171):

> 'The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals-and the liability of the carrier is one of them-the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.'

Earlier in his speech His Lordship, in reference to the 'purpose' of the Convention, had said:

> 'Thus, the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention.' (See [1997] 2 LRC 149 at 165.)

The more recent House of Lords decision relied upon by Mr Gedye is *Morris v KLM Royal Dutch Airlines, King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 5 LRC 721. The House of Lords had before it two conjoined appeals involving the question whether an air carrier was liable under art 17 of the Warsaw Convention for mental injury sustained by a passenger without any accompanying 'bodily injury'.

Kelly Morris had been travelling as an unaccompanied minor. She fell asleep and woke to discover that the man sitting next to her was caressing her left thigh from the hip to the knee. She was very distressed. Although she did not suffer any physical illness or injury she was subsequently diagnosed as suffering from clinical depression.

In the second appeal Philip King was a passenger on board a helicopter which had taken off in bad weather from a floating platform in the North Sea oilfield. The two engines of the helicopter failed and the machine, engulfed with smoke, landed heavily back on the helipad. Mr King did not sustain any physical injuries but he was very traumatised by the ordeal and later developed several psychiatric conditions, including a moderate post-traumatic stress disorder.

Once again the House of Lords comprehensively reviewed the history of the Convention and the authorities, concluding that neither action could succeed. The House reaffirmed that where the mental injury or illness lacked a physical cause or origin, it could not constitute a 'bodily injury' within the meaning of art 17 of the Convention. The house approved the earlier decision of *Sidhu*. In his speech, Lord Hope of Craighead restated the principle that the Convention excluded other forms of remedy at common law. His Lordship went on to say ([2002] 5 LRC 721 at [66]):

> 'But it the Convention defines those situations in which compensation is to be available, and it sets out the limits of liability and the conditions under which claims to establish liability, if disputed, are to be made. A balance has been

> struck between these competing interests, in the interests of certainty and uniformity.'

Mr Garrett submitted that the whole issue of the exclusivity of the Warsaw Convention is 'very complex'. He noted that, while the decisions of the House of Lords may have settled the position in England for the time being, they are not binding on this court. He also stressed what he described as a 'crucial distinction' between the two House of Lords decisions and the present case, namely that in the English cases the claimants were passengers whereas the plaintiff in the present case was a non-passenger.

One of the authorities Mr Garrett referred to was the decision of the Australian Federal Court in *South Pacific Air Motive Pty Ltd v Kenneth Magnus* (1998) 87 FCR 301. That case was concerned with a chartered flight from Sydney to Norfolk Island involving a party of students. Shortly after takeoff from Sydney airport the plane ditched in the waters of Botany Bay. No one was killed in the accident but three years later some passengers and parents of passengers issued representative court proceedings based on common law negligence.

The airline sought summary dismissal of the claim on the basis that it was outside the two-year limitation period. The flight in question was a domestic carriage and, therefore, it was not covered by the Warsaw Convention as such but, as many of the principles embodied in the Convention were reflected in the (Australian) Civil Aviation (Carriers Liability) Act 1959, the Convention itself came in for close analysis by the court. Of particular significance to the case before me was the way in which the court approached the nervous shock claims by non-passengers.

Beaumont J referred back to Lord Hope's statement in *Sidhu* that the Warsaw Convention provided the exclusive cause of action and sole remedy for a passenger. Whilst recognising that his Lordship was referring to passengers who were in a contractual relationship with the airline, Beaumont J concluded (at 318):

> 'The policy considerations mentioned by Lord Hope are equally pertinent here, notwithstanding the absence of a contract of carriage between the carrier and this class of claimants.'

His Honour, following the *Sidhu* approach, held that non-passengers had no rights to damages outside the Act.

On the same point, the two other members of the court, Hill and Sackville JJ, reached the opposite conclusion, holding that the Act had no application to claims by non-passengers for psychological injuries.

While acknowledging that the majority decision in South Pacific Air Motive was not binding in Tonga, Mr Garrett submitted that the three judgments showed the diversity of opinion on the topic and, for that reason, the common law cause of action should not be struck out at this stage.

Whilst I accept the force of Mr Garrett's submission, I find the decisions of the House of Lords in *Sidhu* and *Morris* highly persuasive in relation to the issue I now have to determine. It seems to me that the purposive construction given to the Convention, as exemplified in those decisions, makes it clear that the Warsaw Convention should be regarded as an exclusive cause of action so that if a remedy cannot be claimed under the Convention then no remedy is available. In this regard, I

find, with respect, the reasoning of Lord Hope in both cases compelling and on all fours with what I perceive to be the intendment of the scheme.

Although I acknowledge that the House of Lords was dealing with claims by passengers, all the pointers are that in a non-passenger situation the same principle should be applied with, perhaps, an even more aggressive fervour. If air carriers were to be exposed to damages claims falling outside the Convention by non-passengers based on causes of action such as nervous shock and psychological injuries, the floodgates would surely tumble and the Convention rules relating to international carriage by air would soon be subverted. It seems to me that, wherever the boundary lines are finally drawn for the still emerging nervous shock cause of action, they will be unable to make any inroads into the now entrenched principle of construction that the Warsaw Convention is a comprehensive code which excludes any other form of domestic remedy by passengers or non-passengers alike.

For these reasons I uphold the defendant's application and the plaintiff's second cause of action is struck out.

In summary, therefore, my decision is:

1. The second defendant is struck out as a party;
2. The accident investigation report is ruled inadmissible;
3. No order is made in relation to the Currency Equivalent Order;
4. The nervous shock cause of action is struck out.

I make no order as to costs in relation to the Currency Equivalent Order but the defendant is awarded costs in respect of the other applications, to be either agreed or taxed.

Tu'ivai v Lokotui

Supreme Court, Nuku'alofa
Webster CJ
CV 741/2004

1 and 3 February 2005; 9 February 2005

Practice and procedure – application for judicial review and certiorari - refused
Magistrates' powers – adjournment – judicial review of decision – Magistrate's decision upheld

On 20 October 2004 the defendant, Magistrate Lokotui, made a decision to allow the prosecution a further adjournment of the Preliminary Inquiry [PI] in the criminal cases against the plaintiff and others (Nos 692-6/03). The plaintiff, 'Amini Tu'ivai, applied for judicial review of that decision. The plaintiff claimed that the PI was adjourned several times since December 2003. He sought an order of certiorari quashing that decision. On 18 November 2004 the Court granted the plaintiff leave to make the application, but refused leave for the plaintiff's accompanying application to strike out and/or dismiss all the charges in the criminal proceedings against the plaintiff and his 2 co-accused. The plaintiff's application was brought on four grounds, set out at para 8 of his Statement of Claim: that the defendant's ruling allowing an adjournment was void and invalid and/or ultra vires and had no legal effect, as it was (1) unreasonable; and/or (2) in breach of the principles of natural justice and fairness; and/or (3) it was made on wrong points of law; and/or (4) it was also based on wrong points of fact.

Held:

1. The Court found that it was quite clear from the transcript of the hearing on 20 October that the points of substance raised by the plaintiff with the defendant were considered and accurately reflected in the transcript. Therefore the Court found that the defendant had properly considered the points submitted by the plaintiff before coming to a decision.
2. The Court did not find that the defendant had been in breach of the principles of natural justice or procedural fairness, so as to amount to a procedural impropriety.
3. In relation to abuse of process in committal proceedings, the powers of magistrates must be exercised very sparingly and only in the most obvious circumstances which disclosed blatant injustice. The Court did not find

that there was blatant injustice. There had therefore been no abuse of process by the defendant in arriving at his decision.

4. The Court found that there had been no illegality, as the defendant had not made his decision on wrong points of law.

5. Traditionally, courts have been reluctant to examine alleged factual errors by way of judicial review; and generally such errors would be reviewed only on a basis analogous to abuse of discretion, namely, that the evidence did not reasonably support the decision or that no reasonable tribunal could have reached the same conclusion.

6. The Court found that there was no mistake of fact so the ground of challenge on irrationality did not succeed.

7. In relation to applications for adjournments, the fundamental principle of natural justice was that a party had to be given a reasonable opportunity to prepare his or her case. A Magistrate had to exercise discretion in a judicial manner; and was not entitled to punish the prosecution for delays or inefficiency by dismissing the information.

8. Overall the Court found that, in reaching his decision on 20 October, the defendant had taken into account all relevant factors and had not taken into account any irrelevant factors, so on that basis his decision could not be said to be unreasonable. Nor could it be said that his decision was so absurd that no sensible person could ever dream that it lay within the powers of his authority, nor that it was so outrageous that no sensible person could have arrived at it; especially as the decision included the injunction that it was the final adjournment and there was ample time for the case to be ready by the hearing.

9. The plaintiff did not succeed in establishing any of the three heads for control by judicial review (illegality, irrationality or procedural impropriety), therefore his claim failed and his application for certiorari was refused.

Cases considered:

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223

CCSU Minister for the Civil Service [1984] 3 All ER 935

Clayton v Chief Constable of Norfolk [1983] 1 All ER 984 (HL)

Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14

Harrington v Roots [1984] 2 All ER 474 (HL)

HK (an infant), In re [1967] 1 All ER 226 (DC)

Kanda v Government of Malaya [1962] AC 322 (PC)

Mahon v Air New Zealand Ltd [1984] 3 All ER 201 (PC)

Murdoch v New Zealand Milk Board (1982) 2 NZLR 108

R v Canterbury and St Augustine's Justices, ex p Klisiak [1981] 2 All ER 129 (QBD)

R v Canterbury and St Augustine's Justices, ex p Turner (1983) Crim LR 478

R v Filimoehala [1997] Tonga LR 140

R v Home Secretary ex p Zamir [1980] 2 All ER 768 (HL)

R v Sutton Justices ex p DPP [1992] 2 All ER 129

R v Telford Justices ex p Badhan [1991] 2 All ER 854 (QBD)

R v Vaiangina [1990] Tonga LR 118
Ridge v Baldwin [1963] 2 All ER 66 (HL)
Russell v Duke of Norfolk [1949] 1 All ER 109,118 (CA)
Stevenson v United Road Transport Union [1977] 2 All ER 941 (CA)

Plaintiff in person
Counsel for defendant : Ms Simiki

Reserved Decision on Application for Judicial Review

Preliminary

The Plaintiff, 'Amini Tu'ivai, applied for judicial review of the Defendant, Magistrate Lokotui's, decision on 20 October 2004 to allow the prosecution a further adjournment of the Preliminary Inquiry [PI] in the criminal cases against the Plaintiff and others (Nos 692-6/03). The Plaintiff claims that the PI has been adjourned several times since December 2003. He seeks an order of certiorari quashing that decision.

On 18 November 2004 I granted the Plaintiff leave to make this application, but I refused leave for the Plaintiff's accompanying application to strike out and/or dismiss all the charges in the criminal proceedings against the Plaintiff and his 2 co-accused.

This is an important case because I am not aware of a decision by a Magistrate in relation to adjournment of a PI having previously been challenged in Tonga by way of judicial review, yet it is very clear from the authorities that challenges of such decisions of the lower courts in Britain have been frequent: see eg the cases cited in Gordon, Judicial Review: Law & Procedure (2nd Ed), para 10-010 - Applications for adjournments.

Evidence and submissions

The Plaintiff relied on his affidavit dated 25 January and supplementary affidavit in reply dated 31 January. The Defendant relied on his affidavit dated 25 January with annexures.

Although I had made it clear that this hearing would be on affidavit evidence only, at the start of the hearing the Plaintiff also sought to call a witness, but subsequently withdrew that application.

I heard submissions for both parties and was referred by each to various legal authorities.

Primary facts

The principal relevant primary facts in relation to this application are as follows:

By way of background, the criminal proceedings in question have been brought against the Plaintiff and 2 other accused, Hon Veikune and Mr 'Aisea To'a, arising out of goods imported from Fiji. The offences are alleged to have taken place in September 2003 and the charges, which include allegations of bribery of a Government servant, conspiracy and knowingly dealing with forged documents, were brought on 2 December 2003.

The matter was set down for a PI before Magistrate Mafi early in 2004, but adjourned to 9 June 2004, when it came before Magistrate Tatafu and the Police prosecutor sought an adjournment. The record of that hearing showed that on that occasion the Police prosecutor said:

> "Chairman, if by the 20/10/04 and that the works on these cases are not yet completed and the charges shall all be withdrawn."

In reply Magistrate Tatafu had stated:

> "... it is fair that these cases are to be adjourned to the 20/10/04 as to the request of the prosecutor and if by that time comes and the prosecutor's works are not yet ready, and it is for him to withdraw the charges."

The hearing on 20 October 2004 was before the Defendant, who had not previously been involved in these cases. The Plaintiff states in Para 21 of his affidavit of 25 January:

> "21. I submit that when entered the court and found out that the defendant is the chairman for that day I thought my prayer is answered as I know that he is one of the Magistrates that always straightening the police prosecutors when they abuse the process and I hope that he will do the same thing that day. The Magistrate was sitting in the last hearing is an ex-police officer and even he is a Magistrate now but I did know for sure that he was to rule in favour of the Police."

At the hearing the Defendant had before him 2 letters, one from the Counsel for the co-accused Hon Veikune, Mr Tu'utafaiva, who was at that time engaged in a lengthy jury trial at Vava'u. The translation of that letter is:

> "Re: Hon Veikune
>
> We act for the above mentioned accused.
>
> The reason for this request is if you could convey to the Magistrate my application to adjourn the matter to a date which is convenient to the Prosecution and its witnesses due to a trial which is heard before the Supreme Court in Vava'u.
>
> Yours sincerely
>
> Siosifa T Tu'utafaiva"

The other letter was from the Police prosecutor. The translation of that letter is:

> "Re: Letter of Application to Adjourn the matter between the Crown and Hon Veikune and Amini Tu'ivai, 'Aisea To'a
>
> With respect I would like to convey this request.
>
> The reason of this request is to ask to again adjourn the court case that is mentioned above to the month of February 2005

so that the inquiry can be carried out. The reasons for this request.

1. the request for assistance through the Mutual Assistance in Criminal Matters 2003 to Fiji to obtain the original documentary evidence to become evidence in this trial. There was a problem due to the changes in the portfolio of Attorney General (AG) for the request must be made by the Attorney General.
2. The status of this request is that the AG has approved the request and it has been forwarded to the Government of Fiji so work can proceed. I hereby attach a letter from the Solicitor General for your reference to see the status of this request.
3. The accused appealed to the Supreme Court about the matter due to the long delay of this matter and the appeal was not granted because it is still at the inquiry stage.
4. The nature of this offence was that it started in a different jurisdiction and the offence was completed here in Tonga. Due to this it is quite difficult to obtain evidence about this matter. There is a request as stated in paragraph 1 to the authorities in Fiji if evidence can be obtained from there.
5. The way in which this offence was carried out makes the investigation difficult in this type of case.

The prosecution due to the reasons that are mentioned above requests that the inquiry of the matter be adjourned for 3 months so that the evidence for the matter be confirmed.

Hope you will accept this request.

Sgt Mema Latu

Prosecutor CC: Sifa Tu'utafaiva

'Amini Tu'ivai

'Aisea To'a"

The letter (Savingram) referred to in Para 2 of that letter and attached to the Police prosecutor's letter was:

"To: Acting Secretary for Foreign Affairs

From: Acting Solicitor General

Date: 18th October 2004

RE: Request for Mutual Assistance in Criminal Matters

1. Pursuant to sections 4(1) and (3) of the Mutual Assistance in Criminal Matters Act 2000, the Hon Attorney General

and Minister of Justice has the authority to make requests on behalf of Tonga to a foreign state for mutual assistance in any investigation commenced or proceeding instituted in Tonga, relating to any serious offence.

2. Accordingly, please find attached a request from the Hon Attorney General and Minister of Justice seeking the assistance of the Attorney General of the Fiji Islands regarding a case pending before the Magistrates Court.

3. We seek your assistance in urgently forwarding the attached original request and two copies, to the relevant authority in Fiji and any further necessary action to expedite the request.

Respectfully

For Acting Solicitor General"

The Plaintiff queried the authenticity of Para 2 of that letter, as the request referred to was not attached, but at this hearing there was produced for the Defendant an earlier Savingram about the request showing that the request had been signed by the Hon Attorney General on 14 October (the full request being a bulky document which was confidential and not made available to the Plaintiff). That Savingram stated:

"To: Hon Attorney General and Minister of Justice

From: Solicitor General

Date: 12th October 2004

RE: Mutual Assistance in Criminal Matters.

1. Pursuant to sections 4(1) and (3) of the Mutual Assistance in Criminal Matters Act 17 of 2000, the Attorney General has the authority to make requests on behalf of Tonga to a foreign state for mutual assistance in any investigation commenced or proceeding instituted in Tonga, relating to any serious offence.

2. Accordingly, please find attached a letter from Assistant Police Commander Viliami 'Unga Fa'aoa, Officer Commanding Crime & Operation, Ministry of Police requesting the Hon Attorney General's approval of a Request for Mutual Assistance in Criminal Matters, dated 10 August 2004.

3. The application relates to a case pending before the Magistrates Court and the request for assistance from the relevant authorities in the Republic of Fiji, as attached, and if obtained will assist in establishing a prima facie case.

4. The matter is to be heard again in the Nuku'alofa Magistrate's Court on October 20th, 2004 and due to the

> urgency, your favourable consideration and approval is hereby sought.
>
> 'Alisi N Taumoepeau
>
> Solicitor General
>
> Have signed request
>
> (AG initials) 14/10"

At the hearing on 20 October the Defendant gave the Plaintiff the opportunity to make submissions, which were recorded in the transcript, the translation of which is:

> " 'Amini: Sir, Teisina [*Mr Teisina Fifita, who is acting for Mr To'a*] asked if I could say something on behalf of myself and 'Aisea To'a because he will be late due to matters in the Supreme Court. Sir, since December, 2003 this matter was adjourned for the police to go to Fiji and bring evidence to the trial the Magistrate at the time was Salesi Mafi and it was adjourned to June 9th and that was Paula Tatafu, and it was said that the money will be obtained in July (new financial year) so that the 2 police can go and the tickets were confirmed which was an application made by the Prosecutor. There are 4 things that I would like to submit.
>
> Submission 1 The record of the Court in which the Prosecutor (Mema) on the 9th of June that if the evidence were not obtained all summons would be struck out.
>
> Submission 2 In Law Report 1997 p 140 between the Crown v Filimoehala before CJ Hamilton [*Hampton*] in which Lewis continuously adjourned for 7-8 months after 6 months for the matter was not ready, and it was submitted that the PI was completed. So I submit that you make a decision.
>
> Submission 3 The accused is in difficulty in trying to obtain a visa to travel overseas and things of that sort.
>
> Submission 4 'Aisea To'a should be heard separately from Veikune and I, because he has been bribed.
>
> Ct: Is your Law Report here, 'Amini?
>
> 'Amini No Sir"

Although the Plaintiff submitted that there were very few points on which he agreed with the Defendant's account, I did not find that there was any substantial difference of relevance to the issues between the facts set out in the affidavits of the parties which would affect the basis of this decision.

In my view there was only one substantial matter on which there was a difference, the issue of whether the Plaintiff made submissions to the Defendant that the Police should have completed their investigation before bringing the charges. In Para 14 of the Statement of Claim the Plaintiff stated:

> "The defendant was wrong when he ignored and/or did not accept the submission of the Plaintiff that the Police should have conducted their full investigation on these charges to get all their evidence needed before charging the accused and not to charge the accused first without any evidence then do the investigation later ..."

Then in his affidavit of 25 January the Plaintiff stated at Para 16:

> "16. The reasonable procedure is that when a complaint is lodge the police will then make their first move is to investigate the matter to get evidence. The next thing when there is sufficient evidence is to charge the suspect or the accused. When the preliminary inquiry hearing is heard ie the police must be ready to give to this court sufficient evidence to prove their case but this case, the police do the charge first then dated the preliminary inquiry hearings for so many hearings now then they start their investigations and we adjourned so long so many times for eleven months now still the investigations are not yet done."

In response in Para 13 of the Statement of Defence it was stated for the Defendant:

> "13. The Defendant denies paragraph 14, and says in response that the Plaintiff never made a submission that the police should have completed their investigation before charging the Plaintiff."

While I am inclined to accept the transcript record of the Plaintiff's submissions as being correct, especially as in more than one place it refers to him making 4 points of submission, I am aware that the Plaintiff has a habit of making long, complex submissions which are not always easy to follow, and I suspect he may have added something along these lines in relation to his submissions on the case of Filimoehala, which has been taken as being part of his submissions on that case. But in any event, while I am prepared to consider the Plaintiff's submission on the matter, as set out below it seems to me that due to the limited scope for Magistrates to dismiss cases for abuse of process, the matter cannot be of great relevance.

The decision of the Defendant appears in detail in the translation of the transcript of the hearing as follows:

> "Ct: In this matter the Prosecution has submitted a letter to the Court, and distributed copies to the accused. There are ground for the application to adjourn the trial which is stated in the letter of the Prosecution. And attached is a letter from Solicitor General to the Acting Secretary to Foreign Affairs. And there is letter from counsel Sifa Tu'utafaiva for an adjournment to a date which this matter will be ready from the prosecutor for he is still at a trial in the Supreme Court in Vava'u. I would like to emphasise the Prosecution has no authority to strike out a criminal matter. There are submissions made by the accused 1, 'Amini Tu'ivai together

with submissions on behalf of Teisina Fifita that he submits will be late because he is at the Supreme Court. And I will refer to this.

First, there was a promise from the Prosecutor (M Latu) on the last trial date 9 June, that by today if they have not obtained the evidence they will strike out the matter. The Court will only accept this if the Prosecutor did state those things. But today the Prosecution submits documents that supports its application, that work has commenced for the financial year has started to carry out the work. The requests for adjournment in the past it was clear that work had not commenced to carry out work in a foreign country and money is needed for that. Another reason is that stated in the letter from the Prosecutor prompt work could not be carried out because something happened in government that is relating directly to the Attorney General, Minister of Justice and Solicitor General. They were dismissed, another person was appointed than suddenly another new Minister appointed, short while, another Minister was appointed now, and it appears that things are stable that the work commenced.

Secondly, it has been submitted a case from the Law Report, and unfortunately, counsel does not have the Law Report for me to refer to because I did not bring my Law Report, but despite that I will use the working documents that the Court has now.

Thirdly, it is submitted that he is in difficulty in trying to travel overseas including asking for a visa. The Court does not believe this because it is still available to the accused to ask for a visa to any place he wants to apply for. To travel, the Court believes that the accused can apply to the Court to allow him to travel overseas and I believe the accused has done this before and the Court accepted and this is available at any time he wants to travel overseas to apply. It is not prevented or made difficult because of this matter.

Fourthly, it is submitted that the accused 'Aisea To'a should and may have separated from them Veikune and his case. The Court accepts what you submit, but that submission should be made by 'Aisea To'a's counsel. Even though the Court accepted you to speak on behalf on Teisina Fifita because he will be late but you are limited to the application for adjournment. In relation to other matters that you have submitted the Court MUST receive a request from Teisina Fifita that you will be representing him in the matter. Maybe that is my answers to the submissions made by 'Amini. So, I

have considered all the matters in the application that came in this morning, and I order:-

i) The application made by the Prosecution to adjourn there is support that work has commenced according to the letter from the Acting Solicitor General to the Acting Secretary for Foreign Affairs.

ii) The Court has received a letter from counsel Sifa Tu'utafaiva for the 2nd accused for the matter to be adjourned for a time in which the Prosecution will be ready for he is at a case in the Supreme Court at Vava'u.

iii) And other reasons I have referred to in the submissions made by 'Amini Tu'ivai.

The Court believes that there are sufficient reasons why it should grant the application made by the Prosecution. If I agree to have the matter heard according to the application made by 'Amini, how about Veikune whose counsel has requested an adjournment?

Teisina still has not arrived yet and he said he is going to be late. So I order that I grant the application made by the Prosecution for this matter. Submit some dates.

C/Pros: The 26/2/05 is this date convenient?

Ct: i) This matter adjourned to the 26 February 2005 for Inquiry.

ii) During the period from today to 26 February 2005 the Prosecution to bring evidence in Tonga and from overseas to be ready.

iii) This is the final adjournment granted because work has commenced and there is ample time for it to be ready for 26 February 2005.

iv) The accuseds will continue to be on bail on the same conditions granted."

The next date for the PI is in fact 23 February.

Grounds of application

The Plaintiff's application was brought on 4 grounds, set out at para 8 of his Statement of Claim: that the Defendant's ruling allowing an adjournment was void and invalid and/or ultra vires and having no legal effect, as it was (1) unreasonable; and/or (2) in breach of the principles of natural justice and fairness; and/or (3) it was made on wrong points of law; and/or (4) it was also based on wrong points of fact.

In addition at the start of the hearing the Plaintiff sought to add a further ground (that the Police Prosecutor had been acting fraudulently in relation to the letter dated 19 October) to his application, but Counsel for the Defendant objected. I refused that motion on the grounds that it came too late, especially for a serious allegation of

fraud. It also appeared to me that the basis of the additional ground sought to be added was misconceived; and in any event the matter was likely to be covered under the Plaintiff's ground of wrong facts.

Plaintiff's submissions

The Plaintiff claimed (at Paras 25 and 26 of his affidavit of 25 January) that, as mentioned above, there had been a promise by the Police prosecutor on 9 June to Magistrate Tatafu that if by 20 October the cases were not ready the charges would be withdrawn. The Plaintiff submitted that the Defendant should have taken the promise of the prosecutor seriously, to keep him to his promise.

The Plaintiff also submitted that he had made detailed submissions to the Defendant in relation to *R v Filimoehala* [1997] Tonga LR 140, as described at Paras 14-16 of his affidavit. In that case the prosecution had sought an adjournment of the trial because of the absence of the complainant and other witnesses, but that had been refused (except to the following day). The Plaintiff submitted that in that case the PI had already been completed and the adjournment had only been to the following day, but the present case was more serious, as there had been no evidence at all put to the court to show that there was a prima facie case, yet an adjournment of 4 months had been allowed. The Plaintiff submitted that the first duty of the Police was to investigate a complaint to make sure that they had evidence, then when they had evidence they had to charge the suspect, and at the PI they had to be ready to produce sufficient evidence to prove the case. He submitted that in the current case the Police had first prepared the charges and had then come to the court for the PI before they had done their investigation, and they were still doing their investigation while the accused were waiting for the PI.

The Plaintiff further submitted that he had made submissions to the Defendant about the conditions of bail, as he required 2 sureties, travel overseas was restricted without leave of the court, and overseas visa applications were restricted.

The Plaintiff's next submission related to Para 8 of his Statement of Claim, ie that the Defendant's ruling had been unreasonable or unfair or made on the wrong point of law. He submitted that it had been unreasonable for the Defendant to reach the decision he did because in a normal criminal case there was investigation of evidence before the charge, then the PI and then the trial – but in this case the complaint had been lodged, then the charges made and the PI scheduled before the investigation.

With reference to Para 13 of the Statement of Defence (already referred to above), where the Defendant said that the Plaintiff had never made a submission that the Police should have competed their investigation before charging him, the Plaintiff submitted that he had made such a submission (see Para 16 of his affidavit), but in any event the Defendant should have known the principles of criminal procedure.

The Plaintiff further submitted that the acceptance by the Defendant of the prosecutor's letter dated 19 October only 1 day before the hearing was unfair, as it had not given the other parties fair time to receive the letter. As the previous hearing had been on 9 June, the prosecutor should not have waited until the last moment. The Plaintiff submitted that the Defendant was unreasonable, unfair and wrong in law when he accepted that application by the prosecutor while he had the report of the

previous hearing with the promise made by the prosecutor, as the adjournment on 9 June had been based on that promise by the prosecutor.

The Plaintiff also submitted that it would have been a more reasonable alternative for the Defendant to have made a ruling and he should have dismissed the case, because no evidence had been presented by the prosecutor, who had to bring a prima facie case.

The Plaintiff submitted that the Defendant had been wrong to deny him the opportunity of speaking for his co-accused, Hon Veikune, as the latter had instructed the Plaintiff that he had had no contact with his own lawyer, Mr Tu'utafaiva, about the hearing.

The Plaintiff also referred to the following authorities:
Mahon v Air New Zealand Ltd [1984] 3 All ER 201 (PC)
Murdoch v New Zealand Milk Board (1982) 2 NZLR 108
Russell v Duke of Norfolk [1949] 1 All ER 109,118 (CA)
Stevenson v United Road Transport Union [1977] 2 All ER 941 (CA)
Kanda v Government of Malaya [1962] AC 322 (PC)
R v Home Secretary ex p Zamir [1980] 2 All ER 768 (HL)
In re HK (an infant) [1967] 1 All ER 226 (DC)

Counsel for the Defendant made detailed submissions in reply.

Legal framework for judicial review

It is important to set out the legal framework at the start, and I do so by first making it clear that the law has now developed and the generally understood grounds for judicial review are those set out by Lord Diplock in *CCSU Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 950-1:

> "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By '**illegality**' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those

> persons, the judges, by whom the judicial power of the state is exercisable.
>
> By '**irrationality**' I mean what can by now be succinctly referred to as *'Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its 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. 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. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes)* v *Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as '**procedural impropriety**' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

I shall deal with the Plaintiff's grounds in turn, but I shall leave the ground of unreasonableness until last as it is more complex.

Was the Defendant in breach of the principles of natural justice and fairness?

[*Procedural impropriety*]

In relation to the alleged denial of natural justice, Counsel for the Defendant referred to Para 2-013 of Gordon and the observation of Lord Denning MR in *Kanda v Government of Malaya* [1962] AC 322 (PC) at 337:

> "The rule against bias is one thing. The right to be heard is another. These two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *nemo judex in causa sua*, and *audi alteram partem*. They had recently been put in the two words, impartiality and fairness.

> But they are separate concepts and are governed by separate considerations."

It was also submitted that Defendant had given a fair opportunity to the Plaintiff to give his views in relation to the application for adjournment; and that the Defendant had applied the test emphasised by Lord Reid in *Ridge v Baldwin* [1963] 2 All ER 66 (HL) at 71, ie what a reasonable man would considered to be fair in the particular circumstances (Gordon Para 2-021). As stated in Paras 14-17 of the Defendant's affidavit and the transcript of the hearing, there had been an opportunity for the Plaintiff to make submissions and all submissions had been carefully considered, so that a fair hearing had been given to the Plaintiff and he had been granted natural justice.

In relation to procedural fairness, Counsel for the Defendant referred to Para 10-008 of Gordon and the words of Lord Roskill in *Clayton v Chief Constable of Norfolk* [1983] 1 All ER 984 (HL) at 992 explaining the rule audi alteram partem:

> " ... it is impossible to lay down general rules applicable to every case which may arise but if justices ask themselves, before finally ruling, the single question what is the fairest thing to do in all the circumstances in the interest of everyone concerned? - they are unlikely to err in their conclusion, for the aim of judicial process is to secure a fair trial and rules of practice and procedure are designed to that end and not otherwise."

Looking at both the translation of the transcript of the hearing and the Plaintiff's own affidavits, there are no signs that the Plaintiff was not afforded natural justice at the hearing in relation to his own case. He knew that the Police prosecutor was seeking an adjournment and why, and he had ample opportunity to make submissions about that to the Defendant, and did so, submitting 4 separate points. There was no suggestion in the Plaintiff's affidavits that he was refused an opportunity to speak on his own behalf.

While the Defendant did refuse the Plaintiff an opportunity of speaking for Hon Veikune, that was because Hon Veikune's own Counsel had already written to the Court seeking an adjournment because he could not attend the PI that day to represent his client Hon Veikune. Likewise the Defendant refused the Plaintiff an opportunity of speaking for Mr To'a in the absence of his Counsel, and that was because in those circumstances the Defendant - in my view properly - did not consider he should hear the Plaintiff as stand-in counsel on a substantive new issue about separation of the trials. Both these instances concerned the Plaintiff's co-accused, who are not parties to this application, so they are not strictly relevant to this case.

However the Plaintiff's affidavits do appear to show that at the hearing he raised some other issues - eg about men of Folaha - which appear completely irrelevant to the issues before the Defendant and can only have served to confuse the situation. If the Clerk or the Defendant decided not to record them for that reason, and the Defendant did not take them into account, I can fully understand that decision.

I found that it was quite clear from the transcript of the hearing on 20 October that the points of substance raised by the Plaintiff with the Defendant were considered and accurately reflected in the transcript. I therefore found that the Defendant had properly considered the points submitted by the Plaintiff before coming to a decision.

I did not consider that there were any signs from the Defendant's conduct of the hearing that he might have been biased. I also noted that the Plaintiff had been pleased to find that the Defendant was to be taking the hearing on 20 October (as mentioned above, in Para 21 of his affidavit of 25 January) and that he considered that, in his words, the Defendant "is one of the Magistrates that always straightening the police prosecutors when they abuse the process".

While I understand the Plaintiff's annoyance at receiving the letter from the Police prosecutor requesting an adjournment only the day before the trial, he did by that have prior notice of the application and I do not consider that it can be said to have been so late that it amounted to a breach of natural justice.

Overall therefore I did not find that the Defendant had been in breach of the principles of natural justice or procedural fairness, so as to amount to a procedural impropriety.

Was the Defendant's decision made on wrong points of law?

[*Illegality*]

I understood that by this submission the Plaintiff contended that the Defendant, in reaching his decision, did not follow ***R v Filimoehala*** [1997] Tonga LR 140, the case which the Plaintiff referred to in his submissions to the Defendant, as described at Paras 14-16 of his affidavit of 25 January. The Defendant clearly noted that case reference (the translation of the transcript and Para 15.b of his affidavit), but was unable to rely on the case as he was sitting at Maseia Plaza away from the main Court building and the Plaintiff did not have a copy for him. However in my view *Filimoehala* simply states - I believe as a reminder to those concerned in the criminal justice system - what must always be understood in dealing with a criminal case, that it is in the interest of everyone in the criminal justice system that prosecutions proceed as soon as possible. I find that it is clear from the actual ruling given by the Defendant (ie that the prosecution has to be ready by February and this was to be the final adjournment because there was ample time for the prosecution to be ready by February) that the Defendant had that principle in mind. That view also is emphasised by the belief held by the Plaintiff that the Defendant was always straightening the Police prosecutors.

The Plaintiff also submitted (to me) that the first duty of the Police was to investigate a complaint to make sure that they had evidence, then when they had evidence they had to charge the suspect, and at the PI they had to be ready to produce sufficient evidence to prove the case. He submitted that in the current case the Police had first prepared the charges and had then come to the court for the PI before they had done their investigation, and they were still doing their investigation while the accused were waiting for the PI.

As mentioned above, the Defendant disputed that the Plaintiff had made such a submission, but in any event I take the view that this is a point that must always be understood in criminal procedure: see eg ***R v Vaiangina*** [1990] Tonga LR 118. But this issue is not really of prime relevance in this application, because the Plaintiff's belief that the Defendant should then have dismissed the whole case is not borne out by the authorities.

It is made clear in Gordon Para 10-003 that magistrates may, in limited circumstances, stop a prosecution on the basis that it is an abuse of process. But in this case I accepted the submissions for the Defendant that there had been no

evidence to prove that the prosecution had manipulated or misused the process and there had not been unjustifiable delay, as due to the circumstances peculiar to the matter more time was required for the reasons given in the application by the prosecutor; and that had come about because, while evidence was available, it had been considered that principals of documents were required (though no submissions detailing that information had been made to the Defendant).

I also accepted that no serious prejudice to the Plaintiff had been caused by the delay, as his only submissions were that there would be problems in relation to travelling overseas and visas, but, as indicated in Para 17(c) of the Defendant's affidavit, it was open to the Plaintiff to apply to the court for permission to travel, which he had done in the past. I myself am aware that, despite being on bail, the Plaintiff appears to travel regularly.

In particular in relation to abuse of process in committal proceedings, the powers of magistrates must be exercised very sparingly and only in the most obvious circumstances which disclose blatant injustice: *R v Canterbury and St Augustine's Justices, ex p Klisiak* [1981] 2 All ER 129 (QBD) at 136 per Lord Lane CJ; *R v Canterbury and St Augustine's Justices, ex p Turner* (1983) Crim LR 478; *R v Telford Justices ex p Badhan* [1991] 2 All ER 854 (QBD) at 859. While it is certainly unfortunate and unsatisfactory that the PI has been so delayed in this case, the circumstances are very unusual and I did not find that there was blatant injustice in this case.

There had therefore been no abuse of process by the Defendant in arriving at his decision.

Overall I therefore found that there had been no illegality, as the defendant had not made his decision on wrong points of law.

Was the Defendant's decision based on wrong facts?

[*Irrationality*]

Traditionally, courts have been reluctant to examine alleged factual errors by way of judicial review; and generally such errors will be reviewed only on a basis analogous to abuse of discretion, namely, that the evidence does not reasonably support the decision or that no reasonable tribunal could have reached the same conclusion: Gordon Para 10-005.

In all cases it is important to determine the conceptual basis on which the application for judicial review is brought. A purported exercise of discretion may be a conventional error of law if not permitted by statute. Similarly, the disregarding by a magistrate of evidence is an error of law rather than one of fact where, for example, he wrongfully rejects admissible evidence; and conversely, it is an error of law to consider inadmissible hearsay evidence. The division between errors of fact and of law is not always easy to discern. (Gordon Para 10-005)

As I understood it, this head was based on the Crown Law Office letter of 18 October and the Plaintiff's perhaps understandable but mistaken belief that because the Attorney-General's request was not attached and copied to the Plaintiff it did not exist. As it was made clear at this hearing that the Attorney-General had by 20 October signed the request (on 14 October), then there was no mistake of fact in the decision, so this ground of challenge on irrationality does not succeed.

Was the Defendant's decision unreasonable?

[*Irrationality*]

As set out above, in the *CCSU* case Lord Diplock explained 'irrationality':

> "By 'irrationality' I mean what can by now be succinctly referred to as *'Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680 (CA)). It applies to a decision which is so outrageous in its 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."

The famous passage of Lord Greene MR in the *Wednesbury* case at 682-3 was:

> ".. a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

As mentioned above, the Plaintiff claimed (at Paras 25 and 26 of his affidavit of 25 January) that there had been a promise by the Police prosecutor on 9 June to Magistrate Tatafu that if by 20 October the cases were not ready the charges would be withdrawn. The Plaintiff submitted that the Defendant should have taken the promise of the prosecutor seriously, to keep him to his promise.

In relation to those submissions, Counsel for the Defendant submitted that there was no clear reference to any promise at the previous hearing and it would have been up to the Police prosecutor to withdraw the charges in October, but he had applied for an adjournment instead of doing so. That hearing had also been before a different Magistrate.

While I understand the Plaintiff's point - that the Police prosecutor should have been held to what could be read as a promise, even though it may not have been expressed as such - the essential point about this matter is that, as mentioned above in relation to wrong points of law, except in the most obvious circumstances which disclose blatant injustice, any inherent powers of magistrates at PIs in relation to abuse of process must be exercised very sparingly: Gordon Para 10-003. As I have said above, while it is certainly unfortunate and unsatisfactory that the PI has been so delayed in this case, the circumstances are very unusual and I did not find that there was blatant injustice in this case.

In addition, as Counsel for the Defendant submitted, in relation to applications for adjournments, the fundamental principle of natural justice is that a party has to be given a reasonable opportunity to prepare his case, which applies to both prosecution and defence. A Magistrate has to exercise his discretion in a judicial manner; and is not entitled to punish the prosecution for delays or inefficiency by dismissing the information: *R v Sutton Justices ex p DPP* [1992] 2 All ER 129. (Gordon 10-010)

I did not find that the circumstances in this case amounted to such blatant injustice that it could be said that the Defendant had been unreasonable to allow the

adjournment. As stated in Para 4 of the letter of 19 October from the Police prosecutor to the Defendant, the nature of these alleged offences was that they started in a different jurisdiction, but were allegedly completed in Tonga, so that there were difficulties obtaining evidence and a request had been made to the authorities in Fiji. That request had unfortunately been delayed with 2 changes in the position of Attorney-General in quick succession. Thus it was reasonable for the Defendant to take these new factors into account, despite what may have amounted to a promise by the prosecutor at an earlier hearing; and it would have been unreasonable for him not to have done so and to punish the prosecution for the delays.

In addition the case is not against the Plaintiff alone and there are 2 other co-accused. The Defendant also had before him another letter from Hon Veikune's Counsel Mr Tu'utafaiva, who was occupied at the Supreme Court in Vava'u and had consented to the adjournment to a date convenient to the prosecutor and witnesses. So in fairness to Hon Veikune, another possible alternative, that of proceeding with the PI on that day with the available evidence, was not open to the Defendant: cf *Harrington v Roots* [1984] 2 All ER 474 (HL).

As mentioned earlier, the Defendant did consider the Plaintiff's submission about difficulties in travelling overseas, but did not accept it for stated reasons as he had not been prejudiced in applying for visas and his bail had been varied earlier to allow him to travel overseas. I did not consider the Defendant's view on that unreasonable.

Overall I therefore found that in reaching his decision on 20 October the Defendant had taken into account all relevant factors and had not taken into account any irrelevant factors, so on that basis his decision could not be said to be unreasonable. Nor could it be said that his decision was so absurd that no sensible person could ever dream that it lay within the powers of his authority, nor that it was so outrageous that no sensible person could have arrived at it - especially as the decision included the injunction that it was the final adjournment and there was ample time for the case to be ready by the hearing later this month.

Conclusion

As the Plaintiff has not succeeded in establishing any of the 3 heads for control by judicial review (ie illegality, irrationality or procedural impropriety), his claim must fail and his application for certiorari is refused.

However in all the circumstances I understand his feelings and I do not criticise him for bringing this application. I hope that some of the guidelines which I have set out above, particularly in relation to the inherent powers of Magistrates in respect of adjournments and potential abuses of process, may be of use in this and other cases.

Kingdom of Tonga v Allianz Australia Insurance Ltd

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

17-19 November 2004; 25 February 2005

Insurance law – maritime insurance – query whether ship was insured – not insured

Tropical Cyclone *Ami* struck Tongatapu on the night of the 14th and early morning hours of the 15th of January 2003. One of the casualties was the plaintiffs' inter-island ferry MV *Olovaha* which ran aground on an inner reef and sustained severe damage. The plaintiffs were respectively the owner of the *Olovaha* and the "Managing Agent" for the owner. The defendant company was a firm of insurance underwriters based in Sydney, Australia. The plaintiff alleged that at all material times the *Olovaha* was insured with the defendant for Hull and Machinery risk under Insurance Policy number 51--1254329--MCH. The "material time" in that context was defined as on or about the 15th day of January 2003. The defendant admitted that it was the lead underwriter under the policy for the period 31 December 2001 until 31 December 2002 in respect of two of the plaintiffs' vessels -- the *Fua Kavenga* and the *Olovaha* but, it pleaded that cover for the MV *Olovaha* was suspended as from 29 July 2002 because, contrary to a warranty in the policy, the vessel was no longer "in class". "Class" referred to the *Olovaha's* classification by Germanischer Lloyd (one of the world's leading Classification Societies) as a RoRo ferry with restricted international service. A Classification Society would withdraw a ship's class unless the owners have the vessel periodically surveyed and maintained to a satisfactory condition within the Society's rules. The question before the Court was whether the vessel was insured at the time of the cyclone.

Held:

1. A policy of maritime insurance, like any other contract, could be varied by consent. Clause 4.1 of the Marine Policy specifically provided for changes and suspensions.
2. The Court was satisfied that both parties were contemplating that nothing out of the ordinary was going to happen and if, at any stage, insurance cover was going to be sought over the *Olovaha* then the usual procedures would be followed. The decision regarding the reinstatement of cover could only be made by underwriters after proper consideration of all the material facts.

3. The policy was silent on the question of renewal therefore cover could only be renewed by mutual consent. It was well-established that each renewal constituted a fresh contract. Any agreement that might have been reached between the parties in July 2002 in relation to the 2002 insurance year would have no relevance to the 2003 contract of insurance unless that had been expressly agreed to in the negotiations giving rise to the 2003 contract.
4. A binding contract could not arise until the person to whom a proposal was made did or said something to indicate his acceptance of it. Mr Gulliford's silence in respect of the *Olovaha* was consistent with his stand since the end of July 2002. The Court was satisfied that in his mind he took, and maintained, the view that underwriters no longer had cover over the *Olovaha* and that position would not change in any way without going through the usual processes which would be involved whenever an insurer takes on a new risk.
5. At the time of the cyclone the *Olovaha* was uninsured. The plaintiffs' claim failed and the defendant was entitled to costs.

Case considered:

General Reinsurance Corp v Fennia Patria [1982] 1QB 1022 (CA)

Statute considered:

Marine Insurance Act (Cap 144)

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

Judgment

Tropical Cyclone *Ami* struck Tongatapu on the night of the 14th and early morning hours of the 15th of January 2003. One of the casualties of what was described in the plaintiffs' pleadings as the "tempestuous winds and the ferocious sea conditions" was the plaintiffs' inter-island ferry MV *Olovaha* which ran aground on an inner reef and sustained severe damage. The question before the Court is whether the vessel was insured at the time.

The named plaintiffs are respectively the owner of the *Olovaha* and the "Managing Agent" for the owner. The defendant company is a firm of insurance underwriters based in Sydney, Australia. The plaintiff alleges that at all material times the *Olovaha* was insured with the defendant for Hull and Machinery risk under Insurance Policy number 51--1254329--MCH. The "material time" in that context is defined as on or about the 15th day of January 2003.

In its statement of defence, the defendant admits that it was the lead underwriter under the said policy for the period 31 December 2001 until 31 December 2002 in respect of two of the plaintiffs vessels -- the *Fua Kavenga* and the *Olovaha* but, significantly, it pleads that cover for the MV *Olovaha* was suspended as from 29 July 2002 because, contrary to a warranty in the policy, the vessel was no longer "in class". "Class" in this context refers to the *Olovaha's* classification by Germanischer Lloyd (one of the world's leading Classification Societies) as a RoRo ferry with

restricted international service. A Classification Society will withdraw a ship's class unless the owners have the vessel periodically surveyed and maintained to a satisfactory condition within the Society's rules. In this case, the evidence was that the plaintiffs had voluntarily withdrawn the *Olavaha* from class.

As an alternative defence the defendant pleaded that when the policy in question was renewed for the 12 months period commencing 1 January 2003, the renewal did not include cover over the *Olovaha*. Further, the defendant pleaded that even if such cover had been included (which is again specifically denied) it would have been subject to the same warranty as to class and as at 15 January 2003 the *Olovaha* was still not in class.

In response to the filing of the statement of defence, the plaintiffs filed a document entitled, "Reply to the Statement of Defence". It is a rather lengthy document. The plaintiffs do not dispute that the vessel had been withdrawn from class and that cover had been suspended on 29 July 2002 but the gravamen of their allegations appears to be that the defendant had agreed to reinstate the suspended cover upon certification by its (the defendant's) "commissioned Agent and Expert, Mr Colin Wickham", that the vessel was up to the requisite standard for "Local Class" certification. The reference to "local class" is explained in the plaintiffs' reply as a local class survey by the Tonga Ministry of Marine and Ports.

The alleged agreement to reinstate or renew cover over the *Olovaha* immediately upon certification by Mr Wickham that he had approved the vessel's local class survey was said to have been made in various oral discussions and written communications between the plaintiffs' insurance brokers and the defendant's underwriting manager, Mr Martin Gulliford, during 2002. The thrust of the plaintiffs' case thereafter is that Mr Colin Wickham, a marine engineer from Auckland, New Zealand, allegedly in his capacity as the defendant's agent, gave his approval to the vessel's local class survey on 14 January 2003 -- the day before the cyclone struck Tonga. In other words, the plaintiffs allege that insurance cover over the *Olovaha* was automatically reinstated the day before the tropical cyclone.

The defendant strongly denied all of these allegations. In particular it denied that Mr Wickham was its agent or that it had ever given any instructions to Mr Wickham in respect of the *Olovaha*. It also denied that Mr Gulliford had made any agreement or representations along the lines alleged. After filing its statement of defence, the defendant issued a formal request for particulars seeking further clarification of the plaintiffs' allegations. In reply to that request, the plaintiffs advised that the alleged agreement they rely upon would be evidenced in Court by the exchange of emails and other documentation relating to both the suspension of cover in July 2002 and the policy renewal negotiations in December 2002. Additionally, the plaintiffs indicated that they would also be relying upon a telephone discussion on or about the 18th of July 2002 between one of its brokers, Mr Simon Gosnell, on the one hand and Mr Gulliford, on behalf of underwriters, on the other.

No reliance is made on the Marine Insurance Act (Cap 144). Plaintiffs' counsel submitted that the Act has no relevance to the issues before the Court.

Before turning to consider the documentary and other evidence relied upon by the parties, it needs to be pointed out that the plaintiff operated through two insurance broking firms. Patrick McLaughlan of the Auckland based aviation and marine broking firm, Boston Marks Group Ltd, had for some 10 years arranged cover for all the Shipping Corporation of Polynesia's fleet and, from the outset, that business had

been placed jointly with placing brokers in Sydney, Gault Armstrong Pty Ltd (Mr Simon Gosnell). It was Mr Gosnell who had all the direct dealings with the defendant's Martin Gulliford and it was Mr McLaughlan who dealt with the Shipping Corp of Polynesia.

The relevant factual narrative begins in December 2000 during the policy renewal negotiations for the 2001 year. On 19 December 2000 Mr Gulliford, on behalf of underwriters, endorsed the marine placing slip with the hand-written comment, "Subject to satisfactory survey." The policy, which at that time covered both the *Fua Kavenga* and the *Olovaha* was duly renewed for 12 months from 31 December 2000.

It does not appear that Mr Gulliford's request for a survey was ever incorporated into the official conditions of cover and no survey report was forthcoming during the 2001 year. Mr Gulliford, nonetheless, would no doubt have taken some comfort from the fact that the conditions of cover did include a warranty that both vessels were classed through Germanischer Lloyd and that the existing classes were to be maintained

On 11 December 2001, in the course of the renewal negotiations for the 2002 year, Mr Gulliford once again endorsed the marine placing slip with the comment:

> "Subject to sight of valuation and condition report for vessels 1 & 2" (the *Fua Kavenga* and the *Olovaha*).

The policy was duly renewed for 12 months from 31 December 2001.

The policy for the 2002 year made reference to proposed cover over a third vessel that was still under construction – a barge named *Otu Tonga.*

After receiving Mr Gulliford's placing slip, Mr Gosnell of Boston Marks in Sydney, emailed Gulliford on 10 December 2001 querying an increase in the premium rates. He then went on to say:

> "We are happy to have the vessels surveyed/valued, but who on earth are you going to suggest does the job? There are not many surveyors in that part of the world and if we fly someone from Australia it is going to be a very expensive exercise. Whoever does it, I hope you can give us say three months to have the job finished as I suspect it will not be an easy task negotiating a reasonable fee and finding someone to fly there at short notice."

Martin Gulliford replied by emailed on the same date. After agreeing to a suggestion Mr Gosnell had made in relation to the premium rate increase, he went on to say: " . . . however I will leave the surveys to you within 90 days."

The policy was then renewed accordingly in respect of the *Fua Kavenga* and the *Olovaha* for the 12 months period from 31 December 2001. Cover over the new *Otu Tonga* was to apply from a date to be advised. The Coverage Summary form issued by Boston Marks to the plaintiffs confirmed insurance cover over the *Olovaha* in the sum of A $3,000,000.

In his evidence, Mosese Fakatou, a director and general manager of the Shipping Corporation of Polynesia told the Court that in early 2002 the company decided to remove the *Olovaha* from GL (Germanischer Lloyd) Class because the

vessel was getting too old and it was too expensive to keep ships in GL Class. Mr Fakatou said:

> "The vessel was over 20 years old which is normally considered the commercial life expectancy of a vessel. The company was making plans with the Government to replace the *Olovaha*. In order not to incur further costs on GL survey fees, travel & accommodation, expenses special surveys and dry docking in New Zealand, we decided to place the vessel on Tonga Ministry of Marine & Ports Survey.
>
> The issue of my request to remove the vessel from Class was communicated to Pat McLaughlan, the managing director of the New Zealand brokers, Boston Marks Group Ltd. Boston Marks retained Colin Wickham as the surveyor for the underwriter who I understood would carry out an initial Condition Survey on the vessel and report to the underwriter and Shipping Corporation of Polynesia."

Referring to the same development, Mr McLaughlan told the Court that he travelled to Tonga between Christmas and New Year in 2001 and learned from his discussion with Mosese Fakatou that serious consideration was being given to removing the *Olovaha* from GL Class because of the expense. On 8 January 2002 he emailed the Sydney brokers, Gault Armstrong (Mr Gosnell) and asked:

> "Could you please also ask underwriters what difference it would make if *Olovaha* was taken out of class and operated under Tongan Ministry of Transport regulations."

Simon Gosnell replied by email the same day, i.e. 8 January 2002. After referring to another matter that had been raised in the correspondence, he went on to say:

> "In meantime we may well be able to persuade Hull underwriters to maintain the current terms on *Olovaha* if class is lapsed provided her intended survey comes out OK. Suggest we wait for this and can then assess the situation. Any idea yet who can do the survey job -- any one in Auckland want a trip to Tonga? Await your response."

It does not appear that Mr Gosnell's suggested proposal was taken up with underwriters and Mr McLaughlan, therefore, would seem to have read more into Mr Gosnell's reply than was warranted when he said in evidence:

> "As a result of his reply (Gosnell's the email of 8 January 2002), I came to learn that an alternate to Class classification could be accommodated by the provision of an independent satisfactory survey."

In cross-examination, Mr McLaughlan had to agree with defence counsel that all Mr Gosnell had said in his email of 8 January was that he "may well be able to persuade" underwriters to maintain cover. The Sydney broker's proposal could hardly be described as a foregone conclusion.

In relation to Mr Wickham's instructions, Mr McLaughlan told the Court:

> "As best I recall I contacted Wickham soon after the exchange of correspondence with Gosnell in early January. It was verbal and probably by telephone. The purpose of the call was to ascertain his availability, to give him sufficient notice to get to Tonga or alternatively if he was going to Tonga, to give him more time to accommodate the survey."

In cross-examination, Mr McLaughlan agreed that the defendant had had no input into the selection of Mr Wickham for the task. Mr McLaughlan's evidence in this regard obviously assumes some significance given the plaintiffs' earlier description of Mr Wickham in their pleadings as "the defendant's Commission Agent and Expert". The evidence satisfies me that Mr Wickham was, in fact, selected and instructed by the plaintiffs' broker, Mr McLaughlan, and the defendant had no input whatsoever into his selection for the task.

On 6 February 2002 Mosese Fakatou sent a letter to the Classification Society, Germanischer Lloyd, requesting that the MV *Olovaha* be withdrawn from class effective from 1 February 2002. That information was duly conveyed to the company's broker, Mr McLaughlan, but it was not passed on to underwriters.

Commenting upon the failure to be informed of this development, Mr Gulliford said in evidence that he had never seen the letter from Mr Fakatou of 6 February 2002 but if the vessel had been withdrawn from class at the date nominated then there would have been a clear breach of the express warranty in the policy that required class to be maintained.

In early April 2002, Mr Wickham travelled to Tonga and carried out a survey of the plaintiffs' fleet of vessels, which at that time comprised the *Fua Kavenga*, *Lomipeau* and the *Olovaha*. There is letter in the agreed bundle of documents before the Court dated 16 April 2002 from Mr Wickham to Mr McLaughlan enclosing the report for each of the three vessels. (I will need to come back to this letter).

Mr Wickham's report covered both matters Mr Gulliford had sought confirmation on from Simon Gosnell regarding the *Olovaha*, i.e. the vessel's valuation and its general condition. As to the *Olovaha's* valuation, Mr Wickham concluded:

> "The current intrinsic value for this vessel is estimated to be of the order of about US $70,000. However, given that it is still engaged in local trade, its value to the owner will be higher.
>
> A replacement vessel (not new construction) could probably be located for US $500,000 to 600,000. We therefore believe that the current operational value could be as high as US $200,000 whilst a market value would be significantly less than US $70,000."

Mr Wickham summarised the vessel's condition as follows:

> "The vessel was generally found to be in poor condition with evidence of heavy corrosion of structural members and deck plating. Most of the watertight side windows and port holes

> were found to be in a damaged condition and not fit for the purpose."

On 11 June 2002 Mr Wickham emailed Mr Fakatou:

> "Mosese
> I have had a meeting with Pat McLaughlan to see how we could improve the reporting situation with *Olovaha* and *Lomipeau.* He is going to talk to you about a proposal on how we can put together a set of recommendations to progress the necessary repairs and maintenance for the two vessels.
>
> Having had time to consider my draft reports perhaps you have some ideas on how you wish to proceed. If you can give me an outline of what you propose I will be able to put together a proposal for recommendations that should satisfy insurers . . .

On 26 June 2002 Mr Wickham again wrote to Mosese Fakatou suggesting that he (Mr Wickham) could prepare an addendum to his April reports outlining the plaintiffs' proposals and schedules for repair work to the *Olovaha* and the *Lomipeau*. His proposal was that the addenda could be then sent to underwriters and, "we can show the insurer an acceptable level of progress without incurring large survey fees." At that stage, of course, underwriter's had no knowledge of the existence of Mr Wickham's April reports.

As it turns out, Mr Wickham's raising of the matter was timely. On 28 June 2002 Mr Gulliford emailed Mr Gosnell of Boston Marks as follows:

> "Subject: Shipping Corp of Polynesia
>
> Mr G. Can I remind you that two of the vessels under this policy were renewed subject to sight of a valuation -- condition report within 90 days of inception. To date I have not sighted such survey and wonder why I am still insuring these vessels. Can you enlighten please? Regards, MG."

On 4 July 2002, Boston Marks responded that they understood the surveys had been completed by Mr Wickham and they were, "chasing Auckland for the survey."

At around this same period of time, Mr Wickham was preparing a brief addendum for each of his three April reports. The addendum in respect of the *Olovaha* was dated 9 July 2002. In the addendum, Mr Wickham outlined the maintenance and repair work that he understood the Shipping Corporation of Polynesia would be carrying out "the next two to three months." He concluded:

> "Provided the foregoing improvements are made and the maintenance levels improved, this vessel should be capable of a safe service in the short to medium time frame."

On 10 July 2002 Mr Wickham sent a copy of his addenda to Mr Fakatou and he suggested that he (Mr Wickham) could paste them into his April reports and then forward copies to Mr McLaughlan. He commented to Mr Fakatou:

> "Clearly, *Olovaha* is your first concern and you will be aware of the work that is necessary to enable the vessel to function safely."

Mr Fakatou responded on 15 July 2002 confirming to Mr Wickham that his addenda were acceptable and he asked him to forward the reports (containing the pasted in addenda) to underwriters. Mr Wickham did not do that. Instead, he forwarded the reports on to Mr Mclaughlan of Boston Marks. In his covering letter dated 16 July 2002, Mr Wickham said:

> "Pat
> Re: Shipping Corporation of Polynesia
> Enclosed are three copies of the report for each of the three vessels. Would you please forward one of them to Mosese. I have already discussed the addenda with Mosese and emailed copies to him. I had hoped that he would have provided more details so that I could be more positive in completing the reports but he says what I have written will do. I don't know what you will think; myself I think the end result is a bit weak and may not make insurers very comfortable.
> Yours sincerely"

Earlier I referred to a letter from Mr Wickham to Mr McLaughlan dated 16 April 2002 and I said that I would need to come back to it. Although it did not appear to have been picked up during the hearing, apart from the date, the letter of 16 April 2002 is identical to the letter of 16 July 2002 set out above.

When Mr McLaughlan was cross-examined by Dr Harrison over his receipt of the Wickham report he agreed, after being referred to a copy of the 16th April letter, that the report had been forwarded to him on that date. The witness was then criticised by defence counsel for failing to forward the report onto underwriters.

Having considered the contents of the letter in question, however I do not accept that Mr McLaughlan did, in fact, receive the Wickham report in April. The first paragraph of the letter refers to the addenda and Mr Wickham records that he had forwarded copies of the addenda to Mosese Fakatou. The addenda, however, did not come into existence until early July. Faced with that evidence, in fairness to Mr McLaughlan, I have decided to disregard the mysterious letter of 16 April 2002 altogether and, despite his admission, I do not believe that he did, in fact, receive the Wickham report in April.

On 18 July 2002 Mr McLaughlan faxed the completed reports on the plaintiffs' vessels, including the addenda, to Simon Gosnell in Sydney. In a covering letter Mr McLaughlan stated:

> "Dear Simon
>
> Attached are the reports completed by Colin Wickham. Could you please have a look through these and let me know if you think they will "pass muster". I'd rather do some more footwork now than try and do it later. Thanks and regards."

On the same day, i.e. 18 July 2002, Mr McLaughlan sent copies of the Wickham reports to Mosese Fakatou of the Shipping Corporation. In a covering facsimile he commented:

> "Obviously the *Fua Kavenga* now *Capitaine Ferne II* is no problem, however we are concerned about presenting the *Olovaha* report to underwriters."

Upon receipt of the Wickham reports, Simon Gosnell acted with commendable speed and on the same day he wrote to Martin Gulliford of underwriters:

> "Martin, I have finally received the attached survey report on the *Fua Kavenga*, which looks pretty reasonable. The report on the *Olovaha* is apparently not so good and I am waiting to hear from Colin Wickham as to whether the client has done some work on her or we have some problems. Will be back to you shortly. In the meantime please could you confirm *Fua* survey is OK. Kind regards."

There then followed an exchange of emails between Gosnell and Gulliford which assumed some significance in the case and so I, therefore, set the relevant passages out in full. They are all dated 18 July 2002.

Gulliford to Gosnell:

> "Is *Fua Kavenga* back in class and also were underwriters advised that Neptune Shipping now charter the vessel. Is *Olovaha* still in class? or should we suspend cover."

Gosnell to Gulliford:

> " . . . Checking on *Olovaha* -- understand she is no longer in class, which if correct would certainly prejudice the cover as there is a warranty to this effect. How do you want to handle this if my information is correct?

Gulliford to Gosnell:

> "Accept *Fua Kavenga* as ok, but I think cover should be suspended on the *Olovaha* until such time as we are convinced that cover should continue.

Gosnell to Gulliford:

> "Subject: Shipping Corp -- *Olovaha*
>
> Martin, apparently the vessel has been put under local register rather than GL and a great deal of work has been done on her to bring her up to scratch. She is going into dock this evening/tomorrow morning for more work at which time Colin Wickham will receive digital photos of her etc. He is

> then issuing a report, which should be with you by the end of the week. In the circumstances can you be very kind and continue cover until say 4 p.m. 29/7 -- i.e. seven days by which time matters will be resolved. Appreciate your help."

Gulliford to Gosnell:

> "Agree continue cover until 4 p.m. 29/7".

On Monday 22 July 2002 Simon Gosnell reported to his New Zealand counterpart, Pat McLaughlan:

> "Pat, my conscience got the better of me on Friday and I sent Allianz the survey on *Fua*. All, as expected, is okay with her, but Martin Gulliford (the underwriter) rang me about this and *Olovaha*. I was naturally obliged to tell him that the vessel's class had lapsed and the client was working on the vessel to bring her up to scratch at which time a further survey would be issued. In any event he wants to suspend cover on *Olovaha* until either she is returned to class or Colin can issue a good report on her.
>
> I am very sorry I had to say anything, but if there had been a problem with *Olovaha* you and I would have gone down in a screaming heap and our PI policy costs enough already!
>
> In the circumstances please could you advise Shipping Corp that cover has been suspended as above. We will issue the necessary return premium and wait upon your advice re-repair refit work. Kind regards."

Mr Gosnell was cross-examined about these email exchanges. He conceded that on 18 July when he emailed Mr Gulliford and told him that he was checking to see if the *Olovaha* was still in class, he already knew from Mr Wickham's report that the vessel had been withdrawn from class. The witness was then asked by Dr Harrison why he had made out that he had not, at that stage, seen the Wickham report on the *Olovaha* and why he had forwarded the report on the Fua Kavenga to underwriters but not the report on the *Olovaha*:

> "Q. Now you knew what the *Olovaha* report said and it was seriously grim wasn't it?
>
> A. Yes, it was not good. That's why it was not worth sending it to the underwriter.
>
> Q. Not worth sending it to underwriter, but the underwriter had made its grant of cover subject to satisfactory condition and valuation reports, correct?
>
> A. Yes.
>
> Q. You had received a condition and valuation report from Mr Wickham?

> A. Yes.
>
> Q. It was not satisfactory. Why did you not send it on?
>
> A. Because more work was being done on the vessel and I was wanting to hear from Mr Wickham as to what had actually been completed."

Mr Gosnell was asked about the statement made in his email to Pat McLaughlan of 22 July that the underwriter wanted to suspend cover on the *Olovaha* until she was either returned to class or "Colin can issue a good report on her." In evidence in chief, Mr Gosnell had explained that the basis for his statement had been a telephone call he had had with Mr Gulliford shortly before the email was sent but he told the court that he had no written record or precise recollection of the conversation other than what was recorded.

When Mr Gulliford gave evidence he, likewise, could not recall the precise telephone conversation and he could not remember talking about cover being suspended until: "Colin can issue a good report on her." Mr Gulliford opined that it was more likely he would have simply confirmed that underwriters would require a satisfactory condition report.

In cross-examination by Mr Stanton, Mr Gulliford admitted that he could not deny the conversation as recorded by Mr Gosnell but he went on to say that if he had used words to that effect then Mr Gosnell would have known that underwriters would still need to see the report for themselves before there could be any question of deciding to reinstate cover.

I accept that statement. It is consistent with the witnesses email advice to Mr Gosnell of 18 July 2002 where he made the suggestion that cover on the *Olovaha* should be suspended until such time as "**we are satisfied** that cover should continue." (emphasis added) Mr Gosnell was also cross-examined about the telephone conversation in question. Dr Harrison put to him the following proposition:

> "Q. But whatever the nature of the dispute about the conversation, there was never any doubt that the suspended cover would only be resumed when Allianz was satisfied that it should be?
>
> A. Yes."

There was another important aspect to Mr Gosnell's evidence about his telephone conversation with Gulliford on or about 18 July that was clarified in cross-examination. The report which he (Mr Gosnell) had then been referring to was expected from Colin Wickham within the week. This point was highlighted during the following exchange in cross-examination:

> "Q. You're saying Mr Gosnell undertook to accept (a) or (b) (the *Olovaha* returning to class or Colin issuing a good report on her)?
>
> A. Yes.
>
> Q. In a way that was binding on the underwriter?

A. No, not if he had not approved the survey.

Q. Would you also agree with this much -- that what you were emailing about and talking about at this time was a report that was anticipated within the week?

A. Yes, I was led to believe that the report was coming in shortly, yes.

Q. So that any talk of suspending cover until either (a) or (b) related to an interim short-term way of dealing with it?

(Clarifications sought on the question)

Q. I'll come right out and put it to you directly. Whatever was said as between the two of you, the discussion and the emails at this time were dealing only with the current 2002 insurance year?

A. They were dealing with the current policy.

Q. And the current policy was due to expire at the end of December?

A. Exactly.

Q. You and he had not even begun to think about insurance cover for the following year at the time of your dealings in July had you?

A. No.

Q. You agree with that?

A. Yes."

That exchange speaks for itself and I accept what Mr Gosnell says.

The final email in the July exchange of correspondence was dated 29 July from Simon Gosnell to Martin Gulliford:

"Re: Shipping Corp -- *Olovaha*

Martin, apparently the report is not ready as the vessel has been delayed, photos not taken etc, etc. I have told the client that cover will be suspended at 4 p.m. this afternoon and they have accepted this (I felt this was the correct thing to do!!). Hope to have something to you in the next 3/4 days. Typical islands -- no one is ever in a hurry!!! Kind regards."

It is significant that Mr Gosnell did not ask Mr Gulliford for a further extension of time for receipt of the anticipated Wickham report. The report that Mr Gosnell had been expecting within the week had not come to hand. Nothing further was said about it at that stage. Both Mr Gosnell and the Shipping Corp accepted the appropriateness of suspending insurance cover over the *Olovaha.*

A policy of maritime insurance, like any other contract, can be varied by consent in this way. Clause 4.1 of the Marine Policy in the present case specifically provided for changes and suspensions.

The defendant immediately then set about arranging for a refund to the plaintiffs of the balance of the insurance premium in respect of the *Olovaha* covering the period from 4 p.m. on 29 July 2002 until 31 December 2002. Referring to this same time period, in answer to a question from the Court, the plaintiffs' broker, Mr McLaughlan, confirmed that his client the Shipping Corp of Polynesia was aware that the *Olovaha* was uninsured as from the end of July 2002.

When Mr Gulliford gave evidence he confirmed that at no stage prior to the cyclone had he seen any of Mr Wickham's reports relating to the *Olovaha.* Commenting on this aspect of the case, the witness said:

> "I confirm that I had not previously seen that Condition Survey Report. Had it been brought to my attention at that time, or in the course of any renewal negotiations for the subsequent years' cover, I would have declined to renew the cover or go on risk until all the matters identified in that report had been attended to. On receipt of any confirmation that all the matters referred to had been fixed, the decision to renew cover or go on risk would not have been mine. It would have been necessary for me to refer the matter to Head Office to make that decision and discussions would need to have been entered into with reinsures to see whether reinsurance could have been placed on that vessel."

I turn now to the next significant development, namely, the insurance renewal negotiations in December 2002 for the 12 month period from 31 December 2002. They form an important part of the plaintiffs' case.

On 9 December 2002 Mr Gosnell forwarded to Mr Gulliford of Allianz the renewal slip on the Shipping Corporation's account for the following year. Cover was sought over the *Fua Kavenga* and the *Otu Tonga.* The *Olovaha* was not mentioned in the slip. In a covering letter, Mr Gosnell said:

> "Martin, herewith the renewal slip on Shipping Corp. You may remember *Olovaha* did not pass muster and has thus been deleted from the slip until such time as they do the necessary repairs etc so Colin Whickham can give her a good report. The slip is again clean and I have increased both Hull and TV rates by 15%, which I hope will be OK with you. Please let me know asap. Many thanks."

In a letter of the same date to Associated Marine Insurers (the joint lead underwriter during 2002 with Allianz on the Shipping Corporation account) Mr Gosnell repeated the second sentence of his letter to Mr Gulliford and added: "We will then offer her to you for reattachment." That comment is, of course, significant and it is consistent with Mr Gosnell's evidence on the subject. I am satisfied that just as the initial Wickham report, that had been expected within a week back at the end of July, would need to have been approved by underwriters before any question of reinstatement of insurance cover could arise, a report from the same source coming some five or six

months later would inevitably, because of the time lapse, have required even closer scrutiny and consideration by underwriters.

In other words, whenever Mr Wickham's report came to hand, Mr Gulliford anticipated that nothing other than the usual steps for a new risk would then be followed. Underwriters would need to make a determination as to whether they were prepared to cover the risk and that exercise in turn, as Mr Gulliford told the Court, would involve a referral to the defendant's Head Office and discussion with reinsurers before there could be any question of him having authority to sign the slip. Mr. Gulliford impressed me as a witness and, although he no longer is employed by Allianz, I have no doubt that he would have a conscientious and responsible underwriter.

Section 21 of the Marine Insurance Act provides that a contract of marine insurance, "is deemed to be concluded when the proposal of the insured is accepted by the insurer, whether the policy be then issued or not" and it specifically recognises that reference can be made to "the slip" for the purpose of determining when the proposal was accepted.

Sutton, Insurance Law in Australia, 2nd ed. (para 2.17) states:

> "The slip is an offer by the broker on behalf of the assured which is accepted by the initialling of the slip by the underwriter, that is, the contract is complete at that point, and the insurer binds himself to sign a policy in accordance with the slip when tendered to him for signature."

In *General Reinsurance Corp v Fennia Patria* [1982] 1QB 1022, 1036, the Court of Appeal noted, in relation to the same provision in the (UK) Marine Insurance Act, that there could still be cases where it is plain that it is the insurer who is making the proposal and the assured accepting it. I am satisfied that in the present case both parties were contemplating that nothing out of the ordinary was going to happen and if, at any stage, insurance cover was going to be sought over the *Olovaha* then the usual procedures, as outlined by Mr Gulliford, would be followed.

Significantly, and in my view sensibly, at no stage in his evidence, as I understood it, did Mr Gosnell try to suggest otherwise. He did not claim that under the arrangement he had made with Mr Gulliford, the production of a report by Mr Wickham per se (no matter how favourable) would be sufficient to automatically bind underwriters into reinstating insurance cover over the *Olovaha*. The decision regarding the reinstatement of cover could only be made by underwriters after proper consideration of all the material facts.

On 16 December 2002, Mr Gulliford signed off the reinsurance slip for the *Fua Kavenga* and the *Otu Tonga* for the 2003 year meaning that, subject to the plaintiffs' final approval, the insurance policy would be renewed in respect of both those vessels for the 12 month period from 31 December 2002.

The policy is silent on the question of renewal, and thus, cover can only be renewed by mutual consent. It is well-established that in such circumstances each renewal constitutes a fresh contract. In other words, any agreement that might have been reached between the parties back in July 2002 in relation to the 2002 insurance year would have no relevance to the 2003 contract of insurance unless that had been expressly agreed to in the negotiations giving rise to the 2003 contract.

On 18 December 2002, Mr Gosnell emailed Mr Gulliford giving him the option of becoming the sole underwriter as Associated Marine Insurers no longer wished to participate. Mr Gulliford agreed to the proposal. It was a significant development in that under the 2002 contract Allianz had been a joint underwriter for both Hull and Increased Value insurance with an exposure on that risk of 26.5% only. Under the 2003 renewal, however, Allianz would become the sole insurer only with an exposure of 100%.

On 30 December 2002 there was a last-minute flurry of emails between Mr Gosnell and Mr Gulliford, which became the subject of close scrutiny by both counsel during the hearing. In the first email from Mr Gosnell no vessels were mentioned by name but a query was raised as to whether the defendant agreed to accept 100% of the risk. I pick up the exchange from the second email. I have corrected the spelling of the *Otu Tonga*, which is referred to in two of the emails as the "*Out Tonga*".

2. Gulliford to Gosnell:

> "If I am to write the *Otu Tonga* as a singleton I will need more premium, probably an extra 25%."

3. Gosnell to Gulliford:

> "Subject: Re: Shipping Corp
> Martin -- sorry you misunderstood me -- this would be both vessels and *Olovaha* when her refit is complete and you a happy to put her on risk -- i.e. you would be writing 100% of the lot."

4. Gulliford to Gosnell:

> "I have lost many brain cells over the past five days, but as I see it, I agree to write 100% of both vessels *Fua Kavenga* and *Otu Tonga* Hull & Machinery and you will place IV in London. Regards."

The email exchange continued on 31 December 2002:

5. Gosnell to Gulliford

> Many thanks Martin -- please bind 100% cover accordingly. There is one error on our slip in that we stated the new vessel *Otu Tonga* was GL class. She never was! She is a small self-propelled barge, which is operated in accordance with the Ministry of Marine and Ports requirements -- sorry for the confusion. Kind regards."

6. Gulliford to Gosnell:

> "Cover bound. Regards."

In his closing submissions, Dr Harrison described the plaintiffs' case as "shifting, confused, internally inconsistent, and inconsistent with the facts -- in particular the documentary evidence on which the outcome necessarily turns." I suspect that one of the points counsel then had in mind was the plaintiffs approach to the email exchange I have just referred to. Although it was not pleaded as such in the plaintiffs' statement of claim or in the reply to the statement of defence, it now appears that the plaintiffs' case relies heavily upon this correspondence. Towards the end of the plaintiffs' 72 pages of closing submissions it is submitted:

> "5.42.5. When the contract expired, by reason of the effluxion of time, the suspension, in these circumstances, also came to an end, subject to a revival of the right to renew the contract, upon the basis that Mr Wickham gave a satisfactory survey, and then the suspension having come to an end, in terms of the agreement for the policy in 2002, was it capable of being read in conjunction of (sic) the offer for renewal as stipulated (in the emails of 30, 31 December)? We would submit it was, and that the contract, whilst expressly suspending the parties' performance until the occurrence of the stated event, i.e. the provision of the satisfactory survey, it was sufficient to enable the right to continue with the contract, albeit suspended, into a further agreement for renewal, subject to the provision of the survey. In short, it did not amount to a termination, which is quite different from suspension because of its finality, i.e. "termination".

Dr Harrison described this particular submission as "garbled reasoning" but I gather from the line of cross-examination on the issue that what is being emphasised by the plaintiffs is the failure of Mr Gulliford to make any reference to the *Olavaha* in his emails, Nos. 4 and 6, in response to Mr Gosnell's specific reference to the vessel in email No. 3. It is alleged, as I understand it, that because of Mr Gulliford's failure to specifically state that the *Olovaha* would not be covered, underwriters had, thereby, committed themselves to carry over the reinstatement agreement, alleged to have been made at the end of July 2002, into the new contract for the 2003 year. In other words, so the argument runs, Mr Gulliford release amounted to an agreed that cover over the *Olovaha* would automatically be reinstated under the renewed contract for the 2003 year upon production of a favourable report from Colin Wickham. Underwriters would not even have to sight the report. Provided it was "satisfactory" (whatever that means precisely), the cover would be reinstated immediately the report was signed off by Colin Wickham. It is a bold proposition.

Mr Gulliford was cross-examined extensively by Mr Stanton on this aspect of his evidence and it was put to him that he must have known that Mr Gosnell in email No. 3 was asking for cover over the *Olovaha* as well as the other two vessels. He was asked why he did not reply, therefore, stating that the *Olovaha* was not covered. In response, Mr Gulliford strongly denied that there could be any question of cover over the *Olovaha* until underwriters had first sighted a survey report.

Dr Harrison objected to this particular line of questioning and submitted that the words in the email exchange speak for themselves. Defence counsel is, of course, correct. As with any written contractual documentation, the meaning of the words used in the various emails is a matter of construction and that exercise in turn involves an objective assessment based on the language used in the context of all the surrounding circumstances. The construction does not depend upon what one or other of the parties may have intended and extrinsic evidence on such matters is generally inadmissible.

The meaning of the emails of 30 and 31 December 2002 is, in my view, obvious. Mr Gulliford agreed to accept cover over the *Fua Kavenga* and the *Otu Tonga* for the 2003 year. He agreed to nothing in respect of the *Olovaha.* His silence does not denote consent. A binding contract cannot arise until the person to whom a proposal is made does or says something to indicate his acceptance of it. Mr Gulliford's silence in respect of the *Olovaha* is consistent with his stand since the end of July 2002. I am satisfied that in his mind he took, and maintained, the view that underwriters no longer had cover over the *Olovaha* and that position would not change in any way without going through the usual processes, which would be involved whenever an insurer takes on a new risk.

I find it fanciful and commercially naive to contemplate an arrangement ever having been entered into by Mr Gulliford under which underwriters would have agreed to be "cover bound" on production of a report by Mr Wickham, which they (underwriters) would not first have had the opportunity of examining and analysing. That scenario, as Dr Harrison expressed it, is "something that no insurer in its right mind would do." Production of the survey report would only be the first step in the chain of events I have earlier outlined.

The Shipping Corp of Polynesia was well aware at the beginning of the 2003 year that the *Olovaha* was still uninsured. On 8 January 2003 Mr Fakatou faxed a letter to Mr McLaughlan in which he concluded:

> "We have no intention of putting the vessel back in class as Colin seems to insist. I hope you will find the above to be of some assistance to putting the *Olovaha* back under insurance cover."

There was no communication whatsoever between the Shipping Corp and underwriters between that date and the day of the cyclone. On the morning of the cyclone, Mr Gosnell, the plaintiffs' placing broker in Sydney, emailed the plaintiffs' broker in New Zealand:

> "Pat/Shirley
>
> I have just heard from Colin Wickham that *Olovaha* is up on the rocks. I cannot believe it; obviously there is no insurance cover, which I suspect the guys at SCP are aware -- what incredible bad luck. Presume you will talk to SCP, but not sure there is much good news to tell them. Kind regards."

Mr Gosnell, of course, was in a better position than anyone else at that point in time to know whether or not the *Olovaha* was insured.

This is a case where the facts very much speak for themselves and, on any view of those facts, the plaintiffs' case, as Dr Harrison put it, is "fundamentally flawed". The plain fact is that, at the time of the cyclone, the *Olovaha* was uninsured.

For completeness, there is one other matter I should refer to. The final report from Colin Wickham, signed off on the day before the cyclone, is very brief. It comprises of only 14 lines. The concluding paragraph reads:

> "Clearly, the Ministry of Marine & Ports shares our view of the levels of maintenance and recording. If they continue to monitor this aspect then the vessel's condition should achieve a satisfactory level."

The report cannot be described as unqualified and whether it would have been acceptable to underwriters is, of course, both hypothetical and problematical. In all events, the evidence is that neither that report nor Mr Wickham's initial report dated 16 April 2002 or its addendum were forwarded to the defendant at any time prior to 28 May 2003.

The significance of the 28th of May date is that on the particular day a meeting was held in a coffee bar in Sydney between the plaintiffs' brokers (Messrs Gosnell and McLaughlan) with three representatives from the plaintiffs, on the one hand, and Mr Chris Kelsey, National Marine Underwriter for the defendant on the other. The meeting had been requested by Mr Gosnell to investigate if there was any possibility that the defendant could see its way clear to make an ex gratia payment to the plaintiffs to assist in repairing the *Olovaha*. Mr Kelsey had earlier advised the broker that the defendant was not prepared to settle but he had agreed to listen to any further representations the plaintiffs wished to make.

In evidence, two of the plaintiff's witnesses -- Mr Fakatou and Mr McLaughlan, said that at that meeting in May Mr Kelsey made the comment that, "if they (underwriters) had intended to cover (reattach) the vessel without GL Class, then they would have been on risk." The plaintiffs referred to this evidence in their final submissions and sought to rely upon the alleged admission although it is not referred to in the plaintiffs' pleadings

For his part, Mr Kelsey denied in evidence using the words in question and he explained that, as he had not been personally involved in any of the negotiations, the discussions he had had at the meeting were, necessarily, in general terms only. No notes were taken at the meeting recording the comment and, although other representatives of the plaintiffs had been in attendance, they were not called to give evidence. Moreover, the plaintiffs' broker Mr Gosnell, who in general impressed me as a witness, did not say anything about the alleged remark. The onus of proof, of course, rests on the plaintiffs. For the record, I confirm my finding on this particular issue is that I simply have not been persuaded on the balance of probabilities that the remark attributed to Mr Kelsey was ever, in fact, made.

For the reasons stated, the plaintiffs' claim fails. The defendant is entitled to costs to be agreed or taxed.

R v Aumua

Supreme Court, Nuku'alofa
Ford J
CR 209/04

4 March 2005; 9 March 2005

Criminal law – charge of bodily harm – wound needed - discharged

The 19-year-old accused, Senolita, was charged with one count of bodily harm contrary to section 107 of the Criminal Offences Act (Cap 18). The Crown's case was that on 3 October 2004 Senolita confronted the 21-year-old complainant, Mele, on the verandah outside the Anglican Church at Kolofo'ou. There was an ordination ceremony being conducted inside the church at the time. At the time of the confrontation, the accused and her sister had walked over to where Mele and her sister were seated and the accused had sat down in a plastic chair directly facing Mele. Mele responded to the accused's verbal accusations verbally. The Crown alleged that in anger the accused then stood up and scratched Mele on the face and that was the basis for the bodily harm charge. Mele retaliated by pushing the accused to the ground. A scuffle then broke out with the two women pulling each other's hair before other people broke up the fight.

Held:

1. The Crown needed to establish four elements. First, that there was injury amounting to bodily harm; secondly, that the bodily harm was caused by the accused; thirdly, that at the time of the assault the accused had the intention of causing bodily harm to the victim and, finally, that the accused caused the bodily harm without what is called "lawful justification".
2. The Court was satisfied beyond reasonable doubt that the accused scratched the complainant's face.
3. The scratch marks were only superficial. The Crown did not establish that the complainant suffered a wound within the recognised meaning of that word and the accused was acquitted accordingly on the bodily harm charge.
4. The Court may find the accused guilty of a lesser offence if the allegations in the indictment amounted to, or included by implication, an allegation of another offence "falling within the jurisdiction of the Court of trial." Common assault was not an offence that fell within the jurisdiction of the Supreme Court. It was an offence triable summarily in the Magistrates' Court. Therefore, the option of substituting the lesser offence of common

assault for the charge of bodily harm was not available. The accused was accordingly discharged.

Cases considered:

JJC (a minor) v Eisenhower [1983] 3 All ER 230 (CA)
R v Fa'aosi [1996] Tonga LR 36
R v Valu [2004] Tonga LR 257

Statutes considered:

Constitution of Tonga(Cap 2)
Criminal Offences Act (Cap 18)

Counsel for the Crown : Mr Sisifa
Counsel for the accused : Mr 'Etika

Judgment

The 19-year-old accused, Senolita, is charged with one count of bodily harm contrary to section 107 of the Criminal Offences Act (Cap 18). The Crown's case is that on 3 October 2004 Senolita confronted the 21-year-old complainant, Mele, on the verandah outside the Anglican Church at Kolofo'ou. There was an ordination ceremony being conducted inside the church at the time. Senolita was angry at Mele because she thought that she and her sister, Penina, were gossiping about her and her 16-year-old sister, Fuavosa. She was also angry because she believed that Mele, a few days earlier, had told her mother that the accused bullied her at school.

At the time of the confrontation, the accused and her sister had walked over to where Mele and Penina were seated and the accused had sat down in a plastic chair directly facing Mele. Mele responded to the accused's verbal accusations by telling her that they had not been gossiping about her and, in relation to the bullying allegation, she said that what she talked to her mother about was between her and her mum.

It is alleged that in anger the accused then stood up and scratched Mele on the face and that is the basis for the bodily harm charge. Mele retaliated by pushing the accused to the ground. A scuffle then broke out with the two women pulling each other's hair before other people broke up the fight.

To establish the charge, the Crown needs to establish four elements. First, that there was injury amounting to bodily harm; secondly, that the bodily harm was caused by the accused; thirdly, that at the time of the assault the accused had the intention of causing bodily harm to the victim and, finally, that the accused caused the bodily harm without what is called "lawful justification".

The Crown called evidence from the complainant and her sister. They were both impressive witnesses, particularly the sister, Penina. Their evidence confirmed the Crown's version of events.

The onus of proof, of course, is on the Crown and it must establish each element of the charge beyond reasonable doubt. The accused does not have to prove anything. Nor does she have to give or call evidence. In this case the accused elected to give evidence and she also called evidence from her sister and a bystander.

The accused disputed the Crown's version of events. She alleged that after talking to the complainant, she stood up from her chair and was starting to walk away when the complainant suddenly assaulted her by pushing her. She fell to the ground and then when she got back to her feet a scuffle developed between them and they started pulling each other's hair. The accused indicated that at one point during the fight, as a defensive action, she's scratched the complainant's face. The accused's younger sister, Fuavosa, gave evidence supporting the accused's story. The independent witness did not observe the scratching incident.

At the end of the day, the issue before the Court is one of credibility. Who do I believe -- the complainant and her sister on the one hand or the accused and her sister on the other?

As I have already indicated, I found the complainant and her sister reliable and credible witnesses. On the other hand, I did not believe the evidence given by the accused and her sister. The accused made a statement to the police on the day of the incident, which was produced by the Crown and what she told the police was consistent with the complainant's version of events. In answer to the question why had she scratched Mele's face, the accused had told the police, "I was angry at her for giving my sister a bad look." Significantly, she did not say anything to the police about the scratching being a defensive action in response to an attack on her by the complainant. In short, I am satisfied beyond reasonable doubt that the accused scratched the complainant's face as alleged by the Crown, but that is not the end of the matter.

Mr 'Etika submitted that should I reach that conclusion then the Crown has still not made out the charge because the scratches did not amount to "bodily harm". The definition of bodily harm relied upon by the Crown is that set out in section 107(2)(b) of the Criminal Offences Act, namely, "any wound which is not severe."

In support of his submission, Mr 'Etika referred the Court to the English Court of Appeal decision in *JJC (a minor) v Eisenhower* [1983] 3 All ER 230, where it was held that there needed to be a breach in the whole of the skin in order to establish a wound.

This Court has always taken exactly the same view. In *R v Faóso* [1996] Tonga LR 36, at 38, Hampton CJ said:

> "I take the view that wound bears the meaning that it has borne for many a year in this jurisdiction, and in the common law jurisdictions generally, namely an injury that carries with it the severance of the continuity of the whole skin."

That same principle was reiterated as recently as last year by Ward CJ in *R v Valu* [2004] Tonga LR 257.

In the present case, the evidence of Dr Siale 'Akau'ola, called by the Crown, was that the scratch marks he examined on the day of the incident were superficial. Indeed, of the three scratches to the complainant's face identified in the medical report, the complainant admitted in cross-examination that she was unaware of two of them until they had been pointed out to her by the doctor. The doctor told the court that the scratch marks did not puncture the whole of the skin at any point but only the outside layer.

That being the case, I must uphold Mr 'Etika's submission. The Crown has not established that the complainant suffered a wound within the recognised meaning of that word and the accused is acquitted accordingly on the bodily harm charge.

Mr Sisifa submitted that if I concluded that the injury did not amount to a wound then, pursuant to clause 13(d) of the Constitution and section 42(3) of the Criminal Offences Act, I should find the accused guilty on the lesser charge of common assault. Mr 'Etika submitted, in effect, that such a step would be unfair to the accused because, as counsel, he had conducted the whole of the defence case on the basis of the indictment as it stood and even the most elementary research should have alerted the Crown to the fundamental weakness in its case.

I do not need to decide the issue on the criteria referred to in counsel's submissions. Section 42(3) of the Criminal Offences Act, coupled with clause 13(d) of the Constitution, allows the Court to find the accused guilty of a lesser offence if the allegations in the indictment amount to, or include by implication, an allegation of another offence "falling within the jurisdiction of the Court of trial." Common assault is not an offence falling within the jurisdiction of this Court. It is an offence triable summarily in the Magistrates' Court.

The option, therefore, of substituting the lesser offence of common assault for the charge of bodily harm is not one that is available to me. The accused is accordingly discharged.

MBf Bank Ltd v Filipe

Supreme Court, Nuku'alofa
Ford J
CV 500/02

23 and 24 February 2005; 17 March 2005

Contract law – loan agreement – company loan not personal loan

The plaintiff bank claimed to have entered into a loan agreement with the defendant personally on or about the 18th day of April 1997. The plaintiff sought judgment in the sum of $493,068.88 (together with interest) being the outstanding balance under the agreement. The defendant disputed liability and contended that the loan was made not to him personally but to Filcorp Ltd a duly incorporated company in which, at all material times, his two sons were the sole directors and shareholders and he was only the manager.

Held:

1. It was for the plaintiff to prove on the balance of probabilities that the loan in question was, as alleged, made to the defendant personally trading as Filcorp and not to the company, Filcorp Ltd. The plaintiff failed to satisfy the Court in that regard.
2. (Obiter) The Court did not hear argument on the application of the contra proferentem rule but it said that, if applicable, that also would clearly count against the plaintiff who drafted the letters of offer in question.
3. The Court found that the loan was made by the plaintiff bank to the company Filcorp Ltd and not to Mr Filipe personally. The plaintiff's claim failed. The defendant was entitled to costs to be agreed or taxed.

Counsel for plaintiff : Mrs Vaihu
Counsel for defendant : Ms Tonga

Judgment

In this proceeding the plaintiff seeks judgment in the sum of $493,068.88 (together with interest) being the outstanding balance under a loan agreement it claims to have made with the defendant personally on or about the 18th day of April 1997.

The defendant disputes liability and contends that the loan was made not to him personally but to Filcorp Ltd a duly incorporated company in which, at all material

times, his two sons were the sole directors and shareholders and he was only the manager.

Two witnesses were called to give evidence of behalf of the plaintiff. The first was Nunia Hala'api'api who has been with the bank for 10 years. Ms Hala'api'api is currently Head of Credit, a position she has held for three years. The witness was not, however, involved in the loan transaction in question.

The other witness was a Mr Yeoh who has been General Manager of the plaintiff bank since October 1999. Although Mr Yeoh has been in Tonga since March 1997 he was not involved in the loan transaction giving rise to these proceedings but, as it happens, indirectly he did play a background role. One of Mr Yeoh's first tasks with the bank was to redraft various documentation including the bank's standard letter of offer form. The loan in question was one of the first made by the bank utilising Mr Yeoh's newly drafted letter of offer and, as it turns out, the document plays a crucial role in the case for both sides. The letter of offer, dated 18 April 1997, was addressed to:

> "Sione Mateialona Filipe
> T/A Filcorp
> Nuku'alofa."

The company, Filcorp Ltd, principally an importing and exporting business, was incorporated on 30 June 1995. Mr Filipe's two sons who live in Foster City, California, USA, signed all the relevant papers for the formation of the company on 21 February 1995 but Mr Filipe told the Court that he did not trade as Filcorp at any stage prior to the company's formation.

Mr Filipe said in evidence that 99% of his dealings with the plaintiff bank were conducted with Mr Ghee Heng Hock who was General Manager with the bank at the time the company was incorporated and he was also the officer responsible for lending.

The defendant explained how the plaintiff had agreed to lend working capital to the company on overdraft but Mr Hock was not prepared to advance any money until the company had been incorporated and the bank had copies of all the relevant loan documentation including the company's memorandum and articles of association, the certificate of incorporation, the necessary directors' resolutions and the company's business licence. Mr Filipe said that he handed Mr Hock all the documents he required relating to the company and it was not until Mr Hock was completely satisfied in this regard that the bank drew up its first "Letter of Offer for Accommodation" letter which was dated 31 October 1995.

The "borrower" is not specifically defined but the letter is addressed to:

> "Mr Sione Mateialona Filipe
> T/A Filcorp
> Fakafanua Centre
> Maúfanga
> Nuku'alofa
> Tongatapu."

The opening paragraph states:

> "We are pleased to advise that the Bank has approved your application for the following facility, subject to the following terms and conditions." the total advance is shown as $480,000 made up of "Term Loan $30,000, Overdraft $300,000" and "Additional Overdraft $150,000."

That initial letter of offer is only just over two pages long. Two of the conditions refer to specific obligations of "the Company". Thus:

> "(d). Negative pledge by the Company not to incur further liabilities without the bank's consent which shall not be unreasonably withheld, if the need arises.
>
> (e). The audited (certified) financial statements of the company is to be submitted to the Bank within six months after each financial closing."

The letter of offer was signed by Mr Hock and Valeti Tuúholoaki, Credit Officer on behalf of the Bank and Mr Filipe "For Filcorp".

The second letter of offer is dated 18 April 1997. By that stage Mr Hock was no longer with the bank in Tonga and the new general manager and officer in charge of lending was a Mr Choo. Mr Choo was not called as a witness for the plaintiff and it was not clear from the evidence exactly why the second letter of offer was necessary. It is said to have followed on from a review. The letter, in the new format devised by Mr Yeoh, is 15 pages long. It defines the "borrower" as "Sione Mateialona Filipe T/A Filcorp." The "Credit facility and Limit" is described as:

> "(I) Total Overdraft -- $400,000.00 (Increment of $100,000)
> (II) Term Loan -- $30,000.00
> Total -- $430,000.00"

The "Purpose" of the loan is stated to be: "Overdraft for additional Working Capital Requirements."

The letter is signed by Mr Choo on behalf of the bank and by Sione Filipe. Mrs Hala'api'api witnessed Mr Choo's signature but she admitted that she had nothing to do with the loan arrangements and discussions.

Because neither Mr Hock nor Mr Choo were called to give evidence for the plaintiff, there is no direct evidence before the Court relating to the loan transaction apart from that given by the defendant, Mr Filipe. As noted earlier, Mr Filipe's position right from the outset has been that the loan was made to the company and not to himself personally and he claims that the bank's General Managers were perfectly aware of that.

When asked in examination-in-chief why the letters of offer had been addressed to himself "trading as Filcorp", Mr Filipe responded that he had given Mr Hock all the documentation he had requested regarding the formation of the company and all the other necessary paperwork such as the board resolutions relating to the loan and he had then relied entirely upon the general manager to produce whatever documentation the bank required in connection with the loan transaction. That seemed to me to be a reasonable response to the question. I found Mr Filipe to be a convincing witness on these matters and, in the absence of any direct evidence to the contrary, I accept what he told the Court in this regard.

The plaintiff's case relies very heavily on the wording of the letter of offer dated 18 April 1997. Mrs Hala'api'api said in evidence, and repeated the comment numerous times, that the letter of offer is "the standard letter of offer used by the bank" and the same letter is used whether the borrower is a company or an individual. The thrust of her evidence, as I understood it, was that if the loan had been intended to be for Filcorp Ltd then the letter would not have been addressed to Sione Filipe trading as Filcorp but, to the company itself and on the signature page at the very end of the letter of offer provision would have been made for two directors of the company to sign and affix the company seal.

In cross-examination by Ms Tonga, it was put to the witness that the letter of offer form should not be used for loans to individuals because the wording is clearly designed for companies. Some of the examples appearing in the letter which were referred to by counsel in this regard were:

> "REPRESENTATIONS AND WARRANTIES
> (a) The Borrower is a company duly incorporated and validly existing under the Laws of Tonga as a separate legal entity and has full power and authority to own its assets and carry on its business as it is now being conducted;
> . . . .
> (d) The execution, delivery and performance of this Letter of Offer will not exceed the powers granted to the Borrower, or violate the provisions of: (1) .... (2) it's Memorandum and Articles of Association.
>
> CONDITIONS PRECEDENT AND AVAILABILITY
> The credit facilities will be made available subject to the following:
> (a) a receipt of a copy of the Borrowers' Board Resolution approving the acceptance of terms and conditions of the Letter of Offer;
> (b) receipt of specimen signature of person authorised to accept this Offer and to operate the facilities.
>
> EVENTS OF DEFAULT
> . . . .
> (e) a winding up petition is presented against the Borrower."

There were numerous other similar examples referred to by Ms Tonga and counsel emphasised, in particular, the very last paragraph in the letter of offer which reads:

> "Acceptance should be accompanied by your Board Resolution authorising (inter alia) such acceptance."

When faced with this evidence which, on the face of it, clearly supports the defendant's claim that the loan was made to the company rather than to him as an individual, Mrs Hala'api'api, rather surprisingly, continued to maintain that the loan was not made to the company Filcorp but to Sione Filipe personally. The following exchange in cross-examination illustrates her stand:

"Q. Wouldn't it be rather strange for a bank to use wording intended for a company when dealing with individual borrowers?

A. As I said, this is the standard letter of offer that we use in overdraft loans and we have been using this form from 1997 to the present.

Q. Are you saying that the terms vary regarding each borrower?

A. It is standard -- it never varies.

Q. Do you save this on the computer and only print it out when a borrower accepts the offer?

A. Yes.

Q. And would I be correct if I put up to you that if it is saved on the computer, you have to change the wording to suit the nature of the borrower?

A. We change the reference at the top, the name of the borrower, the credit facility and also variation of interest rates starting from there up to the very last page of the 15 pages we do not change anything. That's the standard form used by the bank.

Q. I put it to you it is very unprofessional of a bank to use such wording -- to have the wording in the letter of offer for a limited company used on a loan to an individual?

A. Not everything here is for a limited company. There are clauses here for individuals but for limited companies we need board resolutions and also the certification.

Q. Would it be very hard for the bank to cross out the clauses for a limited company when individual borrowers are borrowing from the bank?

A. No, we want to maintain the same clauses in every offer that we make."

Mrs Hala'api'api was not an entirely convincing witness and her claim that the same letter of offer form is used for loans to companies and individuals defied credibility. Her evidence in this regard can be contrasted with the evidence given to the Court subsequently by the current General Manager, Mr Yeoh. He was asked during examination-in-chief about the letter of offer and he responded:

"A. This letter of offer is made for the purpose of business lending and business here would cover all the respective types of business constitutions -- that's sole proprietor, partnerships and limited companies.

Q. Are there separate letters of offer for individuals?

A. We have a separate letter of offer for individuals that relates to personal loans and housing loans but the one that I have with me (the letter of offer in question) relates to business.

Q. In this case "Sione Filipe trading as Filcorp" -- would you classify that as an individual loan?

A. It is a business loan. If you look into the purpose it is for additional working capital requirements. The bank also does not do any working capital financing for individuals as there is no such needs (sic) in so far as the bank's records that means."

Mr Yeo was then asked, still during examination-in-chief:

"Q. Who was the borrower in this case, looking at the documentation before you?

A. He'd be an individual trading as, so I would classify it as a sole proprietor."

In cross-examination the witness elaborated further on the subject:

"In any case where there is a "trading as" it has to be a business, it cannot be an individual and as I have mentioned earlier, if you look into one of the clauses under PURPOSE it says "overdraft for additional working capital requirements." The bank will not lend to an individual not in business for working capital requirements. Working capital requirements only relates to businesses."

Finally on this topic, Mr Yeoh told the Court:

"Working capital in our definition is solely dedicated to businesses whereby working capital is involved but not to individuals. For individuals it would have been for personal consumption, housing loans or it could be a case of refinancing from other banks. As a matter of record, the bank gives personal loans ranging from $2000 to as high as perhaps $15,000 in exceptional cases. Here I refer to personal consumption.

Q. The rest of the cases (lending) would only be to companies would it?

A. It has to be to a business.

Q. When you say business, do you mean a company?

A. Here, I would define it as a sole proprietor, a partnership or a limited company."

Mr Yeoh did not expand on what he meant by the expression "sole proprietor" but if he was intending to suggest that Filcorp was what is sometimes described as a "one-man company", effectively under the control of Sione Filipe, then not only do I reject that on the facts but, as a matter of law, the general position is that an incorporated company, no matter how controlled, is still a separate and distinct legal entity in its own right.

The statement by Mr Yeoh in cross-examination that a loan to an individual trading under a trade name is regarded by the bank as a loan to a business is something of a legal hotchpot. An individual trading under a trade name does not have some separate and distinct business personality from the individual as a person. In a company or partnership situation, of course, the position is different. The law recognises such entities and they can sue and be sued in their own right. A person trading under some trade name, however, remains an individual. In some jurisdictions, including New Zealand, there are specific Rules that permit an action against an individual trading under a firm name but that is not the common law position, nor is it the position in Tonga.

As in any civil case, the onus of proof is on the plaintiff. It is for the plaintiff to prove on the balance of probabilities that the loan in question was, as alleged, made to the defendant personally trading as Filcorp and not to the company, Filcorp Ltd. I say at once that it has failed quite spectacularly to satisfy me in this regard.

There has not been one scintilla of evidence produced to show that at any time, either before or after the company was incorporated, did the defendant trade, or purport to trade, as Filcorp and I am satisfied that the bank's General Managers were perfectly well aware of that all along. Mr Filipe told the court that during the initial stages, Mr Hock had insisted on sighting all the business invoices as they were issued and the invoices in turn were all in the company's name.

I accept that Mr Hock had also insisted on sighting all the company incorporation documents and other relevant documentation such as the required board resolutions and authorities before he authorised the initial advance. Why Mr Hock, and subsequently Mr Choo, then proceeded to issue the bank's letter of offer to Sione Filipe trading as Filcorp is something which could not be explored in evidence, of course, because neither former General Manager took the witness stand. Mr Yeoh did confirm, however, that Mr Hock apparently still works for the MBf Bank although he was uncertain whether he was presently based in the Malaysian head office or in one of the other six "MBf Groups". Nothing was said about Mr Choo's present whereabouts.

The point I am endeavouring to make in this regard is that the amount in dispute is not insignificant and if the plaintiff elects, for whatever reason, to proceed to trial without calling witnesses who obviously could be crucial to the case it is trying to make out then, almost inevitably, it runs the risk that the claim might fail. That is the reality of what has happened.

The plaintiff cannot suggest that it had no proper warning of the issues involved. From the outset, the defendant had made his position abundantly clear. In his statement of defence filed on 10 October 2002, Mr Filipe pleaded that the bank's General Managers were "well aware of the fact that the overdraft facility and term loan was not for the defendant but for Filcorp Ltd."

Against that background, the plaintiff's failure to call direct evidence in rebuttal of that clearly stated defence is somewhat puzzling. Neither Mrs Hala'api'api or Mr

Yeoh were able to give reliable evidence about the loan transaction itself and, if anything, I found the evidence that was given by Mr Yeoh, coupled with the actual wording of both letters of offer, supportive of the defendant's case. I did not hear argument on the application of the contra proferentem rule but, if applicable, that also would clearly count against the plaintiff who drafted the letters of offer in question. My finding on the evidence is that the loan was made by the plaintiff bank to the company Filcorp Ltd and not to Mr Filipe personally.

For these reasons, the plaintiff's claim fails. The defendant is entitled to costs to be agreed or taxed.

R v Malu

Supreme Court, Nuku'alofa
Ford J
CR 345-7/2003

28 February and 1, 2 March 2005; 1 April 2005

Criminal law – importing hemp – facilitated importation into Tonga – guilty

The first accused, Veiongo Malu, was charged with one count of importing Indian hemp and one count of possession of Indian hemp contrary to sections 34 and 36 (b) of the Drugs and Poisons Act (Cap 79). It was alleged that on 10 February 2003 she uplifted and cleared through customs at Fua'amotu Airport a cardboard box which included amongst its contents two packages containing Indian hemp. The box, the Crown claimed, arrived on a Pacific Link flight from Fiji on Friday 7 February 2003. Veiongo at the time was working in the compliance section of customs. The second and third accused were charged as accomplices. The Crown's case was that the third accused, Sioeli Tupou, approached the second accused, Siaki Lopeti, for assistance in collecting the box from the airport. The Crown alleged that it was the second accused, Siaki, who had initially spoken to Veiongo and asked her to help clear the box in question through customs. The principal submission advanced on behalf of the first accused Veiongo was that she could not be found guilty of importing the Indian hemp because her actions at the airport in claiming and clearing the box through customs occurred after the act of importation had been completed.

Held:

1. The act of importation does not cease until goods have ceased to be under the control of the appropriate customs and shipping authorities and have been released to the consignee or addressee.
2. The Court concluded on the facts that the box did arrive in Tonga on the Pacific Link flight from Fiji on 7 February 2003 as alleged by the Crown.
3. There was no evidence that there had been any tampering or interference with the exhibits. The Court had no doubt that the samples analysed which proved positive for marijuana were taken from the substance found in the packages.
4. The Court had no doubt that the first accused was fully aware that the box contained a supply of marijuana and that she intended that the drug should be brought into the Kingdom. She was convicted on the importing charge.
5. The Court was satisfied that Veiongo knew that the box contained marijuana, but was not so satisfied that she physically had the substance in

her custody or control at any stage. Apart from allowing Veiongo to clear the box through customs, the officers were at pains not to allow her to have physical custody or control of the box or its contents. The first accused was, accordingly, acquitted on the possession charge.

6. The Court was satisfied as to the reliability of the confessions obtained by the police from both the second and third accused.

7. The Crown proved beyond reasonable doubt all the essential elements necessary to establish the charge against the second and third accused and they, along with the first accused, are convicted accordingly.

Cases considered:

George v R (16 May 1996), CA 550/95
R v Atias (No 2) (High Court, Auckland, T025837, Harrison J, 26 September 2003)
R v Fa'aoso [1996] Tonga LR 36
R v Hancox [1989] 3 NZLR 60 (CA)
R v Makahununiu [2001] Tonga LR 127
R v Wickremasinghe 21 August 2003, CA 137/03
Saxton v Police [1981] 2 NZLR 186 (CA)

Statutes considered:

Customs and Excise Act (Cap 67)
Customs and Excise Management Act (UK)
Drugs and Poisons Act (Cap 79)
Misuse of Drugs Act 1975 (NZ)

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

Judgment

Introduction

The first accused, Veiongo Malu, is charged with one count of importing Indian hemp and one count of possession of Indian hemp contrary to sections 34 and 36 (b) of the Drugs and Poisons Act (Cap 79). It is alleged that on 10 February 2003 she uplifted and cleared through customs at Fua'amotu Airport a cardboard box which included amongst its contents two packages containing Indian hemp. The box, the Crown claims, arrived on a Pacific Link flight from Fiji on Friday 7 February 2003. Veiongo at the time was working in the compliance section of customs.

The second and third accused are charged as accomplices. The Crown's case is that the third accused, Sioeli Tupou, approached the second accused, Siaki Lopeti, for assistance in collecting the box from the airport. The Crown alleges that it was the second accused, Siaki, who had initially spoken to Veiongo and asked her to help clear the box in question through customs.

Background

Siaosi Puakahuhua ("Saia") was called as a Crown witness. Saia informed the Court that he retired in 2004 after 33 years with the customs service. On the 7 February 2003 he had been on duty as officer in charge at Fua'amotu Airport. He recounted how, after all the passengers and cargo on the Pacific Link flight from Fiji were cleared, an unclaimed cardboard box remained on the luggage conveyor. According to the labelling on the box, it had originally contained packets of "Maggie 2-Minute noodles." It was addressed to: SEINI LIUTAI - POPUA - TONGATAPU.

Saia explained the usual method for dealing with unclaimed luggage. He said that normally the box would have been taken by the airline officials but he had recalled an earlier incident a week or two previously, and there was other evidence given to this effect, where a similar sized box had been seized which was found to contain an illicit substance. Saia therefore gave instructions for the box in question to be kept in a safe at the airport. First, however, he arranged for it to be opened in the presence of three or four custom staff. The witness initially said in evidence that the box contained biscuits and noodles with two suspicious packages at the bottom but later he corrected that evidence and said that the other contents, apart from the two packages, were packets of peas and noodles. At that stage, the suspicious packages were not opened but all the contents were replaced back in the box, the box was cellotaped up again and then placed in the safe.

Saia was also on duty around noon on Monday 10 February 2003 when Veiongo Malu, the first accused, came to the airport to collect the box. He told the Court that he knew Veiongo and he was aware that she worked for customs in the compliance section at Ma'ufanga. Veiongo was able to correctly tell Saia the name and address on the outside of the box.

Apart from Saia, the Crown called evidence from two other customs officers who had been on duty at the airport that day -- Saimone Tukipili ("Saimone") and Feleti Hopoate ("Feleti"). There were some minor discrepancies in their evidence, which I am satisfied can be attributed to the two-year time lapse since the incident but, in general, I found all the customs officers called by the Crown to be truthful and reliable witnesses.

Perhaps, the most comprehensive description of what happened at the airport on that Monday afternoon was the account given later that same day by Veiongo in her statement to the police. The Crown produced her "Record of Interview" as an exhibit and the passage that follows was actually written by the first accused in her own handwriting. It incorporates the gist of the evidence given by the three customs officers and, as it was written contemporaneously, I found it a reasonably accurate account of the events that took place. Veiongo's narrative begins with her and Siaki (the second accused) in Siaki's car en route to the airport:

> "On the way to the airport we didn't talk about the parcel and I didn't ask him (Siaki). We talked about drinking last Friday and Saturday. On the way I remembered that the customs van was still in town so I called using Siaki's mobile phone and asked whether any one was at the airport but there was no answer. I told Siaki that no one was at the airport and Siaki said that we would just go and wait there. When we got to the

airport Siaki told me that the customs van was already there and I told him to park behind the van.

I got out and went into the customs office. Saia, Feleti and Lo'umanu were there. Saia asked where I was going to and I said I was there to pick up a parcel for some friend. Saia asked what was in the parcel and I told him that it was noodles and peas. Saia turned and picked up a box from behind him and he said "Liutai" and I said "Seini Liutai" and he said "yes". He told me to go and call Lisiate, another customs officer, and I did.

Saimone picked up the box and Saia said to me to go with Saimone to pay the duty. Duty was $2.00 but Saimone asked me what was in the box and I told him it was noodles and peas because that is what I was told.

After the duty was paid and everything was in order Saimone asked me whether I knew that there was marijuana inside the box and I told him: "No, it is peas and noodles." Loamanu and Feleti came in and asked whether the box should be opened and Saimone said "yes." We went into the customs office at the airport and Saia was not there, just myself, Feleti, Saimone and Lo'amanu. Feleti opened the box and Lo'amanu took out its contents. Inside were noodles and peas and underneath that was a piece of cardboard. The cardboard was pulled up and there were two parcels taped with gray tape. Feleti used a knife to open one corner of the parcel and showed the marijuana inside the parcel. Saimone then instructed that everything should be returned into the box and taped up then Saia entered the room.

Saimone told Saia everything while Lo'amanu and Feleti went outside. Saia opened the box and took out everything and took out one of the parcels. Saimone told him that it was already open. Saia turned around and asked me what was in the parcel and I said it was already open and it was marijuana. Saia said to go back and wait outside because he was going to report it to the minister. Saimone and I went and sat on a chair inside the terminal. Saimone said that I should go and ask Saia to release the parcel to me so I can take it while somebody follows and see who the parcel is given to. I went and told Saia what Saimone told me but Saia said to go and wait outside because he was calling Feleti to come to the airport.

I went outside when Lo'amanu was about to have a smoke and I asked him for one smoke and I went outside and Siaki was sitting there. I told him that marijuana was inside the box and I have to wait there while I was being reported to the

> office. Siaki went and started the car and I got in and we left to come to town."

The Court heard how Veiongo was picked up and arrested later that same day. Veiogno commenced making her lengthy statement (comprising 134 questions and answers) to the police at 1800 hours.

Saimone, the 52-year-old customs office cashier at the airport, recalled in evidence that Veiongo had told him that the box was for her mother's sister who lived at Popua. He said that Veiongo had paid the $2.00 assessed duty and had signed for uplifting the box. When he was outside the terminal building with Veiongo later, Saimone noted the man in the car who she was travelling with and he identified him in Court as Siaki.

Detailed evidence was given by the police witnesses about the handling of the box and, in particular the two packages, between the time that the exhibits were labelled and taken into police custody at the airport on 10 February 2003 up until the time of their production in Court. The Government Analyst, Siale'uvea Finau, gave evidence and produced a report he had prepared following what he said was his examination and testing of samples of the substance found in the two packages. Although a challenge has been made in relation to both these evidentiary matters, there was no challenge to Mr Finau's evidence that marijuana is the Spanish-American name for Indian hemp. The botanical name for marijuana and Indian hemp is *cannabis sativa L.*

None of the three accused gave evidence. They did not have to, of course, but they all made voluntary statements to the police, which were produced by the Crown. I have already cited a passage from Veiongo Malu's record of interview. Earlier in the interview, 24-year-old Veiongo had been asked by police officer Sione Pahulu who the parcel belonged to and she had replied:

> "A man named Sioeli. It came through Siaki because I do not know Sioeli."

Sioeli, of course, is the third accused and Siaki the second accused.

Veiongo was asked about her association with Siaki. She described him as a drinking friend who worked as a security guard at Wandas Bar at the Pacific Royale Hotel. She said that on Friday the 7th of February 2003 he had met her at the One Stop Shop in Nuku'alofa and had said that he had a parcel arriving at the airport on a flight from Fiji that day and he wanted her to pick it up. She agreed and they both left for the airport in Siaki's car. She was asked by officer Pahulu:

> "Q. What did you talk about on the way?
>
> A. When we started off, I asked him what was in the parcel and he told me it was peas and noodles and I asked him who the parcel belonged to and he said it was Sioeli's and then he told me the address on the parcel.
>
> Q. What was the address?
>
> A. Seini Liutai, Popua, Tongatapu.

There is another lengthy passage in Veiongo's police record of interview which was also written in her own handwriting. It related to what happened after she and Siaki had arrived at the airport on the Friday. I will come back to that later in this judgment.

In his record of interview, 29-year-old Siaki told the police that he is a married man with two children and he was working as a security guard at the Pacific Royale Hotel. His normal hours of work were 4 p.m. to 12 midnight. He said that he had known Veiongo for about four months.

Siaki, who was interviewed on 11 February 2003, was initially vague and made out that he could not recall his movements on Friday the 7th of February. Later he was more forthcoming and the interview ended up with 145 questions and answers. Siaki said that he knew Sioeli who also worked in security. Sioeli had called him by phone because he had wanted help picking up a parcel at the airport that was arriving from Fiji. Siaki, in turn, had then asked Veiongo to assist him. In his statement to the police, Siaki said that Veiongo knew that there was marijuana inside the box because he had told her. He also said that he had given Veiongo Sioeli's phone number and she and Sioeli had talked to each other about the package. Continuing, Siaki explained that on the afternoon of Monday the 10th of February he had telephoned Sioeli and explained to him that the parcel had been confiscated at the airport and Sioeli had told him not to say anything. The final questions and answers in the police interview with Siaki were:

> "Q. Was there any payment given to you or offered to you if the parcel got out?
>
> A. Yes, but he didn't tell me how much. I wanted some money to pay off my debt.
>
> Q. Was it you who arranged with Veiongo to get the parcel out?
>
> A. Yes."

When the police interviewed Sioeli on 12 February 2003, he told how he worked as a security guard for Black Knight Security. He admitted knowing both Veiongo and Siaki from Wandas Bar at the Pacific Royale Hotel. He was able to recite their mobile telephone numbers.

Initially, Sioeli refused to answer any questions relating to the collection of the box in question. Repeatedly he answered the police officer's questions with the comment, "I will only speak in Court." Eventually, however, Sioeli asked if he could speak to the officer in charge of the drug squad and he was given that opportunity. Following on from that meeting, Sioeli spoke freely about the events giving rise to the charge against him. He told the police that the packages belonged to a person called Pila Sanft who he had first met some years previously at a sports meeting in Fiji when Sioeli was representing Tonga in weightlifting and Sanft in archery.

Referring to the events leading up to his arrest, Sioeli explained in his unsworn statement how Pila Sanft had recently stopped off in Fiji for approximately a week after attending an archery competition in New Zealand. His statement continued:

> "Pila said that he tried to bring the parcel on Monday 3 February 2003 from Nadi but he found out that parcels were

being opened at the airport so he flew to Suva and put the parcel with the passengers thinking a customs girl will pick it up.

Q. When did Pila find out that a girl at customs was to pick up the parcel?

A. When I talked with Veiongo about the parcel Pila asked me about her and asked whether he could speak with her. They talked and Pila told Veiongo that his name was Tevita.

Q. When did you arrange with Veiongo?

A. I asked Siaki and he suggested Veiongo because she worked at customs.

Q. Have you used Veiongo before to pick up parcels?

A. No, this is the first time.

Q. What did Veiongo say?

A. She said it would be easy for her; to tell her the time of the flight and whether the pickup would be at the airport or Post Office.

Q. Did you know about the deal between Pila and Veiongo on the phone?

A. Yes, Pila asked her of their work whether it would be easy to get the parcel plus $300 to be given to Veiongo for her work. Pila also said that the bonus would be double and a lot of money has been given to Veiongo.

Q. Do you know how much has been given to Veiongo?

A. $350 to $400.

Q. Where from?

A. Pila Sanft.

Q. How was the money given to her?

A. I gave it to her."

Sioeli then explained in detail how the money had been paid across. He was asked by the police officer about Siaki's reward:

Q. Was Siaki given any money?

A. Not yet.

Q. What was the arrangement with Siaki about his pay?

A. I told Siaki I'd give him some stuff.

Q. What do you mean?

A. Siaki smokes and I thought if we get the parcel I'd give Siaki some.

Sioeli explained later in his interview that the "stuff" he referred to was marijuana and he confirmed that he had told both Siaki and Veiongo that the packages contained marijuana.

The Court was told that originally Pila Sanft had also been charged along with the three accused but that at the Preliminary Inquiry the Magistrate had discharged him.

As with any criminal case, the Crown has the onus of proving all the essential elements of each offence beyond reasonable doubt. The accused, as was their right, did not give or call evidence.

To establish the charge of importing against the first accused, the Crown must prove:

First, that (relevantly to this case) Indian hemp was imported into Tonga. The term "imported" is to be given its ordinary meaning of introducing or bringing into the country something from abroad, or causing or arranging for something to be brought in from abroad.

Secondly, that the person who imported the Indian hemp was the first accused, Veiongo.

Thirdly, that the first accused knew that what was being imported was Indian hemp and she intended that it should be brought into the country.

Mr Tu'utafaiva filed comprehensive written submissions raising a variety of issues and Crown counsel has responded. Rather surprisingly, however, neither counsel made reference to any relevant reported legal decisions.

The principal submission advanced on behalf of the first accused Veiongo is that she cannot be found guilty of importing the Indian hemp because her actions at the airport in claiming and clearing the box through customs occurred after the act of importation had been completed.

Did the First Accused "Import" the Indian Hemp?

The term "import" is not defined in the Drugs and Poisons Act (Cap 79) but Mr Tu'utafaiva referred the Court to a section in the (UK) Customs and Excise Management Act 1979 which deems the time of importation when goods are brought into the country by air to be when the aircraft carrying them lands in the United Kingdom or when the goods are unloaded, whichever is the earlier. Defence counsel invited the Court to adopt that same meaning in the present case. Mr Tu'utafaiva also made submissions in relation to the definition of an "importer" in section 2 of the Customs and Excise Act (Cap 67).

In response, Crown counsel also referred to definitions in section 2 of the Customs and Excise Act but he submitted that importation is "a continuous process" and the act of importation was not complete until, in this case, the box had been delivered out of the charge of the customs officers at the airport.

Issues similar to those raised above were considered some years back by the New Zealand Court of Appeal in two reported decisions which have relevance to the facts of the present case -- *Saxton v Police* [1981] 2 NZLR 186 and *R v Hancox* [1989] 3 NZLR 60.

As with the Tongan drug legislation there was no specific definition of the term "import" in the (NZ) Misuse of Drugs Act 1975 but in the *Hancox* case the Court of Appeal cautioned against seeking guidance in drug prosecutions from definitions contained in customs legislation. The definition of "importation" in the (NZ) Customs Act was not dissimilar to the deeming provision Mr Tu'utafaiva referred to in the (UK) Customs and Excise Management Act. It read:

> "For the purposes of this Act, goods shall, except where otherwise expressly provided, be deemed to be imported into New Zealand if and so soon as in any manner whatever, whether lawfully or unlawfully, they are brought or come within the territorial limits of New Zealand from any country outside those limits."

The Court of Appeal (p 62) said:

> "As the opening words emphasise, that definition applies only for the purposes of the Customs Act. While there are other statutory objectives, the Act is particularly concerned with the levying of duty and understandably fixes on the earliest time at which importation for that purpose could properly be considered to have occurred. The particular concern of the Misuse of Drugs legislation is quite different. The purpose of the legislation is to prevent the illicit use of drugs in New Zealand so far as that objective can be achieved through the criminal law. It is for that reason that the importation of drugs, which increases the availability of drugs within the country, is prohibited."

I need to say something, albeit briefly, about the facts of the two New Zealand cases. In the *Saxton* case the accused had posted a parcel containing hashish from England to a named person at a New Zealand address. The parcel was intercepted by customs officers in New Zealand and never reached the addressee. When the accused returned to New Zealand some two months later he was apprehended and charged with importing a controlled drug.

In the District Court the judge dismissed the charge on the ground that the ordinary meaning of the word "import" was to "bring into the country" and the action of the accused had not constituted an importation of the drug.

The Court of Appeal noted that the standard dictionary definition of "import" extended to include "to introduce from abroad" and it held that the actions of the accused in posting the parcel to New Zealand from England amounted to introducing it from abroad or causing it to be brought into the country from abroad and that, in turn, amounted to an act of importing. The accused was, accordingly, convicted.

The facts of the *Hancox* case are more relevant to those of the case before me. Customs officers located a parcel containing illicit drugs in a post office box at Auckland. They took and retained possession of that parcel.

Three days later they found a second parcel containing the same drugs and, after taking a quantity of the contents, they returned the parcel to the post office box. A few days later the accused was apprehended when she opened the post office box and removed the parcel. She disclaimed any knowledge of the contents and said that she

had simply been asked to clear the box by the boxholder and deliver the contents to him.

The accused was charged with importing the drugs into New Zealand. The trial Judge ruled that the act of the accused in uplifting the parcel from the post office box occurred at a time when the process of importation had not been completed. The jury duly found the accused guilty on the importation charge. The crucial question on appeal was when did the act of importation end.

Richardson J, delivering the judgment of the Court, said (p 62):

> ""To import" involves active conduct; and the bringing of goods into the country or causing them to be brought into the country does not cease as the aircraft or vessel enters New Zealand territorial limits. Importing into New Zealand . . . . is a process. It does not begin and end at a split-second of time. The element of importing exists from the time the goods enter New Zealand until they reach their immediate destination. It follows that the importer may be convicted even though the goods are intercepted by customs and never reach the addressee -- or are otherwise disposed of in transit. But the process does not end so long as the goods remain in transit, that is until any shipping and customs formalities are completed and the consignment is available to the consignee at its immediate destination . . . . **The goods have reached their immediate destination when they have ceased to be under the control of the appropriate authorities and have become available to the consignee or addressee.** Any involvement on the part of the importer or anyone involved as a party up to that point would properly be viewed as facilitating the importation of the goods into New Zealand."
>
> (emphasis added)

The Court concluded, on the facts of the case before it, that the cut-off point or final step in the transit process was when the goods were delivered into the post office box and, hence, made available to the consignee or addressee. The appeal was, therefore, allowed and the conviction on the importing charge was quashed.

This same approach was applied more recently in *George v R* (16 May 1996), CA 550/95. The completion of the importation process is a matter of mechanics – the passage of the drug – and is not determined by the planned method of transfer from courier to consignee: see *R v Atias (No 2)* (26 September 2003) High Court Auckland T025837, Harrison J. The accused's behaviour after completion of the importation may support an inference that he or she was involved in bringing about the importation: *R v Wickremasinghe* (21 August 2003, CA 137/03).

I find the reasoning of the New Zealand Courts in these cases compelling and I do not see why the same principles should not also apply in Tonga.

In the present case, at the time when Veiongo claimed the box and proceeded to clear it through customs the cut-off point had not been reached. The goods were then still under the control of the customs authorities and Veiongo's involvement, therefore, can properly be viewed as facilitating the importation of the goods into Tonga.

Mr Tu'utafaiva made a number of other submissions. In fact, he challenged virtually all of the evidence the Crown sought to rely upon in support of its case. I do not propose to traverse in this judgment all the relevant material counsel relies upon but he can rest assured that I have given full and careful consideration to all of the points raised in his submissions. I will now endeavour to deal with those other matters seriatim.

Mr Tu'utafaiva said that the three accused did not concede that the box and the Indian hemp came from Fiji on 7 February 2003. Be that as it may, I have no difficulty in concluding on the facts that the box did arrive in Tonga on the Pacific Link flight from Fiji on 7 February 2003 as alleged by the Crown.

Defence counsel also challenged the expertise of the Government Analyst, Siale'uvea Finau, who examined samples of the suspected material and gave evidence as to his findings. In the alternative, counsel submitted that the Crown had failed to prove that the plant material analysed was taken from the same plant materials found in the box at the airport.

I do not accept either submission. Mr Finau is a medical laboratory technician who has been employed in the laboratory services section at Viola Hospital since 1993. He holds a diploma in Medical Laboratory Technology (DMLT) from the Fiji School of Medicine. I was completely satisfied as to Mr Finau's expertise and in the meticulous presentation of his evidence. I have no hesitation in accepting the results stated in his written report of 11 March 2003 and confirmed in his oral evidence that the tested substance was marijuana or Indian hemp.

In relation to the samples analysed, Mr Tu'utafaiva submitted that there was evidence suggesting that the box and its contents had been tampered with. I do not accept that contention. There were some minor discrepancies in the Crown's evidence in connection with the chain of causation but I found them quite inconsequential and there was no evidence that there had in fact been any tampering or interference with the exhibits. I have no doubt at all that the samples analysed by Mr Finau which proved positive for marijuana were taken from the substance found in the packages in question.

Finally, Mr Tu'utafaiva submitted that the Crown had failed to prove that the first accused knew or ought reasonably to have known that the two packages contained Indian hemp. In this regard, defence counsel quite correctly pointed out that the statements made to the police by the two co-accused touching upon this aspect of the case must be totally disregarded when considering the evidence against the first accused. The same principle applies, of course, in relation to the unsworn statement of each of the three accused. Such a statement can be evidence against its maker but not against one of the maker's co-accused.

Mr Tu'utafaiva stressed that in her own statement to the police, Veiongo had said nothing other than that she believed the box contained peas and noodles. Crown counsel accepted that proposition but he submitted that there was strong circumstantial evidence to show that Veiongo knew that the packages contained Indian hemp. In this regard, the prosecutor referred to Veiongo's evidence about her movements on Friday the 7th of February. In her statement she told the police that she had been on office business at the One Stop Shop and Siaki had tracked her down and asked her to go with him to the airport to pick up a parcel, which was arriving on a flight from Fiji. She had agreed and she knocked off work and went with Siaki. When they could not locate the parcel at the airport they drove back into town and Siaki met

Sioeli under a mango tree at a certain rugby field. Veiongo then went on in her statement to the police to describe how she had gone with Siaki and made inquiries at Teta Tours, Air Pacific and the Post Office as to the whereabouts of the parcel. She said that when she had come out of the Air Pacific office Siaki had a taxi waiting for her and she actually took the taxi from Teta Tours to the Post Office and then back to her work. She was asked by the police officer who, had paid for the taxi and she had replied, "he didn't ask for any fare so I got out."

Mr Sisifa asked rhetorically why would Veiongo have taken significant time off work on the Friday and again on the Monday to do all this running around in search of a box containing peas and noodles. It is a fair question. Mr Sisifa also referred to the difficulty the police had in locating Veiongo on the Monday afternoon and evidence was given by one of her workmates of a ruse that she had used to trap the accused into giving herself up to the police. If Veiongo was so convinced that the box contained only peas and noodles why, asked the prosecutor, did she make the sudden departure from the airport once the contents of the two packages were discovered.

The Court is entitled, of course, to draw reasonable inferences from proven or admitted facts. The inferences Crown counsel invites the Court to draw from the facts he has highlighted are irresistible. The Court functions in the real world, not in some naive, surreal cloister.

I have no doubt that the first accused was fully aware that the box contained a supply of marijuana and that she intended that the drug should be brought into the Kingdom. For all the foregoing reasons, she is convicted on the importing charge.

The "Possession" Charge against the First Accused

The first accused is also charged with possession of Indian hemp. To have possession of something requires the person to have physical custody or control over it plus the required knowledge of its presence.

Whilst I am satisfied that Veiongo knew that the box contained marijuana, I am not so satisfied that she physically had the substance in her custody or control at any stage. On my understanding of the facts, apart from allowing Veiongo to clear the box through customs, the officers were at pains not to allow her to have physical custody or control of the box or its contents. The first accused is, accordingly, acquitted on the possession charge.

Charges Against the Second and Third Accused

The second and third accused are charged with abetment of importing Indian hemp. As the Court stated in *R v Makahununiu* [2001] Tonga LR 127:

> " An abettor is a person who was present (presence in this context may be either actual or constructive) at the time when a crime is committed by another person who intentionally aids or gives encouragement to the offender in the commission of the crime. The mere passive presence of the accused at the scene of the crime is not sufficient to make him an abettor. It must be shown that there was also some intentional aid or encouragement of the principal offender in the commission of the crime."

The Crown's case against Siaki is based upon his own admissions to the police and the evidence of the customs officer who saw him accompanying Veiongo at the airport. It has long been established that an admission made by an accused in an unsworn statement to the police may in itself be sufficient evidence to justify a conviction. In this regard I do not overlook the caveat Hampton CJ spoke about in *R v Fa'aoso* [1996] Tonga LR 36 when he said:

> "Where effectively, the only evidence is of something the accused has said, that something must be convincingly proved and in itself must be cogent and satisfying evidence."

I am satisfied as to the reliability of the confessions obtained by the police from both the second and third accused. After the initial skirmishing, both records of interview, in the end, had the ring of truth about them. Mr Tu'utafaiva sensibly seemed to accept that the charge against the second and third accused stood or fell together with the importing charge against the first accused.

The Crown has proved beyond reasonable doubt all the essential elements necessary to establish the charge against the second and third accused and they, along with the first accused, are convicted accordingly.

R v Funaki anors

Supreme Court, Nuku'alofa
Ford J
CR 440-445/03

7-10 March 2005; 20 April 2005

Criminal law – charge of theft – continuous offence - guilty
Criminal law – charge of abetment – not proved – all principals – not guilty

'Ofa Simiki was in business since 1996 trading under the name of "OSB Trading" wholesaling and retailing. She imported by the container-load, cartons of chickens, turkey tails and hot dogs from the United States and cartons of mutton and lamb products from New Zealand. On or about the months of June and July 2003 cartons of product were stolen from the containers on more than one occasion. There were six accused before the Court. The first accused, Siaosi Funaki, was charged with one count of theft and the five other accused were charged with abetting Funaki in the commission of the theft. Three of the accused, the first, second and sixth accused, all worked for the complainant. The second accused was her stepson. The second and sixth accused both lived at the complainant's house at the time of the alleged offending.

Held:

1. To establish a theft charge, it was not necessary for the Crown to prove that all the articles mentioned in the indictment had been stolen. If it was proved that the accused stole one of the items then that was sufficient.
2. The Courts have recognised it was possible to have a single count that alleged that on days within an overall period, the accused stole all the relevant property, provided that the conduct of the accused amounted to a continuous offence over a period of time. Such an allegation was usually referred to, as theft of a "general deficiency" and a count drafted in that way was not bad for duplicity.
3. The Court was satisfied that the charges had a common factual origin and the Court did not quash the indictments as being bad for duplicity.
4. The various accused all admitted an involvement and it was clearly an involvement as principal. However, the second, third, fourth, fifth, and sixth accused were not charged as such. Where the Court concluded that an accused person was not guilty of the offence specifically charged but the allegations in the indictment amounted to or included (expressly or by implication) an allegation of another offence then he may be found guilty

of that offence. That provision must be read subject to clause 13(d) of the Constitution, which provided that the substituted offence could not be a more serious offence. The Court, therefore, was not entitled to substitute the offence of theft for a count of abetment to theft.

5. The Court had no alternative but to acquit and discharge all of the accused with the exception of the first accused, notwithstanding their obvious involvement as a principal in one or more of the actual thefts.
6. The first accused admitted to theft and he was charged with theft. He was convicted accordingly on the one count of theft but only in respect of the goods to which he specifically admitted stealing.

Cases considered:

Machent v Quinn [1970] 2 All ER 255
R v Bleasdale (1848) 2 C&K 675
R v Firth (1869) LR 1 CCR 172
R v Henwood (1870) 11 Cox 526
R v McCabe [1992] Crim LR 885
R v Makahununiu [2001] Tonga LR 127
R v Saafi [2004] Tonga LR 242
R v Sheppard (1868) 11 Cox 234
Wilson v Read [1956] Crim LR 418

Statutes considered:

Constitution of Tonga (Cap 2)
Criminal Offences Act (Cap 18)

Counsel for the Crown	:	Mr Sisifa
Counsel for first accused	:	Mr Kengike
Counsel for second and sixth accused	:	Mr Tu'utafaiva
Counsel for third, fourth, fifth accused	:	Mr Fakahua

Judgment

Background

There are six accused before the Court. The first accused, Siaosi Funaki, is charged with one count of theft and the five other accused are charged with abetting Funaki in the commission of the theft. The particulars of the theft count set out in the indictment read as follows:

> "PARTICULARS
> Siaosi Fata Funaki
> On or about the month of June and July 2003, at Fanga, you stole: 365 cartons of chickens, 13 cartons of hot dogs, nine cartons of mutton neck (sic), five cartons of turkey tails, these properties amounted to a total value of T.$19,045.00 belonging to 'Ofa Simiki."

'Ofa Simiki told the court that she has been in business since 1996 trading under the name of "OSB Trading". She described her business as wholesaling and retailing. The evidence was that she imports by the container-load, cartons of chickens, turkey tails and hot dogs from the United States and cartons of mutton and lamb products from New Zealand.

The two containers were apparently always stored to the side of the building in which the OSB shop is situated. As product was required in the shop, it would be taken by the complainant's delivery truck from the container to the shop and all leftover would then be returned to the container by the same method each night. Although the evidence was rather vague, it would appear that deliveries were also made from time to time directly from out of the containers to other retail stores around Nuku'alofa. The accused Funaki, Simiki and Burke were responsible for these particular tasks.

The evidence was confusing as to whether there were, in fact, one or two containers located to the side of the OSB building. In the end, I do not think that anything hinges on the point and so I have proceeded on the basis that, at all material times, there were two containers but I acknowledge that that factual statement may not be correct; the Crown's evidence on the matter was quite ambiguous.

'Ofa Simiki explained in evidence how at any one time she would employ on the average approximately 15 staff but her employees are invariably young people with a low level of academic achievement. Her mission, she told the Court, is to provide an opportunity for such youngsters to try and make something out of their lives. The complainant explained that her employees are not given any specific job descriptions. They are expected to help each other and work in whatever area of the business the demand may, from time to time, require.

The evidence was that three of the accused, the first, second and sixth accused, all worked for the complainant. The second accused is, in fact, her stepson. The second and sixth accused both lived at the complainant's house at the time of the alleged offending.

The Crown Case

'Ofa Simiki wrote a letter dated 17 July 2003 which formed the basis of her complaint to the Police. The letter, as translated, read:

> "Sir,
> I 'Ofa Simiki, 43 years old, residing at Fangaloto, do wish to make a complaint in regard to my container which was stationed at my shop at Fanga. Inside were 945 cartons at 15 kg each -- 50 boxes of hot dogs, 20 boxes of crab meat, 100 boxes of turkey tails. I have proved today that 365 cartons of chickens, 13 cartons of hot dogs, five cartons of turkey tails and nine cartons of lamb necks have disappeared.
> So the items that have disappeared are like this:
> 9 cartons of lamb necks x $96 = $864.00
> 365 cartons of chickens x $47 = $17,155.00
> 13 cartons of hot dogs x $57 = $741.00
> 5 cartons of turkey tails x $57 = $285.00
> total = $19,045.00

> I have gathered information from 'Akosita Tangulu, Salesi, Paula, Lini that this is what has disappeared.
> Thank you
> 'Ofa Simiki."

'Ofa may have been able to satisfy herself as to the nature and amount of product that had disappeared from her container or containers but she did not produce any documentation whatsoever to back up her claim and when challenged in cross-examination on this aspect of the case, I found her evidence less than convincing.

The Crown is required to prove all the elements of the various charges beyond reasonable doubt. 'Ofa said that she had relevant supporting documentation which would establish the figures she gave to the Court but the documentation was not produced in evidence. It should have been. Unless the prosecutor had a clear agreement with defence counsel that these matters were not in dispute then it behoved him to produce the evidence needed to back up the Crown's case.

Nevertheless, having regard to the totality of the evidence before the Court, I am prepared to accept, as proven beyond reasonable doubt, that cartons of product were stolen from the containers on more than one occasion over the two-month period in question.

To establish a theft charge, it is not necessary for the Crown to prove that all the articles mentioned in the indictment had been stolen. If it is proved that the accused stole one of the items then that is sufficient -- see *Machent v Quinn* [1970] 2 All ER 255.

The case for the Crown in opening was that the charge arose out of six separate incidents during June and July 2003 where all or some of the offenders were involved.

Apart from 'Ofa Simiki, the Crown also called evidence from 'Anau Ngalu. 'Anau told the Court that she was working at the OSB store in 2003 on clerical duties and she and 'Ofa kept the keys to the containers. She had been instructed by 'Ofa to give the keys to "the boys" when they needed them but the boys were meant to return the keys to the office or to 'Ofa after use. 'Anau related how, sometime in June or July 2003, she had given the keys to the containers to the first accused, Funaki, and he had failed to return them but she said that she had not realised that the keys had not been returned until after the theft had been discovered.

The next witness called by the Crown was Malusiu Motulalo ("Malu"), a 31-year-old motor mechanic from Kolomotu'a. Malu told the Court about one incident on the night of 16 July 2003. He was asleep at his home and he was woken by the accused Holani and asked if he had a vehicle available to make some deliveries. Malu agreed to make available a 3 ton truck he had been working on which actually belonged to Holani's father on condition that he go with them and that he drives the vehicle. He was paid $100 to make the delivery from the containers to a Chinese shop.

Malu said that there were four people involved in loading the truck with cartons from the containers but he could identify only Holani, Funaki and Tu'itakau. The witness told the court that he had no idea that there was anything unlawful going on because nothing was broken into. He explained how, when they arrived at the shop, Funaki went into the shop using a key and then another key was used to open one of

the containers. He also made the observation that the containers were parked under a bright outside light.

Malu explained how two of the men fetched the cartons from out of the container while the other two were up on the deck of the truck stacking the cartons in place. He estimated, but he was not certain, that there could have been more than 100 cartons taken from the containers that night and delivered to the Chinese shop.

Another witness for the Crown was Salesi Funaki (the Court was not told if he is related to the first accused). Salesi was returning home that same night and as he turned into his residence not far from the OSB store he noticed the truck with the cartons on the back pulling out onto the main road. He immediately recognised one of the people on the back of the truck as the first accused, Funaki, because he was a frequent customer at the OSB store where Funaki worked. The witness was unable to identify anyone else on the truck but he told the court that, because of the late hour, he was suspicious that they might be stealing and so he took a note of the vehicle's registration number.

The only other witness for the Crown was a police investigating officer, Lance Cpl 'Ahofono, although there was a challenge on the voir dire by Mr Fakahua on behalf of his three clients and three other police officers gave evidence during the hearing on the voir dire.

The First Accused

As was their right, none of the accused gave or called evidence but they each made unsworn statements to the police, which the Crown case relies upon to a large extent. In his "record of interview", the first accused, Funaki, who is charged with theft admitted stealing 'Ofa Simiki's goods from the container about six times. The interview continued:

> "Q. What did you take the first time and how much?
> A. 10 cartons of chickens and five cartons of mutton flaps.
> Q. When was the second time?
> A. June.
> Q. What did you take and how much?
> A. 10 cartons of chickens and five cartons of mutton flaps.
> Q. What about the third time?
> A. 15 cartons of chickens.
> Q. And the fourth time?
> A. Seven cartons of chickens and seven cartons of mutton flaps.
> Q. And the fifth time?
> A. 10 cartons of chickens.
> Q. What about the sixth time?
> A. 80 cartons of chickens, five cartons of hot dogs and nine cartons of lamb necks."

Funaki went on in his unsworn record of interview to say that all the stolen goods were sold to two Chinese shops at Kolomotu'a and the $4000 received in return was shared between all the boys who had stolen the goods. He named four of the other five accused but, of course, an unsworn statement made by an accused person cannot be used as evidence against anyone else apart from himself.

The Other Five Accused

The remaining five accused are charged with abetment to theft. The indictments are identical. They read:

> "STATEMENT OF OFFENCE
>
> ABETMENT TO THEFT, contrary to sections 8 and 143 of the Criminal Offences Act
>
> PARTICULARS OF OFFENCE
>
> (Name of accused), on or about the month of June and July 2003, at Fanga, you abetted Siaosi Fata Funaki in which you assisted him in stealing 365 cartons of chickens, 13 cartons of hot dog, nine cartons of mutton neck, five cartons of turkey tail, these properties amounted to a total value of T. $19,045.00 belonging to 'Ofa Simiki."

As this Court stated in *R v Makahununiu* [2001] Tonga LR 127 at 130:

> "An abettor is a person who was present (presence in this context may be other actual or constructive) at the time when a crime is committed by another person and who intentionally aids or gives encouragement to the offender in the commission of the crime. The mere passive presence of the accused at the scene of the crime is not sufficient to make him an abettor. It must be shown that there was also some intentional aid or encouragement of the principal offender in the commission of the crime."

The Unsworn Statements

As mentioned, the Crown relies to a large extent upon the unsworn record of interview of each accused and certain other police documentation to the extent that such evidence was ruled admissible after the voir dire hearing. Reference has already been made to the first accused's record of interview.

In relation to the police documentation produced in respect of the second accused, Simiki, Mr Tu'utafaiva, in his detailed written submissions, analysed the series of questions and answers recorded in the record of interview and he made the very valid point that many of the questions are ambiguous and confusing because in parts when Simiki is describing the movements of cartons from a container into the truck he is obviously talking about his regular work routine as an OSB employee. Likewise, the "sales" Simiki talks about making with goods loaded from the container into the truck could well be sales to retailers. The questions asked by the police officer are simply unclear. In his record of interview, Simiki denies any involvement in the thefts.

Mr Sisifa acknowledged that Simiki, in answering a number of questions, denied any knowledge of the thefts, but he submitted that the accused contradicted his answers in his response to other questions. Crown counsel relies upon Simiki's answers in the statement of charges: "Yes it is true" and in his voluntary statement: "What had happened is true, but the value of the amount that I was involved in is too

much." At that stage, however, Simiki had been charged by the police, not with abetment to theft, but with the offence of theft as a principal.

The third accused, Uhi, admitted in his police record of interview to stealing 80 cartons of chickens and five cartons of mutton flaps from a container at 'Ofa Simiki's shop and taking them to two Chinese shops. Uhi was asked how many times he stole goods from the container. He answered twice -- once when Malu drove the three ton truck and on another occasion when he took and pawned five cartons of mutton flaps.

Uhi was also asked by the Police Interviewing Officer whether he knew he was stealing and he replied, "yes". He was duly charged in the Magistrates' Court, along with the other accused, with, "theft of 365 cartons of chickens, 13 cartons of hot dogs, nine cartons of lamb necks, five cartons of turkey tails belonging to 'Ofa Simiki worth a total amount of $19,045." In this Court he, like the other accused apart from Funaki, has been indicted, not with theft, but with "abetment to theft."

The fourth accused, Holani, admitted in his record of interview taking goods from the container on two occasions. The first, when Malu drove the three ton truck. Holani told the police officer that he stood on the back of the truck stacking the cartons as they were brought out of the container. He said that they took 22 cartons that night and sold them to various Chinese shops. Holani said in his statement that on a second occasion in July, he and others took 30 cartons of chickens from one of the containers.

The fifth accused, Tu'itakau, admitted in his record of interview stealing cartons from a container on one occasion only in July, namely, when they used the three ton truck driven by Malu. He said that on that occasion they took 30 cartons of chickens and five cartons of mutton flaps and sold them to a Chinese store. Tuitakau said that he only found out when he arrived at the container that the boys were going to steal goods from the container but he said, "I thought I'd take part in the theft."

The final accused, Bourke, admitted in his record of interview stealing "20 plus" cartons of chickens from inside the shop on about five occasions and another eight cartons from a container on one occasion. He said that all the thefts took place in June.

Submissions and the Law

In his general submissions on the Crown case (which I will treat as submissions made of behalf of all the accused), Mr Tu'utafaiva attacked the form of the indictments as being bad for duplicity in that the one Count alleges that a number of thefts took place over a two-month period in June and July whereas no more than one offence should be charged in a single count.

In response, Mr Sisifa submitted that "because the dates, actual goods and amounts cannot be ascertained" the case falls within the "continuous offence" principle. Reliance in this regard was made on the old authority of *R v Henwood* (1870) 11 Cox 526 and the more recent case of *R v McCabe* [1992] Crim LR 885.

In the *Henwood* case, the defendant was charged with one count of theft of a number of articles from his employer over a nine-year period there being no evidence as to when the articles had been stolen or on how many occasions. Bovill C.J. said:

> "Had there been evidence of distinct takings, it would have made no difference, for the case then would have been similar to the taking of coal at different times in a mine (*R v*

> *Bleasdale* (1848) 2 C&K 675), and the case of cutting trees at such times as to form one continuous taking (*R v Sheppard* (1868) 11 Cox 234)."

In *McCabe*, it was held to have been appropriate to charge one offence of 76 library books that were found together in the defendant's home which must have been taken from one or more of the 32 different branches of a library that were all owned by the same local authority.

Counsel did not produce a copy of the judgment in the *McCabe* case and the decision is not fully reported in the citation given; all that appears is the headnote. What is stated in the headnote does not seem to fit easily into the single activity category of case. In reference to *McCabe*, Archbold 2001 also makes the point (p1-143a) that:

> "The commentary in the Criminal Law Review highlights the difficulty of applying the principle in respect of certain types of offence."

As is noted in Blackstone's Criminal Practice, third edition (p.8.10), "theft is clearly not a continuous offence." The same text does, however, acknowledge the difficulty prosecutors have in drafting an indictment for theft where the evidence is that the accused on numerous occasions over a lengthy period stole items of property but it is not possible to particularise the exact days on which the appropriations occurred. To overcome the difficulty, the Courts have recognised it is possible to have a single count alleging that on days within an overall period, the accused stole all the relevant property, provided that the conduct of the accused amounted to a continuous offence over a period of time. Blackstone observes that such an allegation is usually referred to, as theft of a "general deficiency" and a count drafted in this way is not bad for duplicity. The learned authors go on to state (p D8.16):

> "The test as to whether it is proper to have a single count is: Can the separate acts attributed to the accused fairly be said to form a single activity or transaction. It follows from that test that, if the particulars of a count can sensibly be interpreted as alleging a single activity, it will not be bad for duplicity, even if a number of distinct criminal acts are implied. Thus the rule against duplicity rests ultimately on common sense and pragmatic considerations of what is fair in all the circumstances."

I note that English case law has also acknowledged that a continuous taking or a taking over a period where it is not possible to prove discreet offences should be treated as one theft: *Wilson v Read* [1956] Crim LR 418; *R v Firth* (1869) LR 1 CCR 172.

Blackstone makes another important point relevant to the present case (p D8.23):

> "Where a count is bad on its face for duplicity, the defence should move to quash it before the accused is arrained. Although the objection can be taken at a later stage, the Court of Appeal has disapproved of the defence postponing the

> application to quash for purely tactical reasons . . . In cases of quasi-duplicity, the defence should wait until the close of the prosecution case."

In the present case, objection on the grounds of duplicity was raised for the first time in defence counsel's submissions at the end of the case. No specific miscarriage of justice on this ground alone, however, has been claimed by the defence. I am satisfied that the charges do have a common factual origin and, in all the circumstances, I do not intend to quash the indictments as being bad for duplicity.

The other general submission raised by Mr Tu'utafaiva again relates to the wording of the indictments. The point counsel makes is that all the accused, apart from the first accused, are charged not with theft but with abetment of theft and they are not charged with jointly abetting the first accused or with acting for a common purpose.

The first defence raised under this head is that the indictments disclose no offence because the relevant wording of section 8 of the Criminal Offences Act provides:

> "Every person who directly or indirectly commands, incites, encourages or procures the commission of an offence by any other person is an abettor" but the particulars of the offence allege that the five accused "assisted" the first accused. Mr Tu'utafaiva submitted that as "assisted" is not a term used in section 8, then the indictments do not disclose any offence. In the alternative, counsel submitted that, in any event, there is no evidence that the five accused abetted the first accused by assisting him in stealing the goods in question.

In response, Mr Sisifa submitted that the indictments clearly state the offence against the five accused as abetment of theft, thus satisfying the requirements of clause 11 of the Constitution. In relation to the particulars, Crown counsel submitted that the word "assisted" as it appears in the particulars of the offence means the same thing as the term "encourages" which does appear in section 8.

Even accepting that submission, however, it begs the question, why did the draughtsman not use "encourages" which is the word used in the statute. The omission has the hallmarks of drafting sloppiness. Returning to Blackstone, the learned authors state (p A5.1):

> "The phrase "aid, abet, counsel and procure" maybe, and generally is, used as a whole even though the accused's conduct may only be properly described by one of the four constituent words. Partly for this reason, the precise meaning of each constituent word has not been authoritatively determined, but "aid" and " abet" are generally considered to cover, respectively, assistance and encouragement given at the time of the offence, whereas "counsel" and "procure" are more apt to describe advice and assistance given at an earlier stage."

Archbold Criminal Pleading, Evidence and Practice (2001, and Supplement 2003) (p 7.78), states that a conviction will not be rendered unsafe on account of some drafting

or clerical error, or omission, or discrepancy, or departure from good or prescribed practice."

McElrea J noted in another case involving a challenge to an indictment -- *R v Saafi* [2004] Tonga LR 242 at 249, that:

> "Standing back from the cases and returning to the requirements of the Constitution, the question is whether the offence with which the accused is charged is clearly stated in the indictment."

Findings

I accept that the particular requirement highlighted by McElrea J has been complied with but there is another element to clause 11 of the Constitution which is of particular relevance to the present case and that is the requirement that the grounds of the charge must be clearly stated in the particulars.

One of the points made forcefully by defence counsel is that the particulars of the offence do not set out the grounds relied upon in support of the claim that the five accused abetted the first accused in the commission of the theft. Defence counsel ask rhetorically, how are the five accused alleged to have abetted the first accused.

It is a fair question and it has particular relevance in the present case because, to the extent that the accused were involved in the commission of an offence, it seems clear that they were joint principals rather than abettors.

There is nothing in the particulars to indicate how the Crown alleges that the five other accused abetted the first accused. In their statements to the police their admitted involvement was as principals to the crime of theft and they were each charged in the Magistrates' Court with the offence of theft. What changed, defence counsel might well ask, between the laying of the charges in the Magistrates' Court and the presentation of the indictments in the Supreme Court where the offence is described as abetment to theft.

The usual practice is to charge a person as an abettor when he or she could not possibly have been guilty as a principal offender. That does not appear to be the situation in the present case. Blackstone (p A 5.1) states:

> "A principal offender is the actual perpetrator of the offence, the person whose individual conduct satisfied the definition of the particular offence in question, whilst an accessory is one who aids, abets, counsels or procures the commission of the offence."

Both Mr Tu'utafaiva and Mr Sisifa cited (with different emphasis) the following passage from Smith & Hogan, Criminal Law, 10th edition, p145:

> "Anyone whose assistance or encouragement in fact caused another to commit a crime would be a principal. The separate body of law of accessory liability is based on the assumption that the accessory does not cause the actus reus."

In the present case, to the extent that the various accused admitted an involvement, it was clearly an involvement as principal. Why they were not charged as such is not

apparent to the Court but, as I have said on previous occassions, it is not up to the Court to patch up the prosecution case.

Section 42(3) of the Criminal Offences Act provides that where the Court concludes that an accused person is not guilty of the offence specifically charged but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence then he may be found guilty of that offence.

That provision, however, must be read subject to clause 13(d) of the Constitution, which provides that the substituted offence cannot be a more serious offence. The Court, therefore, is not entitled to substitute the offence of theft for a count of abetment to theft.

For the foregoing reasons, notwithstanding their obvious involvement as a principal in one or more of the actual thefts, and distasteful as it is for that reason, I find that I have no alternative but to acquit and discharge all of the accused with the exception of the first accused.

In relation to the first accused, Funaki, the position is different. He admitted to theft and he was charged with theft. I am satisfied on the basis of his admissions and the other evidence adduced by the Crown that all the elements of the charge of theft have been established in his case beyond reasonable doubt.

Mr Kengike's submissions were confined in the main to challenging the admissibility of Funaki's statements to the police but counsel did not challenge the admissibility of that evidence on the voir dire hearing. In fact, Mr Kengike did not participate in the voir dire hearing which occupied a full day of the trial. As a consequence, the allegations of oppression and unfairness, which he has made in his closing submissions, were never put to the police officers concerned and they have never had the opportunity to respond. In any event, I find no reason for excluding that evidence.

The first accused is convicted accordingly on the one count of theft but, for the reasons stated earlier, only in respect of the goods to which he has specifically admitted stealing.

Sevele v Saulala

Supreme Court, Nuku'alofa
Ford J
CV 105/2002

11-13 April 2005; 28 April 2005

Practice and procedure – verbal settlement of action claimed – not proved

The plaintiff claimed that on or about the 21st day of November 2003 the defamation action was settled out of Court by a verbal agreement between the parties' respective solicitors. The defendant denied that any such agreement was ever reached.

Held:

1. The onus of proof was on the plaintiff to establish his case on the balance of probabilities. The plaintiff failed to persuade the Court that the parties settled the proceeding by an agreement entered into verbally between their respective solicitors on or about the 21st of November 2003, as alleged in the plaintiff's second amended statement of claim.
2. The Court observed that the parties had already encountered problems in October 2003 which resulted in the defendant's application to the Court for an order enforcing a settlement agreement which the plaintiff denied had ever been reached. Against that background, it behoved counsel to take extra precautions the second time around to ensure that all the terms of any settlement were well and truly recorded in writing with the t's crossed and i's dotted before any formal announcement was made that the proceeding had been settled.
3. The plaintiff's action on the settlement failed. His defamation cause of action remained extant. The defendant was entitled to costs to be agreed or taxed.

Case considered:

Allison v KPMG Peat Marwick (1994) 8 PRNZ 128

Counsel for plaintiff : Mr Waalkens QC
Counsel for defendant : Mr Edwards and Mr Kaufusi

Judgment

The Issue

The plaintiff claims that on or about the 21st day of November 2003 this proceeding, which commenced as a defamation action, was settled out of Court by a verbal agreement between the parties' respective solicitors. The defendant denies that any such agreement was ever reached. Whether or not there was such a settlement is the issue before the Court.

The Background

The plaintiff is a prominent businessman in Tonga and at all material times he was the number 2 Peoples' Representative from Tongatapu in the Legislative Assembly. Following the most recent general election in March 2005, the plaintiff was appointed Minister of Labour & Commerce in the newly announced Cabinet. As at the date of delivery of this judgment, he is the acting Prime Minister of Tonga.

The defendant is the owner and, up until recently, was the editor of a weekly newspaper called the "Tonga Star". He is also the manager of the OBN television station.

On the 4th of February 2002 the Tonga Star published a letter to the editor, which the plaintiff alleges was seriously defamatory of him. It is claimed that the statements made in the letter meant that "the plaintiff had committed a felony." The plaintiff instructed a local lawyer, Mr Laki Niu, and the present proceedings were issued on 13 February 2002. The defendant instructed Mr William Edwards as his lawyer and a statement of defence was duly filed denying virtually all of the allegations made in the plaintiff's statement of claim apart from publication.

The case was initially set down for trial before a Judge alone on 25 September 2002 but various interlocutory matters then arose which meant that the September fixture and a subsequent fixture made for July 2003 had to be vacated. The hearing was eventually fixed before a judge and jury for five days commencing 17 November 2003.

"Without Prejudice" Correspondence and Negotiations

At the commencement of this hearing, which was confined to the alleged settlement cause of action, I heard legal argument as to whether the Court was entitled to have regard to correspondence passing between solicitors which was clearly marked "without prejudice" and settlement negotiations that were conducted on a similar basis. I gave a ruling that such evidence was admissible and in my ruling I made reference to the following passage from Cross on Evidence, 7th Australian edition (2004), [25380]:

> "Once negotiations have been completed as a result of without-prejudice interviews or letters, a binding contract has been brought into existence and this may, of course, be proved like any other contract. But this does not make the communications which led to the compromise discoverable to other parties nor does it remove the privilege attending to these communications. However, the Court may examine the

> communications in order to see whether a contract has been arrived at."

Subsequent research has revealed a relevant New Zealand authority in this area of the law and I respectfully adopt the following statement of principle from the judgment of Anderson J in *Allison v KPMG Peat Marwick* (1994) 8 PRNZ 128, 131:

> "The without prejudice rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. The rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it. One of the exceptions, which is very relevant to the present case, is that without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement."

The First Alleged Settlement

Senior counsel for the defendant, Mr Clive Edwards, is the father of the defendant's original solicitor, William Edwards, and so, to avoid confusion, I will refer to William by his first name and for the sake of consistency, for the most part, I will refer to Mr Niu by his first name, "Laki".

It appears that settlement discussions were first broached in September 2003. On 10 October 2003 Laki wrote a without prejudice letter to William which commenced as follows:

> "You will recall that we spoke about settlement of this matter and to leave it to our respective clients to work it out and let us finalise it.
>
> I have spoken to my client about it and he has instructed me to attend to it on his behalf and let him know the outcome for his approval. . . ."

The letter proposed a settlement made up of damages $125,000, costs $12,500, plus an apology.

On 13 October William responded pointing out that "the demands" sought could not be acceded to for several reasons including the fact that the plaintiff had allegedly already personally offered to settle his claim with the defendant in the presence of witnesses without damages for disclosure of the real name of the letter writer, named in the newspaper as "Ate Fulufulu" -- (a non de-plume) and payment of his lawyer's costs in the form of free programming time on OBN television to that same value. William indicated that in respect of the apology, "we are open to continued dialogue".

At a Directions Hearing held in Chambers on 5 November 2003, William indicated to the Court that the parties had already settled and that he was proposing to file an application to enforce the settlement. He did so later that same day. The defendant swore a supporting affidavit in which he deposed that the case had settled. Mr Saulala said in part of his affidavit:

> "4. In order to embark upon settlement negotiations, I instructed my lawyer to approach Mr Laki Niu, counsel for

> the plaintiff, outside the Supreme Court and request whether it would be in order for me to speak to his client and to discuss settlement. I was granted permission by Mr Niu to discuss settlement with the plaintiff.
>
> 5. I had made inquiries as to the whereabouts of the plaintiff, I initiated settlement negotiations with him when he came down to OBN television to participate in a programme to be broadcast on 23 September 2003.
>
> 6. During our conversation we discussed terms and he indicated that he would take care of his own lawyer's costs if I would give him time on OBN television to the amount of his lawyer's costs. I agreed on that and also agreed to publish an apology as well as disclose the name of the author of the article which is the subject of these proceedings. He did not indicate in what amount the lawyer's costs were at that stage. I agreed to give free air time and we both agreed that the lawyers would formulate the terms to be filed in court. I regarded the matter as settled and nothing the plaintiff had said to me indicated that he did not agree with what had been proposed."

In his affidavit, the defendant further alleged that pursuant to the agreement he had already made free airtime available to the plaintiff and his colleagues from the Tonga Human Rights and Democracy Movement and other Peoples' Representatives in the Legislative Assembly.

The plaintiff filed a notice of opposition to the defendant's application to enforce settlement. The stated grounds of opposition were:

> "There was never any compromise or agreed settlement at all between the plaintiff and the defendant or as alleged by the defendant in his application dated 5/11/03."

The plaintiff filed a supporting affidavit where he strongly denied that he agreed to settle the case along the lines stated by Mr Saulala. He said that the discussion referred to lasted no longer than "one or two minutes" and that "I clearly stated to Mr Saulala that I definitely wanted the settlement to be negotiated by our two respective lawyers."

The Second Alleged Settlement

As it turns out, the settlement negotiations I have just referred to are not the settlement negotiations upon which the present cause of action is based. The present cause of action is based on subsequent negotiations, which are alleged to have commenced from on or about the 7th of November 2003.

The Court file notes that on Friday 7 November 2003 both counsel appeared in Chambers for a Directions Hearing at 9 a.m. and a further Directions Hearing was then scheduled for Monday 10 November. There was a wide disparity in the evidence as to the events that unfolded as from Friday the 7th of November 2003.

The Plaintiff's Case

Laki told the Court that after the Chambers hearing on the Friday morning he and William talked in the car park outside the Court and later that same morning he received a settlement proposal in a telephone call from William. The offer was:

1. There would be an apology (in the terms of the apology that Laki had apparently earlier drafted);
2. There would be disclosure of the name of the letter writer;
3. The plaintiff's legal costs were accepted by the defendant at $12,500 but the defendant alleged that the plaintiff already owed $3750 for broadcasting time. The proposal, therefore, was that the balance of $8,750 would be paid by a $5,000 cash payment within 14 days and the balance of $3750 would be paid on 22 December 2003.
4. The plaintiff would be entitled to $20,000 worth of free programming time on OBN calculated at a rate of $250 for half an hour or $500 per hour.

Laki said that he made a file note recording that offer and later that same day, after contacting his client, he telephoned William and conveyed a counter offer in the sum of $32,500 made up of damages $20,000 and costs $12,500 along with the draft apology. The $32,500 was to be paid in instalments with $5,000 payable immediately "upon signing"; $5,000 on 14/11/03; $7,500 on 21/11/03 and the final instalment of $15,000 would be payable on 7 February 2004.

Laki's evidence was that William came back to him, still on Friday 7 November, with a further proposal, which again was not acceptable to Mr Sevele. Mr Sevele did, however, agree to extend the instalment dates under his earlier proposal to 30/11/03, 20/12/03, 31/1/04 and 31/3/04 respectively (the year for the last two dates is wrongly shown in Laki's file note as 2003). Mr Sevele also wanted a provision included allowing for judgment in default in the event of any default in the instalment payments.

Laki made file notes of the conversations, or some of the conversations, he had with William and Mr Sevele. The file notes were recorded on two foolscap pages torn from a pad, which Laki told the Court he kept by his telephone. The record of the first conversation with William takes up the complete first page and it is clearly dated 7/11/03 but the notes of the subsequent telephone conversations recorded on the second page are all undated. Laki was adamant that they had also taken place on Friday 7 November but Mr Edwards submitted it was more probable that they were recorded on Monday 10 November.

Mr Waalkens in response referred to some words written towards the top of the second page of notes, which have been crossed out, but they appear to have read, "upon signing Monday" and he submitted that they could only have been written on the Friday. Mr Niu, when asked, could not recall why he had crossed the words out.

I find the evidence on the matter equivocal. I accept that the words crossed out were most likely written on the Friday but it by no means follows that everything that then appears after the crossed out words were also written on the Friday. As it turns out, it is not necessary for me to make a firm finding on this particular issue. I do make the observation, however, that whenever the final note on the second page was made, which records the last conversation Laki had with his client in which Mr

Sevele agreed to extend the instalment dates, there is no corresponding handwritten note confirming that that amended proposal was then conveyed by Laki to William.

The next development occurred shortly before 9 am on Monday 10 November 2005. Laki said that he was waiting outside the Court to attend the Chambers Directions Hearing when William arrived in a hurry to go elsewhere and said to him, "Sangster has agreed to the terms proposed. You can convey that to the Judge." Laki said that he then attended in Chambers on his own and he conveyed to the Judge that "we had settled". The Court then made an Order noting that Mr Niu had confirmed that the parties had settled and he expected to be able to file a memorandum of settlement in the near future. The fixture for 17 November 2003 was vacated.

Laki said in evidence that following the Chambers Hearing he returned to his office and drew up a document confirming the terms of settlement ("the draft agreement"), which he had faxed to William's office on the same day, for signing by Mr Saulala and William, along with a Notice of Discontinuance and a draft apology. There was no covering letter sent with the documents.

The draft agreement was headed "SETTLEMENT OF ACTION" and consisted of four paragraphs. The first paragraph referred to the apology; the second set out the instalment dates for payment of the $32,500; the third related to the filing of a Notice of Discontinuance and the fourth provided for the entry of judgment in default together with interest if the instalments were not paid by the due date. Laki accepted that the contents of clauses 3 and 4 had not, at any stage, been discussed with William.

Laki told the court how he later received a message from his secretary that William had requested a hard copy of the settlement memorandum and an original had been delivered to his office. On 14 November 2003 Laki faxed a handwritten letter to William, which read:

> "William,
>
> Re: Sevele v Saulala
>
> Please let me have your comments re draft settlement which I faxed you on Monday 10/11/03. If it is in order please let me know so that I can have my client sign & I'll forward it for your client's signature. We need to confirm the adjournment of the case in writing to the Court, as I had told the Judge.
>
> Thanks, Laki."

Continuing in evidence, Laki said that he still did not hear from William but he met up with him again on Friday 21 November outside the Chief Justice's Chambers and he asked him what had happened regarding the settlement. He said that William asked him if he could send him the original because he needed it for his client's signature. Laki pointed out that he had already sent him an original but he returned to his office and instructed his secretary to deliver another one.

On 1 December Laki and William met again outside the Chief Justice's Chambers and Laki told the Court that on that occasion he asked William what was happening because he had heard nothing further and the first instalment was then overdue. He said that William explained how he was having problems contacting his client and he commented that Mr Saulala was trying to get his father to pay. William

suggested that Laki should try to speak to Mr Saulala directly and he gave him a New Zealand contact number to call. Laki said that he tried to make contact but was unsuccessful.

On 2 December Laki wrote a letter to William, paragraph 4 of which received some attention during the hearing. I set out paragraphs 3 and 4 in full:

> "3. I had faxed you the agreement of settlement on 10/11/03 for confirmation so that we could have it signed by our clients and ourselves.
>
> 4. You subsequently informed me after about a week and a half that the draft was OK and to let you have the original to have your client sign and return to me. You were given those on 21/11/03. (My clerk gave them to your clerk and your clerk came into your office and gave them to you and then informed my clerk that she had given them to you). To date you still have not returned them to me."

Laki did not hear anything in response to his letter and so on 12 December 2003 he filed an application for final judgment. The principal ground for his application was that the parties had made an agreement for settlement of the action on 10/11/03.

Subsequent Developments Regarding Court Fixture

The Court fixed a Directions Hearing for 13 February 2004 and on that day William sought leave to withdraw as Mr Saulala's counsel upon the grounds that he had been unable to obtain instructions from his client. Leave was granted upon condition that a further Directions Hearing would be held on 25 February 2004 and if the defendant wished to oppose the plaintiff's application for judgment then he would need to file a notice of opposition by 20 February 2004.

The defendant then proceeded to instruct Mr Kaufusi as counsel and Mr Kaufusi duly filed a notice of opposition to the plaintiff's application for judgment. At that stage, of course, there were two applications for judgment before the Court:

> (1) The original application filed by the defendant dated 5 November 2003 based on an alleged compromise and settlement of the defamation action and;
> (2) The second application filed on behalf of the plaintiff on 12 December 2003 alleging a different compromise and settlement.

Both applications for judgment were awaiting a hearing date.

At the Directions Hearing on 25 February 2004 both Mr Niu and Mr Kaufusi appeared in Chambers but neither counsel sought a hearing date in connection with their respective applications for judgment. Instead, Mr Niu sought and was granted a fixture for the substantive defamation claim before a Judge and jury during the week commencing on 11 April 2005. The defendant, in turn, was granted leave to file an amended statement of defence.

Following on from there, various interlocutory matters were dealt with by the Court from time to time. At one point, the date for the jury trial was brought forward to August 2004, but then, by consent, the original fixture was reinstated.

Shortly before the pre-trial conference, which had been scheduled for 15 March 2005, Mr Waalkens advised the Court that he had been instructed as counsel for the plaintiff and he sought leave to file an amended statement of claim, which contained two causes of action. First, a cause of action based on the alleged settlement and, secondly, the defamation cause of action. The settlement claimed by the plaintiff was still alleged to have been made on or about 10 November 2003.

The Court refused to allow both causes of action to be tried together in the belief that the issues would simply be too confusing for the jury. It ordered that the hearing would be confined to the plaintiff's alleged settlement cause of action.

The hearing was scheduled to commence on Monday 11 April 2005. On Friday 8 April two significant things happened. First, without leave, the plaintiff filed a second amended statement of claim alleging, for the first time, that the settlement agreement had been entered into verbally between the two solicitors "on or about the 21st of November 2003" (as distinct from 10 November which was the date relied upon up until then). Secondly, Mr Clive Edwards was instructed to handle the case as senior counsel for the defendant.

On Monday 11 April the jury was duly sworn in and, after hearing legal argument, the late amendment to the statement of claim was allowed. The Court, however, then ordered, by consent, that the case would proceed before a Judge alone and at that point the jury was discharged.

Case for the Defendant

The case for the defendant essentially is that, whether the relevant date is taken to be 10 November or 21 November 2003, there never was any settlement agreement reached between the parties. Mr Edwards submitted that the plaintiff's last-minute change to the pleadings showing a different settlement date was symptomatic of the difficulty he faced in being able to establish that the parties were ever *ad idem* as to the terms of any settlement.

The first witness for the defence was the defendant himself. By reference to his passport, Mr Saulala was able to tell the Court that he was out of the country between 28 October -- 3 November; 21 November -- 29 November; and 6 December -- 23 December, 2003. In relation to the initial settlement negotiations back in September/October 2003, which he claimed had resulted in a binding agreement, Mr Saulala told the court that he had given instructions to William to try and settle the case principally by offering the plaintiff free television time and disclosure of the name of the letter writer but he had never agreed to the terms of the draft agreement subsequently prepared by Laki. Mr Saulala indicated that, in fact, he had never even sighted the draft agreement.

Mr Saulala acknowledged that William had given him a copy of Laki's letter of 2 December and he said that he had personally responded by letter dated 5 December 2003. Mr Niu had earlier told the Court that he had never received Mr Saulala's letter of 5 December. I accept that statement because the copy of the letter before the Court does not show any PO Box address for Mr Niu and there is no evidence before the Court that the letter was delivered. I also accept, however, that the letter (which is in English) was written at the time by Mr Saulala and, as it effectively summarises his evidence to the Court on the subject, I will set it out in full:

> "Mr Laki Niu

Law Practitioner
Nuku'alofa

Mr Niu

Re: Feleti Sevele v Sangster Saulala

I have received a copy of your letter dated at the 2nd December, 2003 addressed to my lawyer. I am surprised you are trying to bulldolzer (sic) a settlement that have not concluded and without my approval.

How can you apply an judgment against me for a settlement that is been negotiate. In paragraph 4 of your letter you try to deliver to my lawyer a form of settlement that I have not seen or signed.

I have not confirm with my lawyer or with you any terms of settlement. My lawyer has been talking to me and that's the end of it.

Mr Sevele and I have agreed to settle this matter if I screen free program for him which I did and he has subsequently denied its a settlement. How can you claim in your letter enter judgment against me according to clause 4 to an agreement which I have not seen or signed. You can't prepare a document and forward to my lawyer and upon that you agree to it and upon which you can enter judgment. It sounds very funny to me if that is the law. I would like to have this case heard in court and full hearing before a jury.

Yours faithfully

Sangster Saulala."

The second witness for the defence was Mr Saulala's former lawyer, William Edwards. He, like Mr Niu, was subjected to a lengthy and searching cross-examination. One of the surprising features of William's evidence was that he had made no file notes whatsoever recording any of the events of November 2003 relating to this case. His evidence, therefore, was necessarily based upon his recollection of events.

There was a sharp conflict between William and Laki's evidence. William told the Court that he had no telephone conversations with Laki on Friday 7 November but they had a discussion about settlement outside the Chief Justice's Chambers that morning. He said that he had put forward Sangster's idea of free television programming and Laki wanted an apology, disclosure of the name of the author of the letter plus payment of his legal costs in full. William said that he did not offer an apology or costs but it was left on the basis that Laki would go back and speak to his client about the matter. According to William, they had no other discussions that day.

The next development, William could recall, occurred on the Monday morning outside Court shortly before 9 a.m. when Laki told him that Mr Sevele was not interested in free television programming and he wanted cash. He said that Laki then

gave him the figures that Mr Sevele wanted. He saw Laki making some notes at this time and so he asked him to put the proposal in writing. William said that the discussion ended on the basis that both counsel would go back to their respective clients and Laki told him that he would go and see the Judge and arrange for the case to be adjourned.

William denied having told Laki on that occasion that the figures were acceptable. He said that that was the first time he had learned of Mr Sevele's proposal and he had not had time to consider it or discuss it with his client.

William confirmed receiving the draft agreement by fax from Laki later that same morning and he also confirmed telephoning Laki's office the following day and asking him to send over the originals so he could speak to his client about them. He said that he received the originals on the Wednesday but essentially his evidence was that Mr Saulala was very busy about this time and virtually impossible to make contact with and so he did not have an opportunity to speak to him about the draft agreement.

In reference to 21 November 2003, which is the plaintiff's amended date of settlement, William denied having any conversation or communication with Laki on that day and he denied asking for or receiving any further original of the draft agreement.

There was other evidence, some of which went to credibility, which I have taken into account but essentially the foregoing summarises the case presented for both sides.

The Evidence

Against that rather convoluted background, the Court has been left to try and put the pieces of the jigsaw in place.

One of the problems the plaintiff faces is in reconciling or explaining the last-minute change of pleading which saw the alleged settlement date altered from 10 November 2003 to 21 November 2003. Mr Waalkens stressed that the words in the amended pleading read, "on or about the 21st November 2003". Be that as it may, up until the very eve of the hearing the alleged settlement date had been 10 November 2003. Mr Sevele had sworn and filed an affidavit dated 10 December 2003 in support of his application for judgment deposing that the settlement agreement had been made on 10/11/03. What happened, Mr Edwards asked rhetorically, that led to the last-minute change in the alleged settlement date.

In his closing submissions, Mr Edwards hypothesised that the real reason for the late change of date was that Mr Waalkens, after having had the opportunity of examining all the relevant documentation, had realised that the allegation that counsel had reached a binding agreement on Monday 10 November 2003 simply did not "stack up". Senior Counsel for the defendant placed particular emphasis in this regard on Mr Niu's handwritten letter to William dated 14 November which began with the words: "Please let me have your comments re draft settlement . . . ." "He was asking for comment," Mr Edwards submitted, "he was not saying this is the settlement agreed upon or the settlement you accepted." Mr Edwards also stressed that there was not one file note produced by Mr Niu recording that the draft settlement had been accepted or agreed to.

In his closing submissions, Mr Waalkens accepted that there was no concluded settlement reached on 10 November. Whilst stressing that the events of 7, 10 and 11 November were very important for setting the background, plaintiff's counsel invited the Court to focus on the events of 21 November or thereabouts as evidence of the existence of a binding settlement agreement. I now turn, therefore, to the evidence touching upon the period "on or about 21st November 2003."

As I have noted already, for his part, William told the Court that nothing at all happened on Friday 21 November. His evidence was that he had no communication or conversation with Laki whatsoever on that date in relation to this case and I took his answers to be broad enough to encompass the term "on or about 21st November."

Laki's evidence in relation to 21 November was surprisingly brief. In examination in chief, he did not even mention the 21st of November specifically nor, in spite of some prompting through leading questions, did he make mention of any conversation he had with William that could conceivably have amounted to an acceptance of any settlement proposal. After being referred to his handwritten letter to William of Friday 14 November, Laki was asked by Mr Waalkens what happened next?

> "A. It was about a week or over a week. I had not heard from Mr Edwards until he and I met outside the Chambers of Chief Justice Ward at the time. That is the verandah outside his office and I asked him what happened to the settlement that he was to sign or his client was to sign and he said if I could send him the original documents and I said I had sent them and he said he needed the original again.
> Q. And did you arrange for that to be given to him?
> A. Yes, I returned to the office afterwards and I instructed my secretary to forward those documents.
> Q. And what did Mr Edwards say about the terms of the settlement as they are recorded in this document "Settlement of Action"?
> A. Nothing. He just said that he needed them for his signature -- for signing by him and his client.
> Q. Did he say whether the terms were acceptable?
> A. He said that they -- he didn't say that they were not acceptable. He just wanted them for signing.
> Q. Did he say anything about there being no agreement until Mr Saulala had signed?
> A. No
> Q. You mentioned it was outside Justice Ward's Chambers; was that in relation to this case or something else?
> A. No, that's on a different matter."

The matter was then followed up by Mr Edwards in cross-examination:

> "Q. Now Mr Niu, you said that you spoke to William on the 21st of November 2003?
> A. That is correct.
> Q. Did you record that conversation?

A. No, I did not.
Q. You didn't?
A. No.
Q. You regarded that as a very important conversation?
A. I went to the office and I instructed my secretary, Pasepa Tu'i, to take the documents across to Mr Edwards.
Q. That's not what I asked you. I asked you did you write that down?
A. No, I did not.
Q. Why not? Seeing it is an important issue for your client, why didn't you write it down?
A. This was outside Chambers. We were talking and, I can't remember, we were going to different Chambers hearings.
Q. Mr Niu, here is a crucial date as you say it was settled and nothing was recorded -- nothing in writing and you are now saying it was settled on that date?
A. I had already provided to Mr Edwards a fax of the settlement and I followed it up later and then on the 21st of February (sic), having heard nothing from him, I raised it with him and he asked me to give him the documents -- the originals.
Q. Mr Niu, did you write a letter saying I now enclose the final documents as per our agreement to settle and please get your client to sign it? Did you write a letter like that?
A. No I did not."

Later in cross-examination, Mr Niu was referred to his letter of 2 December 2003 and he appeared visibly taken aback when he was informed by counsel that the alleged settlement date had been changed in the pleadings from 10 to 21 November 2003:

"Q. You say in the first paragraph (the letter of 2/12/03) that the matter was settled on the 10th of November?
A. That is correct.
Q. And you now ask the Court to amend the date of settlement from the 10th to the 21st?
Mr Waalkens: He didn't request that. That's my request Your Honour to be fair.
Mr Niu: I wasn't aware of that.
Q. Through your counsel an application has been made to amend the date of settlement to the 21st, correct?
Mr Waalkens: I am not his counsel. I am counsel for the party, not for this witness.
Court: Yes, that's correct. You better ask Mr Niu if he is aware of that because he's just a witness."
. . . . .

Mr Edwards continued his questioning:

> "Q. Counsel, senior Counsel in this case, whose conducting this case delivered to Mr Kaufusi on behalf of Mr Waalkens the amendment, to amend it to the 21st and filed it in Court?
> A. I must have forgotten about that.
> Q. You mean that counsel in this case filed this amendment without consulting you?
> A. He did.
> Q. Oh, I see.
> A. I signed it for him and filed it in Court but I may have overlooked that matter."

It was not until the very end of his answers in cross-examination in relation to this aspect of the evidence that Mr Niu made mention of a comment by William which the plaintiff's case appears to hinge upon:

> "Q. So Mr Niu, which is the correct date of settlement in view of the amendment that has been filed?
> A. Well, we made the settlement on Monday the 10th of November. We then approved the draft of the settlement on the 21st. He conveyed to me on the 21st. Prior to the 21st Mr Edwards made no direction or comment or denial of settlement whatsoever at any time prior to the 21st. On the 21st he then informed me, "**Oh, the draft is okay, send the original to me**.""

Conclusions

As I have observed, the words that I have highlighted which were mentioned almost in passing by Mr Niu towards the end of his cross-examination, appear to form the basis of the plaintiff's claim that the proceeding was settled on the 21st of November 2003. Mr Waalkens, however, relies upon the statement made subsequently by Mr Niu in the fourth paragraph of his letter to William of the 2nd of December 2003 as corroborative evidence that William had informed him on the 21st of November that the draft was okay.

As it turns out, there is other evidence before the Court which casts very real doubt on Mr Niu's recollection of events in relation to the 21st of November date. Mr Niu told the Court that after he had been asked by William on the morning of the 21st of November for another original of the draft agreement, he returned to the office and instructed his secretary, Pasepa Tu'i, to take the documents over to William's office.

Pasepa Tu'i was called as a witness for the plaintiff. She told the Court that she recalled receiving a telephone call from William Edwards asking for the original of the agreement and she explained in some detail how, after consulting Mr Niu, she then took the original across to William's office and waited while the clerk took the document into his room and returned confirming that she had given it to William. Significantly, Pasepa had made a handwritten file note recording the date of the telephone call she received from William and she told the Court that she delivered the original to his office either that same day or the very next day. Pasepa's file note is clearly dated 11 November 2003.

It was suggested to the witness, through some leading questions from plaintiff's counsel, that she had made another delivery of the original agreement to William's

office at a later date but Pasepa did not accept that proposition and, in any event, her file note speaks for itself. I am satisfied that there was only one delivery of the original agreement to William and that was made by Pasepa on the 11th or 12th of November and there was no subsequent delivery of a second original on or about the 21st.

Pasepa's evidence, in other words, confirmed William's evidence that he had only asked once for the original of the agreement and that was on the day after he had received the faxed copy on the 10th of November. Pasepa's evidence also supports William's recollection that nothing, in fact, happened on the 21st of November, which had any bearing on the present case.

As in any civil litigation, the onus of proof is on the plaintiff to establish his case on the balance of probabilities. For the reasons outlined, the plaintiff has failed to persuade me that the parties settled this proceeding by an agreement entered into verbally between their respective solicitors on or about the 21st of November 2003, as alleged in the plaintiff's second amended statement of claim.

As an aside, I make this observation. The parties had already encountered problems in October 2003 which had resulted in the defendant's application to the Court for an order enforcing a settlement agreement which the plaintiff denied had ever been reached. Against that background, I would have thought it behoved counsel to take extra precautions the second time around to ensure that all the terms of any settlement were well and truly recorded in writing with the t's crossed and i's dotted before any formal announcement was made that the proceeding had been settled.

Given my findings on the facts, it is unnecessary for me to have to consider the interesting legal issues I heard submissions on relating to whether the two lawyers had actual, ostensible or implied authority to enter into a binding settlement. As it transpires, that issue never became a relevant consideration.

The plaintiff's action on the settlement fails. His defamation cause of action remains extant. The defendant is entitled to costs to be agreed or taxed.

R v Fanua anor

Supreme Court, Nuku'alofa
Ford Acting CJ
CR 3-4/2004

6 April and 6 May 2005; 9 May 2005

Criminal law – grievous bodily harm – meaning of "severe wound" – acquitted
Criminal law – grievous bodily harm – self defence - acquitted

The two accused were each charged with grievous bodily harm. On Monday 20 October 2003 the complainant, Tipeti, was drinking liquor at his home. He was looking for his wife to get him some food and was yelling and swearing. His neighbour, the second accused Moneata, asked him to stop making noise. Tipeti, in his drunken and belligerent state proceeded to assault her. He slapped her face and punched her on the chest and breast. Moneata fell backwards onto the ground. Tipeti then started dragging her along the ground and at one point he started choking her by the neck. He also stood over her with his legs apart lifting her by the shoulders and dropping her head back and forth onto the ground. The first accused, Va'enuku, was Moneata's de facto husband. He ran over to where Tipeti was standing astride his wife assaulting her. He pushed him away and Tipeti faced up to him and started to challenge him to a fight. At that point Va'enuku punched Tipeti on the right jaw breaking his jaw and dislodging one of his teeth. This formed the basis of the grievous bodily harm charge against the first accused. After the fight was broken up and everyone was walking back to their homes, Moneata suddenly struck Tipeti on the top of the head with a length of PVC hollow plastic piping that had been used as a clothesline support. The blow from the PVC pipe caused a laceration to the top of the complainant's head. That blow to the head formed the basis of the grievous bodily harm charge against the second accused, Moneata.

Held:

1. The defence raised on behalf of the first accused was that he acted reasonably in defence of his de facto wife. The Court was satisfied that the defence was made out. The attack by the drunken Tipeti was vicious and if the first accused had not intervened when he did then the Court was satisfied that Moneata would have sustained severe injuries. The first accused was acquitted.
2. The Court was satisfied that the blow struck by Moneata was not struck in self-defence. The fight had by that point in time broken up. The blow was struck in anger.

3. The Crown had to prove beyond reasonable doubt that the blow from the plastic pipe caused "grievous harm" to the complainant. The definition of grievous harm was "any severe wound". The Crown failed to establish that the laceration to the top of the complainant's head was a severe wound.
4. The Court had discretion to substitute a lesser offence for that of causing grievous bodily harm but the case was conducted on the basis of the indictment as it stood and, more significantly, given the complainant's provocative, aggressive and disgraceful conduct in attacking the second accused in the way that he did, the Court was not prepared to subject Moneata to any further indignity.
5. The second accused was also acquitted and discharged.

Cases considered:

James v R (New Zealand Court of Appeal, 10 August 1998, CA 140/98)
Lane v Holloway [1967] 3 All ER 129
Li v R (New Zealand Court of Appeal, 28 June 2000, CA 140/00)
Moriarty v Brooks (1834) 6 C & P 684
R v Fa'aso [1996] Tonga LR 36
R v Rowson and others [1985] 2 All ER 539
R v Tau'aika (unreported)
R v Waters [1979] 1 NZLR 375 (CA)
R v Wood (1830) 1 Mood CC 278;
Solomon Beckford v The Queen [1988] 1 AC 130

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for Crown : Ms Fukofuka
Counsel for two accused : Mr Fifita

Judgment

The Charges

The two accused are a de facto couple from Ma'ufanga. They are each charged with one count of, on the 20th day of October 2003, causing grievous bodily harm to their immediate neighbour, Tipeti Finau. Tipeti is a police officer of some 14 ½ years standing. At the time of the incident, he was attached to the Police Mobile Unit.

The Facts

The facts of the case can be briefly stated. On Monday 20 October 2003, Tipeti, now aged 34, attended a funeral in the morning and in the afternoon he drank liquor at his home with two of his friends. Between approximately 1 pm and 5 pm the three men consumed a bottle of rum between them. At one point the two friends had some food but Tipeti did not want to eat anything until he had finished drinking. After their meal, the two friends left for home and Tipeti passed out in a drunken state.

Later, when Tipeti woke-up he started looking for his wife to fetch his food. He found that she had gone to visit a neighbour's house and so he started calling out for her and swearing. He was still drunk.

At that point, the second accused, 36-year-old, Moneata, appeared on his doorstep and asked him to stop making a noise because there was a very ill person in the immediate neighbourhood and that person did not like noise.

I should interpolate that the allotment the complainant and the two accused live on belongs to Moneata's uncle, Sofele Katoa, who lives in New Zealand. Moneata holds authority from Sofele to look after the property in his absence. The two houses are approximately 25 m apart.

Returning to the narrative Tipeti, in his drunken and belligerent state, took exception to what he saw as Moneata's unwelcome and unwanted interference and he proceeded to assault her. He slapped her face and punched her on the chest and breast. Moneata fell backwards onto the ground. Tipeti then started dragging her along the ground and at one point he started choking her by the neck. He also stood over her with his legs apart lifting her by the shoulders and dropping her head back and forth onto the ground.

In the meantime, Moneata's de facto husband, the first accused Va'enuku, was still inside their home. He told the Court that he had arrived home from work at around 5pm. Shortly after that there was a knock on his door and two police officers asked him if it was he who had complained about Tipeti. He told them that neither he nor his wife had complained. He said the police then left and he sat down to watch television.

As he was watching television Va'enuku could hear Tipeti shouting out and he knew that his wife went over to see Tipeti. Va'enuku at that stage went to the toilet and he said in evidence that when he returned from the toilet he could hear his young son crying and his daughter saying, "Tipeti stop beating up my mother."

Va'enuku immediately ran over to where Tipeti was standing astride his wife assaulting her. He pushed him away and Tipeti faced up to him and started to challenge him to a fight. At that point Va'enuku punched Tipeti on the right jaw breaking his jaw and dislodging one of his teeth. This was the punch, which forms the basis of the grievous bodily harm charge against the first accused.

First Accused

The defence raised on behalf of the first accused is that he was acting reasonably in defence of his de facto wife. The common law recognises that a person who acts reasonably in defence of another commits no unlawful act.

I say at once that I am satisfied that the defence has been made out in respect of the first accused. The attack by the drunken Tipeti was vicious and if the first accused had not intervened when he did then I am satisfied that Moneata would have sustained severe injuries.

I am also satisfied that Va'enuku did not intend his punch to break Tipeti's jaw or his tooth but he was only intent on trying to stop Tipeti's attack on Moneata. Tipeti is a tall, strongly built policeman. Moneata is an average built woman. In my view, the force that Va'enuku used was, in all the circumstances, reasonable and he is entitled to rely upon the defence of defence of others.

As explained by Lord Griffiths delivering the judgment of their Lordships in *Solomon Beckford v The Queen* [1988] 1 AC 130 at 144:

> "The common law has always recognised as one of these 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."

Tipeti, in his evidence, denied the nature of his attack on Moneata. He referred to it as a scuffle in which she fell to the ground and he strongly denied standing over her and dropping her head back and forth onto the ground. I do not accept his evidence in this regard. The Crown called evidence from Tipeti's 20-year-old married daughter, Vaikalafi, who was a witness to the whole incident and she admitted in cross-examination seeing her father choking Moneata by the neck and banging her head on the ground. Vaikala was a refreshingly honest witness.

The first accused is, therefore, acquitted.

Second Accused

After the first accused threw the punch at Tipeti which I have described, both men started fighting and the fight was eventually broken up by another neighbour who was called as a Crown witness, 'Asipeli Kupu. 'Asipeli had just arrived home from work. He told the Court how he was able to stop the fight and separate the two men. Then as they both started walking towards their respective homes Moneata suddenly struck Tipeti on the top of the head with a length of PVC hollow plastic piping that had been used as a clothesline support. The blow from the PVC pipe caused a laceration to the top of the complainant's head. It was that blow to the head with the PVC pipe, which forms the basis of the grievous bodily harm charge against the second accused, Moneata.

I am satisfied that the blow struck by Moneata was not struck in self-defence. The fight had by that point in time broken up. The blow was struck in anger. Moneata admitted that much in her statement to the police:

> "Q. Why did you hit Tipeti which the pipe?
>
> A. I was very angry because he assaulted me and dragged me around."

Anger, of course, is not a defence.

The Crown, nevertheless, still has to prove beyond reasonable doubt that the blow from the plastic pipe caused "grievous harm" to the complainant. The definition of grievous harm in section 106(2) of the Criminal Offences Act (Cap 18), which the prosecution relies upon, is that set out in subsection (c), namely, "any severe wound". The question I have to consider is whether the resulting injury amounted to a "severe wound".

"Severe wound"

At common law, the meaning attributed to "wound" has long been established as an injury, which causes the continuity of the skin to break. See *R v Wood* (1830) 1 Mood CC 278; *Moriarty v Brooks* (1834) 6 C & P 684. Commenting on the common law meaning attributed to the word "wound", McMullin J stated in the New Zealand case of *R v Waters* [1979] 1 NZLR 375 (CA) at 378:

> "A breaking of the skin would be commonly regarded as a characteristic of a wound. The breaking of the skin will be normally evidenced by a flow of blood and, in its occurrence at the site of a blow or impact, the wound will more often than not be external."

What constitutes a severe wound is not defined in the Act but it would obviously need to be something more than a trifling injury. In the context of "an attack of illness or disease, pain, suffering, loss, or the like," the Shorter Oxford Dictionary definition of "severe" is, "attended with a maximum of pain; grievous, extreme." I see no reason why that same definition should not also extend to cover the expression "severe wound".

Case Law supports this interpretation:

* In the case of *R v Rowson and others* [1985] 2 All ER 539, a fractured skull caused by two blows to the head was called a "severe wound";
* In the New Zealand case of *James v R* (10 August 1998) CA 140/98 a shotgun wound to the foot was described as a "severe wound";
* In another New Zealand Court of Appeal case, *Li v R* (28 June 2000) CA 140/00, a wound caused by sledging a garden slasher into the victim's thigh, causing a laceration 7 – 10 cm long and 4 cm deep was described as a "severe wound";
* A punch to the thigh that needed 19 stitches was described as a "severe injury" in *Lane v Holloway* [1967] 3 All ER 129.

What does not constitute a "severe wound" was discussed indirectly in the recent Tongan case of *R v Tau'aika* (unreported) where there was a nasty cut and broad area of skin loss to the side of the left eye, haematoma to the left eye and cheek, tenderness to the jaws and haematoma and tender swellings on three areas of the back of the head. The Court held that these injuries amounted to bodily harm but could not be considered sufficient to amount to grievous harm.

Again, in *R v Fa'aso* [1996] Tonga LR 36, Hampton CJ held that broken jaw and laceration of the lips suffered by a rape victim, did not amount to a sever wound.

Did the second defendant cause a "severe wound"?

Although medical evidence was called by the Crown from Dr Ámanaki Fakakovi who treated the complainant's broken jaw and broken tooth, there was no direct medical evidence given about the laceration to the top of the complainant's head.

The complainant said in evidence that when he first attended the hospital a nurse came and treated the wound to the top of his head and Dr Fakakovi's report mentions under his list of "findings", "scalp laceration near middle of the skull about 5 cm in length already sutured on arrival at hospital 20.10.03."

In the absence of persuasive medical evidence on the subject, I am not prepared to simply assume that the laceration described could properly be categorised as a severe wound. The Crown has failed, therefore, to establish this important element of the offence.

The Court does have a discretion to substitute a lesser offence for that of causing grievous bodily harm but the case was conducted on the basis of the indictment as it stands and, more significantly, given the complainant's provocative, aggressive and disgraceful conduct in attacking the second accused in the way that he did, I am simply not prepared to subject Moneata to any further indignity.

The second accused is also, therefore, acquitted and discharged.

Tui International Ltd v Nasilai

Supreme Court, Nuku'alofa
Ford J
CV 235/2003

9-11 May 2005; 17 May 2005

Contract law – unpaid invoices – defendant liable to pay
Costs – plaintiff failed to provide all evidence in timely manner – awarded against defendant on a three-quarters basis

The plaintiff company was in business in Tonga as an importer and supplier to the wholesale and retail market of meat products and other goods. The defendant was a bingo operator and used meat products supplied by the plaintiff as prizes at his bingo site. The plaintiff alleged that the defendant did not pay the invoices for the last three deliveries of meat products. The plaintiff sued the defendant for $2219.88. The defendant admitted that the meat was supplied to him but he claimed that it was paid for at the time.

Held:

1. The defendant did not produce any evidence to support his claim that the invoices had been paid. The plaintiff produced invoice and receipt books which convincingly established the plaintiff's case. The plaintiff succeeded and was entitled to judgment in the sum of $2219.88 together with interest at 10% from 17 January 2003 until the date of payment.
2. Even though a defendant has a right to defend an action brought against him, he should be aware that if he abused that right by persisting with an obviously worthless defence then the Court's disapproval was likely to be reflected in the terms of its costs award and may lead to an award of costs on a solicitor/own client basis.
3. However, the plaintiff's receipts and invoice books should have been produced and exchanged at least by the time of the pre-trial conference but they were not. They were only produced at the behest of the Court.
4. The Court was not prepared to award costs to the plaintiff on a solicitor/own client basis. The plaintiff was entitled to costs which were to be fixed in the sum of three-quarters of the amount allowed upon taxation.

Cases considered:

Fonua v MBf Bank Ltd [2000] TOCA 13; [2000] Tonga LR 319 (CA)
Practice Direction No. 1/2004

Statute considered:
Evidence Act (Cap 15)

Counsel for plaintiff	:	Mr Fakahua
Counsel for defendant	:	Mr Kengike

Judgment

The Issues

The plaintiff company carries on business in Tonga as an importer and supplier to the wholesale and retail market of meat products and other goods.

The defendant describes himself as a planter, bingo organiser and flea market operator. He is sued in his capacity as a bingo operator. It is alleged that he failed to pay the plaintiff for three deliveries of meat products used for prizes at his bingo site. The deliveries are detailed in three separate invoices:

Invoice No. 7286 -- dated 01/11/2002 = $590

Invoice No. 7570 -- dated 20/12/2002 = $705

Invoice No. 7646 -- dated 03/01/2003 = $924.88

The total amount claimed is $2219.88. Unfortunately, that sum falls just outside the $2000 upper limit prescribed for the jurisdiction of the Magistrates' Court in civil cases.

The Evidence

The defendant admits that the meat was supplied to him but he claims that it was paid for at the time. His case, in essence, is that there are no amounts outstanding because he had only a limited credit arrangement with the plaintiff which made it impossible for him to ever be in an arrears situation. He maintains that the arrangement he had with the plaintiff was that he would order the meat prizes on the morning of the bingo event and pay for them that same afternoon either when the meat was delivered to the bingo site or by delivering the money to the plaintiff's office.

The defendant told the Court that under the arrangement he had with the plaintiff, he was not able to obtain a fresh order of meat if his account was in arrears and that he never allowed it to get into that situation. He said that he has been a bingo operator now for in excess of 10 years. He has been conducting bingo events every Friday, Saturday and public holiday.

The plaintiff's evidence was that although the defendant was supposed to pay cash for the meat produce when it was delivered, the reality was that he paid later but, because they trusted the defendant and obviously valued his business, the plaintiff's management staff were satisfied with that unwritten, informal arrangement. The plaintiff's Accounts Clerk told the court that when he initially confronted the defendant about the first unpaid invoice he did not deny the allegation but asked if he could make the payment later. At the same time he placed another order for more meat produce.

Unfortunately for the defendant, the invoice and receipt books produced by the plaintiff did not support his contention that the orders were paid for on the day of delivery. A reconciliation statement (referred to during the hearing as a "debtor's card") showed that for the four-month period between September 2002 and January 2003 during which the defendant obtained his meat supplies from the plaintiff, none of the orders were paid for on the day of delivery. Almost invariably, the orders were delivered on either a Friday or Saturday and paid for the following Monday or Tuesday. It is clear from the documentation produced that the plaintiff maintains a proper systematic and accurate record of all its business transactions.

The defendant, on the other hand, freely admits that he keeps no records whatsoever relating to his business activities. He was asked by Mr. Fakahua in cross-examination what records he kept for Inland Revenue purposes. He answered that when he obtained his bingo licence from the police he was told that he did not need to file anything with the IRD.

Findings

Against that background, the defendant was in a hopeless position and he should never have been advised to defend the case. He was unable to produce even a scintilla of evidence in support of his claim that the amounts in question had been paid.

I was impressed with the witnesses called on behalf of the plaintiff. The defendant, on the other hand, was a less than convincing witness. I have no doubt that he was fully aware at the time that he owed the plaintiff for the invoices in question but he believed, or rather vainly hoped, that because of the frequency and quantity of his orders, he would be able to confuse the plaintiff into accepting that there were no arrears. His defence, however, failed to raise even a doubt about the matter.

The plaintiff succeeds, therefore, and is entitled to judgment in the sum of $2219.88 together with interest at 10% from 17 January 2003 until the date of payment.

Costs

I turn now to the question of costs. As I have indicated, the invoice and receipt books maintained by the plaintiff company are well kept and they convincingly establish the plaintiff's case. Had they been produced in a timely way then I would have given consideration to awarding costs to the plaintiff on a solicitor/own client basis. The case, as I have indicated, should never have been defended.

In *Fonua v MBf Bank Ltd* [2000] TOCA 13; [2000] Tonga LR 319, the Court of Appeal approved the principle of awarding costs on a solicitor/own client basis when a plaintiff pursues a thoroughly worthless action. The same principle applies to a defendant. Even though a defendant has a right to defend an action brought against him, he needs to be aware that if he abuses that right by persisting with an obviously worthless defence then the Court's disapproval is likely to be reflected in the terms of its costs award.

In *Fonua* the Court stated that solicitor/own client cost orders would be awarded only in exceptional cases.

The circumstances in the present case, however, are different from those in *Fonua* because here the plaintiff itself is not free from fault. Indeed, it may well have

contributed to the situation in that it failed to comply with the rules relating to the production of documentary evidence.

Under Practice Direction No. 1/2004, the plaintiff's receipts and invoice books should have been produced and exchanged at least by the time of the pre-trial conference but they were not. The only document disclosed by the plaintiff at that stage was a handwritten individual debtor card which appeared to have been compiled in preparation for the Court hearing.

Under section 62 of the Evidence Act (Cap 15) the contents of documents must be proved by primary evidence. In this case, that means by production of the original invoice and receipt books. At the hearing, however, the plaintiff proceeded to produce a copy of each of the three invoices in question but it still did not produce the invoice or receipt books. Instead, the plaintiff sought to rely upon the handwritten entries in the debtor card. It was only at the behest of the Court that the invoice and receipt books were eventually produced.

I am prepared to give defendant's counsel the benefit of a doubt and accept that the unsatisfactory production of the plaintiff's documentary evidence may have influenced his advice to his client regarding the conduct of the case. He may well have been misled, in other words, into thinking that the plaintiff held no contemporary documentation to support its allegation that the three invoices in question had never been paid.

For that reason, I am not prepared to award costs to the plaintiff on a solicitor/own client basis and, indeed, to show the Court's disapproval of the way in which the plaintiff has produced its documentary evidence, I am only prepared to allow costs on a three-quarter scale.

In other words, in addition to judgment in the terms which I have already particularised, the plaintiff is entitled to costs which, failing agreement, are to be fixed in the sum of three-quarters of the amount allowed upon taxation.

R v Valu

Supreme Court, Nuku'alofa
Ford J
CR 28/04

16-18 May 2005; 20 May 2005

Criminal law – question of identity – Court had no doubt

The accused appeared on two separate indictments in relation to the same incident. In the first, he was charged with causing grievous bodily harm to Tevita Kengike and in the second he was charged with causing bodily harm to Sione Fa'amasa. The case for the Crown was that on the night of Monday 12 January 2004 a fight broke out, following a dance at the Finefeuiaki Hall at Kolonga, between youths from Kolonga and the adjacent village of Niutoua. It was alleged that in the course of the fight the accused used a knife and stabbed Kengike in the low back, stomach and thigh and Fa'amasa in the left buttock. The accused denied that he was the attacker and claimed that it was a case of mistaken identity.

Held:

1. Identification of an accused previously know to the witness still required a reminder that there was room for mistake in such cases.
2. The Court had no doubt that the accused was involved in the fighting, that he had a knife and that it was he who caused the injuries to the two complainants. Although there were no eyewitnesses to the attack on Fa'amasa, the admission made by the accused in his statement to the police was sufficient in itself to support the conviction.
3. The accused was convicted on both counts.

Cases considered:

Langford v The State [2005] UKPC 20
R v Turnbull [1977] Q B 224 (PC)

Counsel for the Crown : Ms Tupou
Accused in person

Judgment

The Charges

The accused appears on two separate indictments. They both relate to the same incident. In the first, he is charged with causing grievous bodily harm to Tevita Kengike and in the second he is charged with causing bodily harm to Sione Fa'amasa.

The case for the Crown is that on the night of Monday 12 January 2004 a fight broke out, following a dance at the Finefeuiaki Hall at Kolonga, between youths from Kolonga and the adjacent village of Niutoua. It is alleged that in the course of the fight the accused used a knife and stabbed Kengike in the low back, stomach and thigh and Fa'amasa in the left buttock.

Evidence

The accused conducted his own defence and cross-examined the Crown witnesses. He also elected to give evidence on his own behalf. The accused did not dispute the medical evidence relating to the injuries sustained by the two complainants but he strongly denied that he was the attacker. In essence, the accused claims that it was a case of mistaken identity. He says that he was not involved in the fighting. He accepts that he witnessed much of the action but he says that he was standing some distance away and he did not become personally involved. He told the Court that afterwards he went to the assistance of two boys (not the complainants) who had been left injured on the roadway.

21-year-old Sione Fa'amasa told the Court that he was at the dance with a group of about eight boys from Niutoua. Between them they had consumed a bottle of rum. He said that after the dancing had finished they walked outside the hall and he noticed the accused who was holding a knife and standing with a group of boys from Kolonga. He said that he knew the accused well and he was able to see him clearly in the light from the outside verandah of the hall. Sione said that he continued walking over to the roadway and he noticed that two of the tyres on his friend's car, which was parked directly across the road from the hall, had been punctured.

Sione then described how the group of boys, estimated to be approximately 20 in number, walked towards him and his friends. Stones were thrown and then fighting broke out. He said that he remembered being punched and then he blacked out. When he regained consciousness, he realised that he had been injured and stabbed with a knife twice. He did not know who had attacked him.

Tevita Kengike, also from Niutoua, said in evidence that he had been drinking homebrew during the dance. After the dance ended he walked outside the hall and was caught up in the fight between the two groups of youths. He said that the fighting took place between the front of the hall and the road. In cross-examination, he agreed with the accused that rocks and sticks were being thrown.

Tevita said that he recalled someone punching him on the back causing him to fall to the ground. When he stood up again he was stabbed in the back and as he turned around, the same person stabbed him in the thigh and the stomach. At that point, Tevita grabbed hold of his attacker's hand and was able to identify him as the accused. Someone else then punched him again and he let go of the accused's hand. He said that he knew the accused before the incident and he was able to identify him in the light shining from the verandah of the hall.

The other lay witness for the Crown was Lopeti 'Ofahulu. Lopeti is a married man and a carver by occupation. He told the Court that on the night in question he had been watching a video at his home and then sometime after 10 pm he and his wife had walked along to the dance hall. While he was standing outside the verandah of the hall, shortly before the dancing finished, he noticed the accused standing nearby holding a knife. He described the knife as being sharp pointed and approximately 9 inches in length. Lopeti said that when the fighting broke out he and his wife were afraid for their own safety and so they walked home. Lopeti did not witness any of the fighting but he was very positive in his identification of the accused as the person he had seen holding the knife.

A significant aspect of Lopeti's evidence is that he was sober. He told the court that he had not been drinking.

The final witnesses for the Crown were Corporal Tu'fua, the police officer who took statements from the accused, and Police Constable Kofeloa, the countersigning officer.

Because he was unrepresented, the Court asked the accused whether the statements he had given to the police had been made voluntarily and he gave an affirmative response. Later, however, when giving evidence, the accused indicated that the police had made up the answers to the questions in the two records of interview and he had only co-operated so that he could be released from custody quickly.

I say at once that I reject that proposition. Corporal Tu'ifua told the Court that he had not been involved in the arrest of the accused and he knew nothing about the case until he was instructed to take a statement from the accused. He said that during the interview, he asked the questions and the accused voluntarily wrote down the answers in his own handwriting. When that proposition was put to the accused, he denied that the handwriting was his but he gave the Court a sample of his handwriting and I have no doubt that it was he who wrote down the answers.

In the first record of interview, the accused spoke about the attack on Kengike. He freely admitted stabbing Tevita Kengike with a knife which he described as a "cooking knife". He was asked why he used the knife and he replied, "it was a fight."

In the second record of interview, the accused spoke about the attack on Sione and he admitted stabbing this complainant with the same cooking knife. When asked why he had used a knife during the fight, he replied: "There were lots of boys from Niutoua and they had stones and sticks."

In his evidence, the accused strongly denied having a knife in his possession that night and, as I have indicated, he denied being involved in the fighting in any way. I do not accept his evidence in this regard. Lopeti 'Ofahulu was an impressive witness and he had no doubt that he had seen the accused standing outside the dance hall holding a knife just before the fighting began. Lopeti, as I have already observed, was sober at the time.

Having rejected the accused's version of events, it is still necessary for me to be satisfied beyond reasonable doubt that the Crown has established all the necessary elements of each charge.

One concession the accused was able to obtain in his cross examination of Tevita Kengike was that when the case was called in the Magistrates' Court he had asked Tevita outside the court whether it was he (the accused) who had stabbed him and Tevita had answered, "No." In this Court, Tevita admitted that he had given that

answer but he explained that he was scared to say it was the accused because he knew the accused well and he said he had a reputation for getting drunk and beating people up.

I interpolate that the 30-year-old accused told the Court that he is well known to the younger generation as a boxer. He represented Tonga eight times in boxing at the Oceania and South Pacific Games. His last representative appearance was in 1997.

I accept Tevita's explanation. I found him to be a thoughtful and honest witness. Even though he was admittedly influenced by alcohol on the night in question, his description of how he grabbed his attacker's hand while the knife was still inside his stomach was quite graphic. It was at that point that he looked up and recognised the accused as his attacker.

The leading authority on identification cases has long been the UK Privy Council case of *R v Turnbull* [1977] QB 224. Giving the judgment of the Court, Lord Widgery set out at p228 the guidelines for directing juries in such cases. This is not a jury trial, of course, but sitting as a judge alone I have taken into account all the factors Lord Widgery listed; in particular, the need for caution in relying on the correctness of an identification bearing in mind the possibility that a mistaken witness can often be a convincing one.

The principles expounded by Lord Widgery in *Turnbull* were recently followed and applied again by the Privy Council in *Langford v The State* [2005] UKPC 20 (11 May 2005). In *Langford* Lord Carswell, giving the judgment of the five-judge Court added:

> "One other factor of general importance requires mention. Where, as in the present case, the identification depends upon the recognition by the witness of a person or persons previously known to him, the jury should be reminded that there is room for mistake in such cases as well as in those which turn on the identification of a person thitherto known to the identifying witness who is recollected by description."

I have taken all these factors into account and I have been left in no doubt, on the Crown's evidence, that the accused was involved in the fighting, that he had a knife and that it was he who caused the injuries to the two complainants. Although there were no eyewitnesses to the attack on Fa'amasa, the admission made by the accused in his statement to the police is sufficient in itself to support the conviction.

The accused did not claim to be acting in self-defence but I have, nevertheless, given careful consideration to that possibility. Although there was evidence that sticks and stones had been thrown during the fighting, the evidence satisfied me that no other person, apart from the accused, was carrying a knife and there was no evidence that the accused had suffered any injury or was in any sort of danger. That finding in itself is sufficient to rule out any element of self-defence but in any event I find that the use of a knife in all the circumstances was totally unjustified.

As I have indicated, no challenge was made to the medical evidence called by the Crown and I am satisfied beyond doubt that the injuries to the two complainants amounted to grievous bodily harm and bodily harm respectively.

The accused is, accordingly, convicted on both counts.

R v Vi

Supreme Court, Ha'apai
Webster CJ
CR 18/05

14 and 15 March 2005; 10 June 2005

Criminal law – manslaughter – cause of death – guilty

The victim, Sime Soakai, had been drinking beside Pangai market with Suli Fililava, Malu Mafi and Sione Mahe on the morning of Saturday 3 July 2004 from around 10am, and they had consumed 2 bottles of vodka. During that time the victim had fallen backwards off his chair, and had also fallen when he got up to go to the toilet. At around 2.00-3.00 pm the members of the drinking party, including the victim, all walked up from the market to the main road at Pangai. At that stage the victim had been shouting very loudly and noisily his usual words such as "No one here at Pangai, I will destroy Pangai". When the men reached the main road they had started walking south along the main road. The accused, Tevita Vi, heard the victim shouting and stepped over the fence onto the road and told him to keep quiet, but he kept on shouting. The accused slapped the victim who fell to the ground. Blood came out of the victim's ear and mouth. He suffered a severe head injury. They put him into a vehicle and rushed him to hospital. The victim died three months later on 18 October 2004 of complications. The accused was charged with manslaughter and alternatively with bodily harm.

Held:

1. There was no requirement for the prosecution to establish an intention by the accused to cause the deceased bodily injury which the accused knew was likely to cause death and was reckless whether death ensued or not. All that need be proved was that the accused intentionally did what he did, that the death was caused by it and that, applying an objective test, all sober and reasonable people would recognise the risk that some harm would result.
2. As a matter of law an accused was still criminally liable if he hit a blow which was a cause of death; the incident need not be the sole cause of death, nor even a substantial cause, but it must be one of the causes and something more than de minimis. Even if something else happened after the original blow, it was enough that the original blow contributed significantly to the resulting death, if at the time of death the original

injury was still an operating cause and a substantial cause, albeit that some other cause was operating.

3. The Court was satisfied beyond reasonable doubt that the degree of force used by the accused was plainly more than was called for by the circumstances as he subjectively believed them to be (as his belief that a slap was necessary to fulfil his duty cannot have been an honest belief); and therefore that the accused's action in slapping Sime Soakai on 3 July 2004 was not objectively reasonable and was not an action which was in any way sanctioned by the law, and accordingly it was an unlawful act. Even if the accused subjectively and mistakenly believed that Sime's actions required him to apply some force to Sime to stop him shouting, the force used by the accused was not objectively reasonable in the light of that fact, as shown by its effect in knocking down Sime. It was also found that the accused intentionally did what he did when he slapped Sime Soakai, and that, applying an objective test, all sober and reasonable people would recognise the risk that some harm would result.
4. The Court was satisfied beyond reasonable doubt that it was the slap by the accused which caused Sime to fall down instantly and strike his head on the road. It was consistent with the account of 'Eseta and the accused's statement in his Police interview that as the slap was delivered (by the accused's strong left hand, as he was left-handed) to Sime's right cheek there was some turning of his head as he fell, so that a fracture of the left side of the temporal skull bone, as shown on the x-ray, was entirely consistent with the evidence. The slap by the accused was a cause of Sime's severe head injury from which he subsequently died.
5. The accused was found guilty of manslaughter.

Cases considered:

Andrews v DPP [1937] 2 All ER 552,554-5 (HL)

Attorney-General's Reference (No 3 of 1994) [1997] 3 WLR 421,436-7,441-4 (HL), [1998] 1 Cr App R 91

DPP v Newbury [1976] 2 All ER 365,367 (HL)

R v Hennigan [1971] 3 All ER 133 (CA)

R v Kulitapa (Supreme Court, CR 416/03, McElrea J, 8 October 2004)

R v Lamb [1967] 2 All ER 1282 (CA)

R v Larkin [1943] 1 All ER 217,219 (CA)

R v Owino [1996] 2 Cr App R 128 (CA); [1995] Crim LR 743

R v Scarlett [1993] 4 All ER 629 (CA)

R v Smith [1959] 2 All ER 193

R v Watson [1989] 2 All ER 865 (CA)

R v Williams [1987] 3 All ER 411 (CA)

Shaw (Norman) v The Queen [2001] UKPC 26; [2001] 1 WLR 1519; [2002] 1 Cr App R 77; [2002] Crim LR 140 (PC)

Statutes considered:

Criminal Offences Act (Cap 18)

Order in Public Places Act (Cap 37)

Police Act (Cap 35)

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

Judgment

Preliminary

The accused was charged on indictment with manslaughter, contrary to section 92 and 93 of the Criminal Offences Act (Cap 18), and alternatively with bodily harm, contrary to section 107(1) of that Act, the particulars being:

> (Count 1 - manslaughter)
> Tevita Vi of Pangai, Ha'apai, on or about 3 July 2004 at Pangai, you did cause the death of Sime Soakai when you slapped him on the right side of his face with your left hand while he was drunk causing him to fall and hit his head on the road, and thus caused him to receive severe head injury and thus caused his death.
>
> (alternative Count 2 – bodily harm)
> Tevita Vi of Pangai, Ha'apai, on or about 3 July 2004 at Pangai, you did wilfully and without lawful justification cause harm to Sime Soakai when you slapped him on the right side of his face with your left hand while he was drunk causing him to fall and hit his head on the road, and thus caused him to receive severe head injury.

In this case the prosecution focussed on culpable homicide falling within section 86(1)(a) of the Act, which provides:

> "Definition of culpable homicide.
> 86. (1) Culpable homicide consists in the killing of any person either-
> (a) by an unlawful act; or
> (b) .....
> (2) Culpable homicide is either murder or manslaughter."

Witnesses

The prosecution led evidence from Det Cpl 'Isileli Veikoso, Pangai, Ha'apai; Mrs Tiulipe Soakai, Ha'ato'u, Ha'apai, widow of Mr Sime Soakai; Mr Suli Fililava, Tongoleleka, Ha'apai; Mr Malu Mafi, Hihifo, Ha'apai; Mr Sione Mahe, Pangai; Mr Latu Vea, Pangai, Ha'apai; Miss 'Eseta Tu'ifua, Pangai, Ha'apai; Det Sgt Asaeli Katoa, Pangai, Ha'apai; Dr Lisiate 'Ulufonua, Acting Chief Medical Officer, Niu'ui Hospital, Pangai, Ha'apai; and Dr 'Ana 'Akau'ola, Senior Medical Officer in Radiology, Vaiola Hospital, Nuku'alofa. The accused gave evidence on his own behalf. Documentary exhibits were also produced by the prosecution.

Essential elements of manslaughter

The essential elements of the offence of manslaughter relevant to this case are:

> That it was the accused;
> who killed the deceased;
> by an unlawful act (ie not an act allowed by law);
> which he did intentionally,
> and that, applying an objective test, all sober and reasonable people would recognise the risk that some harm would result that act;
> when he slapped the deceased on the right side of his face with his left hand while the accused was drunk,
> causing him to fall and hit his head on the road,
> and thus causing him to receive severe head injury,
> and thus causing his death.

As set out below, there is no requirement for the prosecution to establish an intention by the accused to cause the deceased bodily injury which the accused knew was likely to cause death and was reckless whether death ensued or not. All that need be proved is that the accused intentionally did what he did, that the death was caused by it and that, applying an objective test, all sober and reasonable people would recognise the risk that some harm would result.

The evidence

Sime Soakai's habitual drunken behaviour

There was evidence, which I accepted, that the deceased Sime Soakai was frequently drunk at Pangai, when he would shout and make noises, especially in public places in Pangai. The accused admitted in cross-examination that he had arrested Sime Soakai once previously for being drunk, when he informed Sime that he was very drunk and was going to be arrested, and he did that and took him to the Police Station; the accused also said in evidence that usually when Sime shouted his usual words, most of the time the accused went and spoke to Sime and Sime stopped. There was also evidence from Det Cpl Veikoso that he had once arrested Sime after a report from a local bar that he was causing trouble with his son-in-law: he had informed Sime that he was drunk and causing trouble and Det Cpl Veikoso said that Sime had agreed and had given in to Police authority. I therefore accepted that Sime Soakai was not a violent or aggressive person when drunk; and I inferred that the accused knew that on the date of the incident on 3 July 2004 Sime would not have attacked him or anyone else in Pangai.

Drinking party on 3 July 2004

There was essentially no challenge as to the identity of the accused, the background to the incident when the accused slapped Sime Soakai, or the fact that it was the accused who delivered the slap. The background was that Sime Soakai had been drinking beside Pangai market with Suli Fililava, Malu Mafi and Sione Mahe on the morning of Saturday 3 July 2004 from around 10.00 am, and that they had consumed 2 bottles of vodka. There was evidence that during that time Sime Soakai

had fallen backwards off his chair, and had also fallen when he got up to go to the toilet. I accepted all that evidence as established beyond reasonable doubt.

Accused's Police service

I accepted the evidence for the accused that he was a Lance Corporal in the Police with 9 years' service, although he had originally been a mechanic on one of the Police vessels and had transferred to full Police service working full-time at Pangai Police Station after that vessel sank. As a result he had never gone through the usual recruit training at the Police Training School at Nuku'alofa, but had picked up the job from colleagues as he went along, learning and following Police procedures from other officers while working at Pangai Police Station.

The accused accepted that a Police officer should be calm and patient at all times when dealing with any kind of situation, and at times like this incident; that in any such situation an officer should try to resolve it in a peaceful manner; that it was not reasonable for a Police officer to lose his temper in such a situation; and that a Police officer should not assault any member of the public. He said that a Police officer should do what he thought was best when carrying out his duty, and if possible stop a person beforehand if he was committing an offence or about to commit an offence.

Sime's shouting

The incident had occurred around 2.00-3.00 pm when the members of the drinking party, including Sime Soakai, all walked up from the market to the main road at Pangai. At that stage Sime Soakai had been shouting very loudly and noisily his usual words such as "No one here at Pangai, I will destroy Pangai". When the men reached the main road they had started walking south along the main road, with Sime Soakai still shouting. Suli Fililava crossed to the other side of the road and following him was Malu Mafi. Sione Mahe was walking on the verandah of the former 'Ofa Kelepi Toutai [OKT] store and they were followed by Sime Soakai, who was walking on the road beside the verandah.

Intervention of accused

At that time the accused was at home doing some carpentry work and he said he repeatedly heard shouting coming from the main road at Pangai. The accused's sister was present; and in cross-examination he accepted that in Tongan custom it is not good to swear when a sister is around, but he denied that he was angry when there was that shouting because his sister was around at the time. I regret that, considering the whole evidence I was unable to accept that denial. The accused then approached the next allotment, said to be that of the old MAFF office situated next to the main road, from where he saw the 4 men approaching the main road and said he noticed Sime Soakai shouting repeatedly. However the accused denied in cross-examination that when he heard that shouting by Sime he was angry due to that and the fact that he was used to Sime being drunk. Again I was unable to accept that denial. The accused said that as he stepped over the fence onto the road he said to Sime to keep quiet, but he kept on shouting.

All 3 of Sime Soakai's companions said that they then saw the accused running to the main road. Suli Fililava said he saw the accused holding onto an object, which

seemed to be a piece of timber, and saw him running from the old MAFF allotment and jumping the fence to the main road. He said that the accused then ran past him and later he heard a banging sound and saw Sime Soakai lying on the ground on the roadside next to the OKT store. Malu Mafi also recalled the same as Suli Fililava, but Sione Mahe's account was that, as the accused ran past, it was a matter of seconds when he heard a banging like a slap and as he turned round he saw Sime Soakai lying on the ground. The accused accepted Sione Mahe's description in evidence that he had been walking in a hurry.

There was also another important eye witness, 'Eseta Tu'ifua, a 14-year old schoolgirl at Ha'apai High School, who was at her house when she heard shouting from the main road. When she heard the shouting she ran outside the house and as she looked towards the main road she saw the accused walking past hurriedly towards Sime Soakai. As the accused approached Sime Soakai he had thrown the object he was holding in his right hand (described as like a timber) to the verandah of the OKT store; and at the same time with no pause and no hesitation the accused slapped Sime on the right side of the face with his strong left hand (he is left-handed). After 'Eseta had been shown her statement made shortly after the incident, she accepted that as Tevita Vi crossed the road he called to Sime to stop making noises, but that Sime had still been shouting when Tevita Vi reached him. In the witness box 'Eseta demonstrated how the accused slapped Sime, drawing his left arm to the back before he moved it forward in a full swing to slap him. She said that Sime then fell to the ground, she said he fell like a doll after being slapped. The accused said that Sime fell down on his back.

It is consistent with the account of 'Eseta and the accused's statement in his Police interview that as the slap was delivered (by the accused's strong left hand, as he was left-handed) to Sime's right cheek there was some turning of his head as he fell, so that a fracture of the left side of the temporal skull bone, as shown on the x-ray, was entirely consistent with the evidence.

The accused said that he did not arrest Sime on this occasion because of his old age and sometimes he (the accused) stopped Sime, who obeyed what the accused said. The accused said that on this occasion the last time he spoke to Sime they were standing together and he spoke to him, finishing off what he was saying, at the same time as he then slapped him. The accused said he was trying to get across to Sime to keep quiet. He suggested that he had to slap Sime's mouth to stop him from shouting or behaving in a disorderly way; and that there was no alternative but to assault Sime, which I regret I was unable to accept; and I found beyond reasonable doubt that that view was not honestly held by the accused. The accused also said he did not hit Sime very hard, but on all the other evidence I could not accept that, as it was clear that Sime was slapped with sufficient force to make him fall down, ie with considerable force.

When he was later interviewed by the Police the accused said when asked about that:

> "Q11. What happened to Sime Soakai and his friends who were drunk?
> A11. I walked towards Sime Soakai and I said to him "How many times have I told you to stop making noises when you

are drunk". I then slapped him on the right cheek and he fell down."

Sime's bleeding

All 3 eye witnesses from the drinking party noticed that blood came out of Sime's ear and mouth. The accused himself said during his interview that he noticed blood on Sime's mouth; and in evidence he said that Sime was bleeding from his mouth and left ear. The accused asked Suli Fililava to hold Sime while he called Latu Vea to come in his vehicle. They had then put Sime onto the vehicle and rushed him to Niu'ui Hospital, Pangai. The accused also said during his interview that when they put Sime onto the vehicle to rush him to hospital, he noticed blood running out of Sime's left ear.

Hospital treatment

When Dr 'Ulufonua saw Sime Soakai on admission at Niu'ui Hospital he also noticed a slight leakage of blood from the left ear, which is usually indicative of a fracture at the base of the skull or skull areas close to the ear, and he said that was one of the major reasons why he took him into hospital. He said that in this case the swelling of the brain would have started almost instantly from the time of the trauma (ie Sime hitting his head on the ground), or within not more than 1 hour.

Dr 'Ulufonua's evidence was that on admission, and after close neurological monitoring, Sime Soakai was diagnosed to have 2 problems: 1. a severe head injury; and 2. a left side fracture of the temporal skull bone. Sime was unconscious or semi-conscious from that time onwards, and I accepted Dr 'Ulufonua's evidence that, despite Sime's state of intoxication, right from the start he thought that he had severe head injuries and started neurological monitoring. Dr 'Ulufonua said that Sime was managed accordingly, with routine intensive nursing care of an unconscious person with a severe head injury. He had discussed Sime's case with the Surgical Team and the Intensive Team at Vaiola Hospital, Nuku'alofa and they had agreed with the problems he stated and his findings. If it had been possible to move Sime to Vaiola Hospital he could have been put on an artificial ventilator, but Dr 'Ulufonua said that at the time transferral to Vaiola Hospital was impossible, particularly as Sime was unconscious, so routine management was continued at Niu'ui Hospital, Ha'apai.

There was also evidence that Sime could have been treated with steroids to reduce the brain inflammation, but that these would only work depending on the severity of the inflammation; or he could have been treated by drilling a hole in his skull to release the pressure, but that had not been done. Dr 'Ulufonua's colleagues at Vaiola Hospital had agreed with his findings.

Sime's death

Dr 'Ulufonua also reported that Sime had died on 18 October 2004 after ongoing complications of his 2 problems: severe electrolyte imbalance, diabetes insipidus, recurrent fitting episodes, severe malnourishment and sepsis, which were difficult to manage at Niu'ui Hospital.

Complications prior to death

I accepted the evidence of Dr 'Ulufonua that, based on his clinical findings plus the subsequent x-ray of Sime's head, those complications listed in his Report were caused by Sime's severe head injury, and eventually lead to his death over 3 months later on 18 October 2004. I also accepted his evidence that a large trauma to the head would be the first on his list of causes; and that all Sime's problems were a consequence of the incident at admission, mostly problem number 1. The complication of severe electrolyte imbalance arose from Sime being unconscious, not moving around and not able to use his muscles (with electrolyte) so they release electrolyte and these come out in the urine, of which Sime was producing a large amount. The complication of diabetes insipidus indicates damage to an organ inside the head which regulates the blood sugar, once there is a problem it is very hard to cure, there is no control centre and the body produces urine and because sugar is withdrawing there is abnormally high sugar in the body; and Sime was producing a larger amount of urine, which is a very good indication and sign of diabetes insipidus. These first 2 problems relate to almost every unconscious patient who does not recover. The complication of recurrent fitting episodes is caused by a lot of things such as a severe blow to the head and arose from electrolyte imbalance, higher blood sugar level, direct/indirect trauma, and sepsis: all things which occurred in Sime, but Dr 'Ulufonua considered it was probably trauma first and last. The complication of sepsis, which is an infection in the blood, arises from patients being confined to bed and unable to move; and sometimes because Sime was so big he tended to have sores which were a focus to start infection.

Medical Report

Dr 'Ulufonua's written Report dated 22 November 2004, following Sime's death, was:

> "Re: Mr Sime Soakai M/73 yrs (dob: 29/01/1931) of Ha'ato'u –
>
> Medical Report on Cause of Hospitalization and Cause of Death.
>
> May I refer to the above which he was brought into the hospital by Constable Tevita Vi on July 3rd, 2004 and I found him to be unconscious withdrawing to pain only and has a strong smell of alcohol. I then admitted him to the hospital for close observation with a suspicion of Severe Head Injury.
>
> On admission, after close neurological monitoring and investigations he was diagnosed to have these problems.
>
> Problems 1. Severe Head Injury (Glasgow Coma Scale of < 8) With Cerebral Edema
> 2. Linear Left Sided Fractured Temporal Skull Bone
>
> He was then managed accordingly with routine intensive nursing care of an unconscious person from Severe Head Injury. Due to his critical condition I discussed his situation with the Surgical Team & Intensive Team in Vaiola Hospital in which they agreed with his problem but a transferral is

> impossible hence have to continue with the management in Niu'ui Hospital.
>
> The above died on 18/10/2004 after acquiring complication of his problems such as Severe Electrolyte Imbalance, Diabetes Insipidous, Recurrent Fitting Episodes, Severely Malnourished and Sepsis which were difficult to manage in Niu'ui Hospital.
>
> These problems were explained to family members hence no resuscitative measures were undertaken when he arrested.
>
> Any information with regards to his condition would be provided if needed.
>
> Yours sincerely,
> (sgd) Dr Lisiate F 'Ulufonua,
> ACMO NIU'UI HOSPITAL."

I accepted Dr 'Ulufonua's clinical findings from his clinical observations, as indicated in his Report and in evidence, that Sime was suffering from a severe head injury received from his fall when slapped by the accused. I also accepted Dr 'Ulufonua's evidence that, although in this case there were no visible marks that told him straight away that there was a fractured skull, trauma to the skull would not necessarily have shown significant bruising, as he had dealt with a number of cases in the past with no bruising at a fracture.

X-ray

Dr 'Ulufonua recorded Sime's severe head injury and fractured temporal skull bone, which was evident from the X-ray (Exhibit 3) shown to the Court by him and Dr 'Akau'ola. He considered that the fracture would be contributed to by Sime's condition, with a history of alcohol abuse and lower bone density due to ageing.

An X-ray of Sime's head was taken on 7 July and sent to Dr 'Akau'ola at Vaiola Hospital, Nuku'alofa, whose report dated 12 July was:

> "SXR - Fracture of the temporal parietal bone on the Lt is demonstrated. No basal skull view provided so cannot R/O base of skull #
>
> C-spine C1 - C5 only in NAD. Should do swimmer's view to cover C1 - C11.
>
> Dr 'Ana 'Akau'ola"

Dr 'Ulufonua said he had been definite in his diagnosis after seeing the x-ray, but wished to have a second opinion as there was likely to be a legal case. He had been further assured on 22 November, when he wrote his Report.

The evidence of Dr 'Akau'ola was that Sime's death resulted from the fracture of the left parietal region (ie the left side of the head); and that if there was also injury to the middle meningal artery, which was usually but not always torn when there was a temporal bone fracture, that was likely to have caused brain fever and problems. I accepted that evidence as supplementing that of Dr 'Ulufonua, even although (as

submitted by Mr Tu'utafaiva for the accused) she could not tell whether the middle meningal artery had been injured; and Dr 'Ulufonua did not refer to the artery in his Report or evidence.

I found, on the excellent explanations by Dr 'Ulufonua and Dr 'Akau'ola in evidence, that it was highly likely that the severe head injury arose from the fracture of the temporal parietal bone on the left causing tearing of the important ligament behind it and hence tearing of the middle meningal artery. As the blood bleeding from that artery had nowhere to go within the skull, it would compress the brain, leading to a swelling of the brain and brain oedema, which is a very serious thing and can lead to all the types of complications suffered by Sime, as described in Dr 'Ulufonua's Report. But I also accepted Dr 'Ulufonua's evidence that brain oedema can be caused by direct trauma.

In relation to the cause of that fracture on the left side of the head, Dr 'Ulufonua in cross-examination accepted that the fracture could still have happened from Sime repeatedly falling backwards from his chair when drinking opposite the market; and that it could also have been caused when he fell onto the ground when he stood up to go to the toilet. However Dr 'Ulufonua said that a fall from a chair or hitting the head while standing up and causing a fracture would not usually cause a person to be unconscious; and that there was no significant bruising to Sime's body or head.

Relevant law

Mental element for manslaughter

In relation to the mental element for manslaughter, Mr Tu'utafaiva for the accused referred to Smith & Hogan (10th Ed 2002) at pages 379 & 381. There the learned authors cite Lord Atkin in *Andrews v DPP* [1937] 2 All ER 552,554-5 (HL):

> "... of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions ... the law ... recognises murder on the one hand, based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intent to kill, but with the presence of an element of 'unlawfulness' which is the elusive factor."

Then, referring to manslaughter by an unlawful and dangerous act, the learned authors state that the present law is that an accused is guilty of manslaughter if he kills by an unlawful and dangerous act. The only mens rea required is an intention to do that act and any fault required to render it unlawful. It is irrelevant that an accused is unaware that it is unlawful or that it is dangerous (*Newbury*, referred to below), and that he is unaware of the circumstances which make it dangerous, if a reasonable person would have been aware of them (*R v Watson* [1989] 2 All ER 865 (CA)).

In *DPP v Newbury* [1976] 2 All ER 365 (HL) at 367 Lord Salmon referred with approval to what Humphreys J said in *R v Larkin* [1943] 1 All ER 217 (CA) at 219:

> "Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite

> inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter."

Lord Salmon said that was as an admirably clear statement of the law which has been applied many times:

> "It makes it plain (a) that an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that that act inadvertently caused death, and (b) that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous. This is one of the reasons why cases of manslaughter vary so infinitely in their gravity. They may amount to little more than pure inadvertence, and sometimes to little less than murder."

On these points also see Archbold 2003 paras 19-100 & 19-105.

However the learned authors of Smith & Hogan go on to state that the better view is that a criminal act must be identified and proved, including the appropriate mens rea, as in *R v Lamb* [1967] 2 All ER 1282 (CA) and *R v Scarlett* [1993] 4 All ER 629 (CA), at 636.

But in *Attorney-General's Reference (No 3 of 1994)* [1997] 3 WLR 421,436-7,441-4 (HL), [1998] 1 Cr App R 91, it was held by the House of Lords, applying *Newbury*, that it was sufficient for the mens rea for manslaughter that the defendant had intended to commit an act which was unlawful and which all sober and reasonable people would have recognised as creating a risk of harm to some other person. As Lord Hope of Craighead said at p 443:

> "Nor is it necessary, in order to constitute manslaughter, that the death resulted from an unlawful and dangerous act which was done with the intention to cause the victim to sustain harm. This is because it is clear from the authorities that, although the defendant must be proved to have intended to do what he did, it is not necessary to prove that he knew that his act was unlawful or dangerous. So it must follow that it is unnecessary to prove that he knew that his act was likely to injure the person who died as a result of it. All that need be proved is that he intentionally did what he did, that the death was caused by it and that, applying an objective test, all sober and reasonable people would recognise the risk that some harm would result."

In *Lamb* an act which was not an unlawful act (pulling the trigger of a revolver in jest) was involved and it was held that manslaughter could only be established by proving gross negligence: Archbold 2003 para 19-100. In other words the mens rea essential for manslaughter is limited to the mens rea appropriate to the unlawful act: Archbold 2003 para 19-105.

Then in *R v Williams* [1987] 3 All ER 411 (CA), at 414, which was referred to but not followed by McElrea J in *R v Kulitapa* (Supreme Court, CR 416/03, McElrea J, 8 October 2004), Lord Lane CJ said:

> "The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more."

The key passage, referred to (but only in part) by McElrea J is at p 415, where Lord Lane CJ said:

> "In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected."

However that was a case of assault causing actual bodily harm, not manslaughter, and I found that in relation to manslaughter it has been superseded by the *Attorney-General's Reference*.

In *Kulitapa* McElrea J followed *Scarlett*, which in the present case was cited by Mr Sisifa for the prosecution, and where it was stated (at p 636):

> "They [*the jury*] ought not to convict him unless they are satisfied that the degree of force used was plainly more than was called for by the circumstances as he believed them to be and, provided he believed the circumstances called for the degree of force used, he is not to be convicted even if his belief was unreasonable."

But, in view of that sentence, *Scarlett* is a case which clearly has to be applied with great care. Smith & Hogan state at p 276:

> "The general principle ... is that the law allows such force to be used as is reasonable in the circumstances as the accused believed them to be, whether reasonably or not. ... It is immaterial that he was mistaken and unreasonably mistaken.
>
> The question 'Was the force used reasonable in the circumstances as D [*the defendant*] supposed them to be?' is ... a question, to be answered by the jury or magistrates. If D's use of force was reasonable to cause any harm which could reasonably have been foreseen, it is justified or excused, even if it results in some greater harm. ...
>
> D's belief that he is only doing what is reasonable may be evidence, but no more, that it was reasonable. 7 ...
>
> These cases relate to self-defence but similar considerations apply to force used to prevent crime or to effect an arrest etc."

and footnote 7 states:

> "*Scarlett* appeared to have significantly modified this rule but *Owino* decides that *Scarlett* in no way qualifies the law as stated in *Williams*."

Further on at p 277 of Smith & Hogan it is made clear:

> "There may be an issue as to what circumstances D believed to exist, especially where the claimed belief is an unreasonable one."

In Archbold 2003 para 19-169, referring to *Scarlett*, it is stated:

> "In *Scarlett* there is a suggestion in the judgment (at p 636) that not only is the accused entitled to be acquitted if he used no more force than would be reasonable in the circumstances as he believed them to be, but he would also be so entitled if he used no more force than he himself genuinely thought necessary in the circumstances as he believed them to be, even though excessive on an objective assessment. The customary view is that it is for the tribunal of fact to say what degree of force is reasonable in the circumstances as the accused believed them to be. *Scarlett* was considered in ***R v Owino*** [1996] 2 Cr App R 128 (CA); [1995] Crim LR 743, but the customary view was upheld."

In *Owino* it was said (p 132):

> "The jury have to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. In this respect a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances as he believed them to be."

The Court of Appeal went on to say in *Owino* (p 133-134 & p 744) that, read in context and properly understood, Beldam LJ in *Scarlett* was not saying that a person was entitled to use any degree of force he believed to be reasonable, however ill-founded the belief; and it went on to say that the law was as set out in *Williams*, ie that a person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be. The Crim LR commentary adds at p 744 that it is best that *Scarlett* is not referred to in the future - a view with which I agree.

In summary therefore, the approach in *Williams* put forward by Smith & Hogan is that the force used must be objectively reasonable in the light of the facts (and the circumstances and the danger) as the defendant subjectively believed them to be. An accused is not allowed to use as much force as he thought reasonably necessary.

That approach has since been followed by the Privy Council in London in *Shaw (Norman) v The Queen* [2001] UKPC 26; [2001] 1 WLR 1519; [2002] 1 Cr App R 77; [2002] Crim LR 140 (PC), where it was stated:

> "19. In the opinion of the Board it was necessary for the trial judge to pose two essential questions (however expressed) for the jury's consideration:
>
> (1) Did the appellant honestly believe or may he honestly have believed that it was necessary to defend himself?
>
> (2) If so, and taking the circumstances and the danger as the appellant honestly believed them to be, was the amount of force which he used reasonable?"

In that concise statement the emphasis is of course on the belief being honest.

But in any event, as I have stated above, I consider that Scarlett and the other authorities referred to above have been overtaken by the *Attorney-General's Reference*, which I find highly persuasive and shall follow. McElrea J did not refer to the *Attorney-General's Reference* in *Kulitapa*, presumable because it was not cited to him in *Kulitapa* and, because of that case and also the other authorities referred to above, I regret that I have to disagree with his view on the mens rea required for manslaughter.

Cause of death

As a matter of law an accused is still criminally liable if he hit a blow which was a cause of death – meaning something more than a minor cause; the incident need not be the sole cause of death, nor even a substantial cause, but it must be one of the causes and something more than de minimis: *R v Hennigan* [1971] 3 All ER 133 (CA). Even if something else happened after the original blow, it is enough that the original blow contributed significantly to the resulting death, if at the time of death the original injury was still an operating cause and a substantial cause, albeit that some other cause was operating: *R v Smith* [1959] 2 All ER 193.

Grounds of decision

Was the slap an unlawful act?

On the evidence before me I was satisfied beyond reasonable doubt that the accused Tevita Vi slapped Sime Soakai at Pangai on 3 July 2004 with such force that he fell and struck his head on the ground. There was no issue about the identity of the accused, the time and location leading up to the incident, nor any issue of self-defence.

I accept that, while in fact Tevita Vi was not working at the time, as a Police officer in terms of section 20(b) of the Police Act he is always deemed to be on duty, but I was unable to accept that the slap fell within the ambit of his duty. The evidence showed that Sime and his unfortunate habit of getting drunk and shouting in public were well known to the accused and other Police officers in Pangai and that Sime was not a violent or aggressive man requiring restraint by force. The accused Tevita Vi himself gave evidence that on a previous occasion he had arrested Sime when he was drunk and he had gone quietly to the Police Station; and that usually when Sime shouted his usual words, most of the time the accused went and spoke to Sime and Sime stopped.

There was conflicting evidence about whether or not the accused told Sime to stop shouting and whether Sime continued to shout right up to the time of the slap. The accused himself said that on this occasion the last time he spoke to Sime they were standing together and he spoke to him, finishing off what he was saying, at the same time as he then slapped him. And in the accused's unchallenged record of his interview by the Police, simply said at Answer 11 that he walked towards Sime and said to him "How many times have I told you to stop making noises when you are drunk", then slapped him on the right cheek and he fell down. After 'Eseta Tu'ifua had been shown her statement made shortly after the incident, she accepted that as Tevita Vi crossed the road he called to Sime to stop making noises, but that Sime had still been shouting when Tevita Vi reached him. Although Sione Mahe's evidence varied, he did accept in cross-examination that the accused had spoken to Sime, but Sime had not stopped shouting. Therefore while I accepted that the accused spoke to Sime about the shouting before he reached him, I also accepted 'Eseta's evidence that the accused did not stop when he reached Sime, but slapped him immediately. That was consistent with 'Eseta's evidence that Tevita Vi was in a hurry, which was corroborated by the evidence of Sime's 3 drinking companions (which in this respect I accepted) that the accused ran or jogged to where Sime was; the accused himself accepted Sione Mahe's description that he had been walking in a hurry.

The evidence to the contrary, that Sime only shouted twice and that they did not hear the accused speak to him before slapping him, came from Sime's 3 drinking companions, and as I believe they were almost as drunk as Sime himself, their evidence on the exact timing of events could not be considered as entirely reliable, so I preferred the evidence of the accused and 'Eseta.

Although Sime may have been shouting right up to the time he was slapped, with threats to destroy Pangai, and thus committing the offences of being found drunk in a public place and being drunk and behaving in a disorderly manner in a public place in terms of section 3(j) & (k) of the Order in Public Places Act, I did not accept that the accused Tevita Vi took these literally as meaning that 73-year old Sime was likely to cause trouble (beyond his shouting) by actually fighting with anyone in Pangai; and I inferred that the accused knew that on that day Sime would not have attacked him or anyone else in Pangai. Although the accused said that he was trying to get across to Sime to keep quiet, and that he had to slap Sime's mouth to stop him from shouting or behaving in a disorderly way, I was unable to accept that in the circumstances that was necessary or called for.

I therefore found it established beyond reasonable doubt that objectively there was no requirement for the accused to use any force on Sime at that exact time. Although the accused had a duty under section 20(e) of the Police Act to prevent the commission of offences and public nuisance, that could have been accomplished without slapping Sime, for example simply by asking or telling him again to stop and then arresting him if he failed to comply and taking him to the Police Station, which was not far away. The accused said that he did not arrest Sime on this occasion because of his old age and most of the time the accused stopped him and Sime obeyed what the accused said - he could have been more patient and done that on this occasion also.

Even accepting that the accused subjectively believed that it was necessary for him to slap Sime (although for these reasons I found beyond reasonable doubt that that was not an honest belief) I found it established beyond reasonable doubt, again

for those reasons, that the accused's use of force was not objectively reasonable in the light of the circumstances as he believed them to be.

But in any event, accepting that the accused had told Sime to stop shouting and Sime had continued to shout until the accused reached him, I do not accept that that was a reason for the accused immediately to slap Sime. There may be occasions when it is perfectly appropriate for a Police officer to use reasonable force - eg to stop a person continuing to commit a crime or to apprehend a violent criminal – but this was not one of them. A Police officer is given very great powers by the law, but he should always carry out his duty in a calm and dispassionate frame of mind and without allowing personal emotions such as anger to influence his actions. He should try to resolve such a situation in a peaceful manner without assaulting any member of the public, as he himself admitted in evidence. In this case I found on the evidence that the accused's actions and whole approach to the situation showed that he had allowed his own anger to influence what he did – even if that anger at Sime again causing a drunken disturbance was to some extent understandable. To that extent I found that the accused deliberately assaulted Sime, as demonstrated by Answer 11 of his interview, and used excessive force. I believe it is significant that the accused had never been through the normal training for a Police officer at the Police Training School, though that does not excuse what he did.

Further, as already mentioned, I was satisfied beyond reasonable doubt that the force actually used by the accused was greatly in excess of any reasonable force required by the occasion. Although Sime was a tall man, he was also an elderly man with no history of aggressive behaviour, but I found that the accused slapped Sime with great force. That was shown by the demonstration in evidence by 'Eseta of the way in which the accused delivered the slap with a full swing, and of the way in which Sime fell down immediately because of it, as 'Eseta described it, he fell down like a doll. I accepted that evidence and was unable to accept the evidence of the accused that he did not slap Sime very hard. Tevita Vi's slapping of the accused, accompanied by Tevita Vi saying "How many times have I told you to stop making noises when you are drunk", seemed much more like the administration of punishment or retribution, which I must make clear is no part of the function of a Police officer on an occasion such as this.

On all that evidence I was satisfied beyond reasonable doubt that the degree of force used by the accused was plainly more than was called for by the circumstances as he subjectively believed them to be (as his belief that a slap was necessary to fulfil his duty cannot have been an honest belief); and therefore that the accused's action in slapping Sime Soakai on 3 July 2004 was not objectively reasonable and was not an action which was in any way sanctioned by the law, and accordingly it was an unlawful act. Even if the accused subjectively and mistakenly believed that Sime's actions required him to apply some force to Sime to stop him shouting, the force used by the accused was not objectively reasonable in the light of that fact, as shown by its effect in knocking down Sime.

I also found it established beyond reasonable doubt that the accused intentionally did what he did when he slapped Sime Soakai, and that, applying an objective test, all sober and reasonable people would recognise the risk that some harm would result.

Was the slapping a cause of death?

Mr Tu'utafaiva for the accused also submitted that the prosecution had failed to prove that the slapping of Sime by the accused was a substantial cause of death, as it had failed to prove that the fracture to the left side of Sime's head was caused by the accused. In cross-examination Dr 'Ulufonua said that the fracture could still have happened from Sime repeatedly falling backwards from his chair when they were drinking opposite the market; and that it could also have been caused when Sime fell on to the ground when he stood up to go to the toilet. In re-examination Dr 'Ulufonua had confirmed that the fall from the chair or hitting the head while standing up and causing a fracture would not usually cause a person to be unconscious. Mr Tu'utafaiva submitted that it was not alleged by the prosecution that the fracture to the left side was caused by the slapping (by itself).

Mr Tu'utafaiva also submitted that there was no injury to the back of Sime's head, and the fracture, according to the x-ray, was to the left side of the skull. Dr 'Ulufonua in cross-examination had said that there was no significant bruising to Sime's body or head, although 'Eseta Tu'ifua's evidence was that Sime fell like a doll after being slapped. He submitted that it could be more likely, if the injury was caused by the fall, that there should be a fracture on the back of the head, instead of the side, which added to the doubt about the cause of the fracture on the left side of the head.

However on the evidence before me I was satisfied beyond reasonable doubt that it was the slap by the accused which caused Sime to fall down instantly and like a doll (according to 'Eseta) and strike his head on the road. It is consistent with the account of 'Eseta and the accused's statement in his Police interview that as the slap was delivered (by the accused's strong left hand, as he was left-handed) to Sime's right cheek there was some turning of his head as he fell, so that a fracture of the left side of the temporal skull bone, as shown on the x-ray, was entirely consistent with the evidence.

What is more important and more significant is that, despite the evidence of earlier falls while Sime was drinking, there was no evidence at all of any bleeding from Sime's ear or mouth before he was knocked down. Yet as soon as Sime was on the ground when he was knocked down, all 3 of his drinking companions who were eye witnesses noticed that blood came out of his ear and mouth. The accused himself said during his interview that he noticed blood on Sime's mouth and when they put him onto the vehicle to rush him to hospital, he noticed blood running out of Sime's left ear.

When Dr 'Ulufonua saw Sime on admission he also noticed a slight leakage of blood from the left ear, which is usually indicative of a fracture at the base of the skull or skull areas close to the ear, and he said that was one of the major reasons why he took him into hospital. He said that in this case the swelling of the brain would have started almost instantly from the time of the trauma (ie Sime hitting his head on the ground), or within not more than 1 hour, thus reinforcing the evidence that it was the fall from the slap by the accused which caused Sime's severe head injury.

All that evidence satisfied me beyond reasonable doubt that the slap by the accused (which caused Sime to fall down instantly and strike his head on the road) was a cause (which was more than minor) of Sime's severe head injury from which he subsequently died, as I find below.

Mr Tu'utafaiva further submitted that Dr 'Ulufonua did not clarify or specify the problems of the deceased Sime which caused his death, as his evidence was based only on his clinical findings plus the x-ray of Sime's head/skull. The evidence of Dr 'Akau'ola, the radiologist, was that the death resulted from the fracture of the left parietal region (ie the left side of the head); and if there had also been an injury to the middle meningal artery that would have caused brain fever and problems, but she said in cross-examination that she could not tell whether or not the artery had been injured. Dr 'Ulufonua had not referred to the artery in his Report or evidence.

Mr Tu'utafaiva also submitted that there were indications that Dr 'Ulufonua was not sure of the real problem faced by the deceased Sime, and was not certain of the cause of death, as he said that the swelling of the brain could have been treated by the use of steroids to reduce inflammation, or by drilling a hole in the head to relieve the pressure. However there had been no evidence that one or both of those treatments was carried out on Sime, and no reason given in evidence for not carrying out one or both types of treatment. He submitted that other aspects of Dr 'Ulufonua's evidence in cross-examination on the contents of his Report, when he stated that severe electrolyte imbalance was highly possible, that diabetes insipidus was highly likely, depending on his clinical findings, and that recurrent fitting episodes were possibly caused by trauma to Sime's head, also indicated that he was not sure of the real problem faced by Sime.

However I was unable to accept those submissions for the defence. As I have found above, I had no reasonable doubt that Sime's condition on admission to hospital was caused by the action of the accused. He was conscious before that slap but unconscious or semi-conscious from that time onwards, and I accepted Dr 'Ulufonua's evidence that, despite Sime's state of intoxication, right from the start he thought that he had severe head injuries and started neurological monitoring. Dr 'Ulufonua's Report after Sime's death stated that on admission, after close neurological monitoring and investigations Sime was diagnosed to have 2 problems: 1. Severe head injury (Glasgow Coma Scale of < 8) with cerebral oedema; and 2. Linear left sided fractured temporal skull bone. The x-ray taken on 7 July (produced to the Court as Exhibit 3) had confirmed Dr 'Ulufonua's diagnosis by showing a fractured skull on the left side of the skull. Dr 'Ulufonua said he had been definite in his diagnosis after seeing the x-ray, but wished to have a second opinion as there was likely to be a legal case. He had been further assured on 22 November, when he wrote his Report.

I accepted Dr 'Ulufonua's clinical findings from his clinical observations, as indicated in his Report and in evidence, that Sime was suffering from a severe head injury received from his fall when slapped by the accused and that complications arising from that were a substantial cause of his death, as I find below. I also accepted Dr 'Ulufonua's evidence that, although in this case there were no visible marks that told him straight away that there was a fractured skull, trauma to the skull would not necessarily have shown significant bruising, as he had dealt with a number of cases in the past with no bruising at a fracture.

Although this finding of death following a severe head injury does not depend on linking the severe head injury to Sime's other problem of a fracture of the skull, I also found on the explanations by Dr 'Ulufonua and Dr 'Akau'ola in evidence that it was highly likely that the severe head injury arose from the fracture of the temporal parietal bone on the left causing tearing of the important ligament behind it and hence tearing of the middle meningal artery. I also accepted the submission by Mr Sisifa for

the prosecution that the phrase "severe head injury" in the indictment covered a head injury such as a fracture of the skull, as well as internal trauma. As the blood bleeding from that artery had nowhere to go within the skull, it would compress the brain, leading to a swelling of the brain and brain oedema, which is a very serious thing and can lead to all the types of complications suffered by Sime, as described in Dr 'Ulufonua's Report. But I also accepted Dr 'Ulufonua's evidence that brain oedema can be caused by direct trauma.

I further accepted the evidence of Dr 'Ulufonua that those complications listed in his Report were caused by Sime's severe head injury, and eventually lead to his death 3 months later on 18 October 2004. I also accepted his evidence that a large trauma to the head would be the first on his list of causes; and that all Sime's problems were a consequence of the incident at admission, mostly problem number 1. I found, on the evidence detailed above, that those complications arose from the severe trauma to Sime's head and his consequent unconscious state. Severe electrolyte imbalance and diabetes insipidus relate to almost every unconscious patient who does not recover.

There was also evidence that Sime could have been treated with steroids to reduce the brain inflammation, but that these would only work depending on the severity of the inflammation; or he could have been treated by drilling a hole in his skull to release the pressure, but that had not been done, although Dr 'Ulufonua had discussed Sime's situation with the Surgical Team and the Intensive Team at Vaiola Hospital, Nuku'alofa, who had agreed with his findings. If it had been possible to move Sime to Vaiola Hospital he could have been put on an artificial ventilator, but a transfer had been impossible, particularly as he was unconscious.

In any event, as set out above under the relevant law, as a matter of law the accused is still criminally liable if he hit a blow which was a cause of Sime's death which was something more than de minimis. Even if something else happened after the original blow – such as it being impossible to take Sime to Tongatapu for better medical treatment – it is enough that the original blow contributed significantly to the resulting death. I was satisfied that the fall caused by the accused's slap caused Sime's death in the sense that the death flowed from the wound, even if the treatment of Sime had been wrong or could have been better (which in all the circumstances I do not accept): at the time of death the original injury was still an operating cause and a substantial cause, so Sime's death could properly be said to be caused by the fall albeit that some other cause was operating.

Although the date of Sime's death was not specified in the indictment, it was very clear that death followed on in a continuous process from the original slapping incident on 3 July 2004 and that in the whole circumstances the accused suffered no injustice or unfairness because the date was not specified in the indictment.

I therefore found it proved beyond reasonable doubt that the slap by the accused Tevita Vi of Sime was a cause of Sime's death which was more than minor, and in reality was a substantial cause of Sime's death.

Conclusion

I therefore found it proved beyond reasonable doubt that the accused Tevita Vi on 3 July 2004 intentionally slapped Sime Soakai on the right side of his face with his left hand while he was drunk, causing him to fall and hit his head on the road, and

thus causing him to receive severe head injury, and thus causing his death. I also found it established beyond reasonable doubt that that was an unlawful act and not one carried out in terms of Tevita Vi's duty as a Police officer; and that, applying an objective test, all sober and reasonable people would have recognised the risk that some harm would result.

I have to add that, even if I am wrong in applying that test for manslaughter from the House of Lords in the *Attorney-General's Reference*, using the approach put forward by Smith & Hogan, I also found beyond reasonable doubt that the force used by the accused was not objectively reasonable in the light of the facts (and the circumstances and the danger) as the accused subjectively (but not honestly) believed them to be. Even if the accused subjectively and mistakenly believed that Sime's actions required him to apply some force to Sime to stop him shouting, I found that that belief was not honest; the accused was not allowed to use as much force as he thought reasonably necessary, and the force he actually used was not objectively reasonable in the light of that fact, as shown by its effect in knocking down Sime.

I therefore find Tevita Vi guilty of manslaughter in terms of Count 1 and I convict him of that - a finding which I make with very great regret in view of Tevita Vi's position as a Police officer of several years experience.

Skeen v Sovaleni anor

Land Court, Nuku'alofa
Ford J
L 16/04

3 and 6 June 2005; 10 June 2005

Practice and procedure – strike out application – opportunity to amend pleadings

The plaintiff was a Tongan subject who lived in Point Chevalier, Auckland, New Zealand. The action related to a block of land at Fasi, Kolofo'ou, comprising 1 rood 29.7 perches. It was pleaded that between 1934 and 1995 the land was leased by the Crown to various lessees. The last lease, lease No. 3172, was to a Mrs Sela Skeen for a term of 20 years from 19 July 1975 until 18 July 1995 at a rental of $200 per annum. It was further pleaded that, sometime after the expiration of lease No. 3172, half of the land (35 perches) was leased to the plaintiff and the other half was granted under deed of grant by the Minister of Lands (the second defendant) to the first defendant. In this proceeding, the plaintiff sought to have registration of the deed of grant cancelled and the first defendant and his family evicted from the property. He also sought an order that the whole of the 1 rood 29.7 perches be either leased or granted to himself. The first defendant applied to strike out the proceeding on the ground that the statement of claim disclosed no reasonable cause of action.

Held:

1. The principles relating to strike out applications were well-established. No evidence was admissible on such an application and the Court was required to assume that the facts pleaded were true and undisputed. The discretion to strike out should only be exercised if the case as pleaded was so untenable that it could not possibly succeed. If the defects in the pleadings were capable of being cured by amendment then it was appropriate for the Court to allow the plaintiff the opportunity to amend.
2. Some nexus was established so the Court was prepared to allow plaintiff's counsel a final opportunity to try and remedy the defects by way of amendment. An amended statement of claim was to be filed and served within 28 days. If, at that stage, it was still apparent that no reasonable cause of action had been established then the pleadings would be struck out.

Case considered:
Tukuafu v Tupoumalohi [2002] Tonga LR 268

Statute considered:
Land Act (Cap 132)

Rules considered:
Supreme Court Rules 1991

Counsel for plaintiff	:	Mr Fakahua
Counsel for first defendant	:	Mr Niu
Counsel for second defendant	:	Ms Raasch

Ruling

The plaintiff's claim is fraught with difficulties and, not surprisingly, the first defendant has applied to strike it out. The Minister of Lands, as second defendant, has undertaken to abide the decision of the Court.

The plaintiff pleads that he is a Tongan subject presently residing in Point Chevalier, Auckland, New Zealand. The action relates to a block of land at Fasi, Kolofo'ou, comprising 1 rood 29.7 perches. It is pleaded that between 1934 and 1995 the land was leased by the Crown to various lessees. The last lease, lease No. 3172, was to a Mrs Sela Skeen for a term of 20 years from 19 July 1975 until 18 July 1995 at a rental of $200 per annum.

It is further pleaded that, sometime after the expiration of lease No. 3172, half of the land (35 perches) was leased to the plaintiff and the other half was granted under deed of grant by the Minister of Lands (the second defendant) to the first defendant. In this proceeding, the plaintiff seeks to have registration of the deed of grant cancelled and the first defendant and his family evicted from the property. He also seeks an order that the whole of the 1 rood 29.7 perches be either leased or granted to himself.

The grounds upon which the plaintiff seeks to have registration of the first defendant's deed of grant set aside are said to be:

> "(a) it was upon fraud or misrepresentation of the first and second defendants
> (b) it was of a mistake or misunderstanding of the second defendant
> (c) it is inequitable to allow it to stand
> (d) the land was not available for grant as there was a dwelling house of the plaintiff and his family on the land."

The application to strike out the proceeding is made pursuant to Order 8 Rule 6(1)(l) of the Supreme Court Rules 1991 based on the ground that the statement of claim discloses no reasonable cause of action. The principles relating to strike out applications are well established. No evidence is admissible on such an application and the Court is required to assume that the facts pleaded are true and undisputed. The discretion to strike out should only be exercised if the case as pleaded is so untenable that it cannot possibly succeed. If the defects in the pleadings are capable

of being cured by amendment then it is appropriate for the Court to allow the plaintiff the opportunity to amend.

The principles applicable to setting aside registration of a deed of grant are also well established. 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. contrary to the Act) or as a result of fraud, mistake, breach of the principles of natural justice or of a promise made by the Minister.

It is axiomatic, however, that before a plaintiff can challenge the registration of any deed of grant he must have *locus standi*. The Land Court was not established as a forum for just any busybody.

In his strikeout application, Mr Niu correctly pointed out that the statement of claim fails to disclose any legal basis to support the plaintiff's alleged entitlement to the land held by the first defendant. The earlier lease over the whole block of land to Sela Skeen had expired. There is no specific pleading clarifying the relationship of the plaintiff to Sela Skeen although there is an implication in the final paragraph of the statement of claim that she was the plaintiff's mother but, even so, there is absolutely nothing pleaded which would suggest that the Minister of Lands was obligated in any way to lease or grant the whole of the land either to the plaintiff or his mother after the expiration of the lease. As Mr Niu expressed it: "The plaintiff has not pleaded in his statement of claim his legal right to claim any right as lessee or successor to the lessee of the expired lease of Sela Skeen."

Mr Fakahua submitted that the plaintiff had *locus standi* by virtue of section 7 of the Land Act (Cap 132). Section 7 is not pleaded but, in any event, that provision simply gives a person falling within its ambit an entitlement to apply for and be granted a tax or a town allotment. It does not give the plaintiff an entitlement to any specific allotment as his counsel appears to be contending in the present case.

The plaintiff's submissions in opposition to the strikeout application are commendably brief but no reference is made to any legal authorities. All counsel effectively does is to repeat the grounds set out in the statement of claim for challenging the validity of the deed of grant and then states that those grounds will be proved in evidence at the hearing.

Such an assertion is not good enough. Before any challenge can be made to registration of a deed of grant, a plaintiff must be able to establish proper standing before the Court. Where, as in the present case, a plaintiff claims entitlement to the land in question then the basis for his alleged entitlement must be apparent from the pleadings. Once that threshold is established then and only then do the pleaded grounds for setting aside the deed of grant become a relevant consideration.

On the pleadings as they stand, I accept Mr Niu's submission that the plaintiff has failed to establish a sound *locus standi*.

Turning next to the pleaded grounds for having registration of the deed of grant cancelled, it is clear from Mr Fakahua's written submissions that the principal ground the plaintiff relies upon is fraud and, as noted above, fraud is a recognised ground for setting registration aside. No particulars of any fraud, however, have been pleaded. Instead, Mr Fakahua submitted that fraud will be established through the evidence when the case eventually comes to a hearing. Counsel also indicated that the principal act of "fraud" to be relied upon will be "favouritism" by the second defendant in that, "the first defendant is the son of a former deputy prime minister."

The meaning of "fraud" was considered by this Court in *Tukuafu v Tupoumalohi* [2002] Tonga LR 268. The concept involves dishonesty or moral turpitude. Whatever meaning the plaintiff attributes to the word "favouritism", it is not something that falls within the recognised definition of fraud. Moreover, it is not good enough for plaintiff's counsel simply to submit that fraud will be established and proven at the trial. Fraud is a serious allegation and it is not sufficient for the plaintiff merely to plead the facts from which it may be inferred. The acts alleged to be fraudulent must be stated fully and precisely with full particulars -- see *Halsbury* vol 36, para 36.

Although I suspect that the task will be beyond him, because some nexus has been established, I am prepared to allow plaintiff's counsel a final opportunity to try and remedy the defects by way of amendment. An amended statement of claim is to be filed and served within 28 days of the issuance of this Ruling. If, at that stage, it is still apparent that no reasonable cause of action has been established then the pleadings will be struck out.

In the meantime, costs are reserved.

Gough Finance Ltd v Westpac Bank of Tonga

Supreme Court, Nuku'alofa
Ford J
CV 684/03

18 and 24 May 2005; 15 June 2005

Costs – taxation of costs – overseas lawyers – not registered in Tonga – costs not recoverable

On 24 August 2004 the Court delivered judgment on an interlocutory issue, namely, whether the Supreme Court of Tonga had jurisdiction to hear the case (as claimed by the plaintiff) or whether the action should properly have been brought in New Zealand (as claimed by the defendant). The Court found for the plaintiff and held that Tonga was the appropriate forum. The Court also awarded costs to the plaintiff on that interlocutory application in a sum to be either agreed or taxed. On 20 September 2004 two bills of costs were filed on behalf of the plaintiff. The first bill from Mr Niu claimed costs of $4515.50 together with disbursements of $325.50. The second bill of costs was in the name of WJ Palmer, a Christchurch-based partner with Buddle Finlay, a New Zealand law firm. The "Buddle Finlay bill" claimed costs incurred by Mr Palmer and various other named "fee earners" in his Christchurch firm totalling NZ $11,182 together with disbursements of NZ $206. Defence counsel opposed both bills of costs and they were subsequently referred to the Court for taxation.

Held:

1. An overseas counsel was unable to claim costs on taxation unless, at the material time, he or she held a valid practising certificate. None of the Buddle Finlay "fee earners" held a practising certificate in Tonga.
2. The Buddle Finlay bill of costs was disallowed. The Court issued a taxation certificate in respect of Mr Niu's bill of costs, which would take account of the points made by both counsel in their written submissions.

Case considered:
Practice Direction 02/92

Statute considered:
Law Practitioners Act 1989

Rules considered:
Supreme Court Rules

Counsel for plaintiff : Mr Niu
Counsel for defendant : Mr Waalkens QC

Ruling

The Issue

The short point at issue in this ruling is whether costs incurred by the plaintiff's solicitors in Christchurch, New Zealand, in respect of an interlocutory argument are recoverable upon taxation in Tonga.

The Background

On 24 August 2004 I issued an earlier ruling rejecting an application by the defendant that challenged the jurisdiction of this Court to hear the substantive action. The defendant had contended that New Zealand was the appropriate forum but I ruled against it and held that the case would be heard in Tonga. I awarded costs on the application to the plaintiff.

The Cost Claims

On 20 September 2004 Mr Niu filed a bill of costs relating to his own attendances claiming $4,190.00 together with disbursements amounting to $325.50. On the same day he filed a separate bill of costs relating to attendances by members of Buddle Finlay, the Christchurch law firm acting for the plaintiff. The Buddle Finlay invoice was for costs of NZ $11,182.00 and disbursements of NZ $206.00. An additional figure is shown on the bill for New Zealand GST totalling $1397.75 but the GST element is not being claimed upon taxation.

The Buddle Finlay account involves attendances by eight "fee earners" whose names and hourly rates are set out on the cover page of the bill. Mr Niu refers to the eight fee earners in his submissions as New Zealand "counsel" but it is not known whether they are all qualified barristers and solicitors. Their charge out rates range from NZ$100 to $300. It would appear that the senior solicitor involved at the Buddle Finlay end was Mr WJ Palmer who signed the bill of costs. He is one of the solicitors on the $300 per hour charge out rate.

In summary, the plaintiff is claiming costs and disbursements on this taxation made up of T$4515.50 and NZ$11,388.00.

I am not familiar with recent costs awards in New Zealand but I can say at once that, in terms of this jurisdiction, the amount claimed is totally out of proportion to what I would be prepared to accept as a "reasonably necessary or proper" charge (to use the relevant wording from the costs provision Order 29, rule 4(i)(ii) of in the Supreme Court Rules) in respect of an interlocutory argument that did not even involve a Court hearing. My Ruling was decided on the basis of (admittedly helpful) written submissions on the law.

Submissions

At the taxation hearing, which was eventually held on 3 May 2005, after considering Mr Niu's bill of costs, I indicated that I would need to receive further submissions from counsel before determining whether all or any part of the Buddle

Finlay bill of costs would be allowed. Those further submissions have now been received and considered.

In his submissions, Mr Niu referred to hourly rates that have been allowed in other cases upon taxation in Tonga involving New Zealand counsel. However, in the cases he referred to counsel held current practising certificates under the Law Practitioners Act 1989. Mr Niu also submitted that overall the Buddle Finlay costs were "reasonably necessary due to the complexity of the issue of jurisdiction which was raised."

In response, Mr Waalkens submitted that the plaintiff had not discharged the onus of proof that the costs being claimed in the Buddle Finlay account were either appropriate or reasonable and he submitted that they should be disallowed in their entirety.

On 3 June 2005, I issued a Minute drawing Counsels' attention to the provisions of the Law Practitioners Act 1989 and I invited them, if they so wished, to make any further supplementary submissions within seven days. No further submissions have been received.

Conclusions

My concern in this case is that s 10 of the Law Practitioners Act 1989 makes it an offence, punishable by up to two years imprisonment or a fine of $1000 or both, for any person to practise as a law practitioner without having in force a valid practising certificate. Section 3(2)(b) of the same Act provides that a person shall be deemed to practise as a law practitioner if he advises any person on any matter of law or legal procedure.

Practice Direction 02/92, which promulgated the guidelines for taxation in terms of Order 29 of the Supreme Court Rules provides (consistently with the provisions of section 10 of the Law Practitioners Act) that the fees allowed upon taxation are recoverable only in respect of the three classes of practitioners defined in that Practice Direction. The definitions then provide that all practitioners in the categories of "Locally qualified Lawyers" and "Counsel" must be licensed to practice law in the Kingdom. Likewise practitioners in the third category, namely "Senior Counsel", are also required in terms of the legislation to hold a valid practising certificate.

The position, therefore, is clear. An overseas counsel is unable to claim costs on taxation unless, at the material time, he holds a valid practising certificate.

None of the Buddle Finlay "fee earners" hold a practising certificate in this country and it seems to me that that, quite simply, must be the end of the matter. To allow the Buddle Finlay bill of costs would be to accept that the named fee earners were able to recover costs upon taxation for practising as law practitioners in connection with a case before this Court when none of them held a valid practising certificate. That situation is simply not permitted. This Court cannot even entertain an application which might appear to condone a breach of the Law Practitioners Act.

The Buddle Finlay bill of costs is, therefore, disallowed. I shall proceed to issue a taxation certificate in respect of Mr Niu's bill of costs, which will take into account the points made by both counsel in their written submissions.

Y v Y

Supreme Court, Nuku'alofa
Webster CJ
FD YY/04

27 June 2005

Family law – application for return of children to Australia – granted

Since late 2003/early 2004 the Applicants' children, a 7 year old boy and a 6 year old girl, had been in Tonga with their paternal grandparents, the Respondents. On 21 June 2005 the Applicants made an application for an immediate order for the return of the children to them in Australia.

Held:

1. The applicable test was the best interests of the children, but the Court could order the return of the children to their original country of residence without a full inquiry into the facts if it was satisfied on the balance of probabilities that the children would come to no harm if it did so.
2. The Court found that it was in the best interests of the children A and B to be re-united with their parents and their younger brother C. This was in principle desirable. Their home was with their parents throughout their lives up until 18 months ago, they were Australian citizens, and their home and schooling was in Australia until 18 months ago. Both were still very young and they wished to go back to their parents.
3. The Court found that it was not necessary to hold a full inquiry and that the Court should order the return of the children to their parents in Australia.

Cases considered:

E (an infant), Re [1967] 1 All ER 329 (ChD)
Gorce v Miller [2003] TOSC 50
H (infants), Re [1965] 3 All ER 906 (ChD); [1966] 1 All ER 886 (CA)

Statute considered:

Nationality Act (Cap 59)

Counsel for applicants	:	Mr Niu
Respondents in person		
Guardian ad Litem	:	Ms Fukofuka

Judgment

This action was raised by the Applicants in December 2004, seeking the return to them in Australia of their children A, a boy aged 7, and B, a girl aged 6. Since late 2003/early 2004 the children have been in Tonga with their paternal grandparents, the Respondents.

This was the hearing of an application by the Applicants (made on 21 June) for an immediate order for the return of the children to Tonga, in terms of *Re H (infants)* [1965] 3 All ER 906 (ChD); [1966] 1 All ER 886 (CA) without the Court holding a full hearing into the action (see also Halsbury's Laws (4th Ed) Vol 5(2) para 1007).

I heard oral submissions for both parties and the Guardian ad Litem in support of the written documents, which included affidavits and other documents. With the agreement of the parties I also spoke to the 2 children individually in the presence of the Counsel for the Guardian ad Litem (but without the presence of Counsel for their parents and the grandparents) to ascertain their wishes on returning to their parents in Australia.

I also had the benefit of an up-to-date report dated 23 May 2005 on the parents and their home circumstances from the International Social Service, Australian Branch [ISS] in Melbourne. Only since receiving this report has it been feasible to hold this hearing.

It was common ground that the Hague Convention on the Civil Aspects of International Child Abduction is not applicable as Tonga is not a party: see *Gorce v Miller* [2003] TOSC 50. Although the ISS report referred to the Convention on the Rights of the Child, which has been ratified by both Tonga and Australia, there were no submissions that it is part of the domestic law of Tonga and I do not understand that to be the case.

It is clear from *Re H* in the Court of Appeal that in such circumstances the Court has jurisdiction to make a full inquiry, if it wishes, into the merits of all the matters in dispute, but is not bound to do so if it is satisfied that the children will come to no harm if it sends them back to their original country. In a later case the same judge (Cross J) held that in general the court should remit the child to the jurisdiction of the court from which he came, unless satisfied beyond reasonable doubt that to do so would inflict serious harm on the child, but there may be special circumstances which oblige the court to decide that the child should be kept in the receiving country: *Re E (an infant)* [1967] 1 All ER 329 (ChD). However that case referred to the situation where the child had been removed in defiance of an order from the original court and I do not think it is applicable in this case.

I have therefore at this stage not made a full inquiry into the facts and this decision only reflects in general the undisputed facts necessary to reach it.

It was not disputed that in a case such as this the welfare of the children is the paramount consideration for the Court, but it is not the only consideration.

In this case I did not understand it to be disputed that the parents in Australia now wish the children to be returned to Australia, so that in effect they remain in Tonga against the wishes of the parents. But, although it is a factor in the general picture, it is not crucial in this case whether or not the children were "kidnapped", and on the material before me I would not at present find that they were forcibly removed to Tonga.

As mentioned above, I saw the children in private as part of this hearing. The boy A was very fluent and expressed a wish to return to see their parents, also to play

with his little brother and to visit his aunts and uncles. When asked how he thought the Respondents would feel if that happened, he thought they would be sad, but then added that "maybe they will just come to Australia and then we can go and visit and stay with them and sleep there". The girl B, who is only 6, said very little, but did indicate that she would like to go back to Australia. I therefore construed the children's wishes as being in favour of returning to Australia, but at the same time they said nothing to indicate that they were against being with their grandparents in Tonga. In any event it is difficult to attach great weight to the views of children of that young age, as they may be based on passing considerations without any real idea of the long-term situation.

The male applicant and his parents the Respondents are all Tongan citizens. The female applicant is an Australian citizen. The 2 children A and B were born in Australia and are Australian citizens with Australian passports, but under section 2(b) of the Nationality Act (Cap 59) are also deemed to be Tongan subjects as persons born abroad of a Tongan father who was born in Tonga.

The Applicants have one other child, a boy C now aged 4, who was due to be escorted to Tonga and delivered to the care of the respondent grandparents in May 2004, but that did not proceed. In an authorisation dated 4 May 2004 signed by both Applicants, they stated "C and his siblings will stay with their grandparents until we make future arrangements for their return to us in Australia". That document was witnessed by the Applicants' GP, who stated that she was satisfied that [the Applicants] understood and agreed with that authorisation.

The male applicant has what can best be described as a formidable criminal record in Australia, with convictions for unlawful assault, recklessly causing injury, making a threat to kill, aggravated burglary, intentionally causing injury and criminal damage over a period from 1997 to 2003. In 2003 he served 3 months of a 6 month sentence of imprisonment, which he says has changed him. He says that he has only one outstanding case at present, for driving without a licence, which is due to be heard in August, but there was no independent verification of that position. Although married to an Australian citizen, he has not achieved permanent resident status in Australia and advised the ISS that he is there on a Criminal Justice Visa. He is unemployed but cares for his wife and receives a weekly Parenting Allowance of approximately $400 (reduced from around $600 since the children A and B came to Tonga).

The female applicant suffers from bipolar affective disorder, for which she is on regular treatment. In a report to ISS dated 17 May 2005, Dr R, Senior Psychiatry Registrar, stated that it was difficult for him to be certain about the prognosis for the female applicant, as current knowledge about the illness indicated that it is a long-lasting illness with relapses in the context of stress or non-compliance with medication, which could happen even when medication is taken regularly. Stress and drug use can complicate the course of illness and often precipitate a relapse. Dr R said that her ability to care for herself and her child can be significantly impaired if she becomes unwell, when she can be a significant risk to her child. Dr R noted that her husband is the primary carer and she showed a dependence on him in performing every day activities like going to the shops and attending appointments, but her recent reviews at the clinic showed that she is well settled and her current mental state is stable. She is also unemployed but receives a weekly Disability Allowance of approximately $210.

The female applicant had a relapse in early February and was admitted as a voluntary patient to a psychiatric unit for a week, during which time her husband had cared for the youngest child C.

The Respondents alleged that in the past the Applicants had alcohol and drug problems. Although this was not specifically established, neither was it specifically denied. The female applicant told ISS that she does not drink, but the male applicant said that although in the past he went out at weekends drinking with friends, he now does not drink on a regular basis. Neither applicant appears to have any drug-related convictions. The female applicant was diagnosed with hepatitis C around 1996.

The GP for the parents and the family reported to ISS that the children were always clean and well-dressed when they attended her surgery and always appear to be well taken care of by their parents. The family attend regularly for medical appointments and the children are up to date with their immunisations. The GP was amazed how well the female applicant was managing, given her mental health issues and believes the family required every assistance to ensure that the children were returned to their care.

The Principal of the school which A attended in 2003 told ISS that no concerns were raised regarding his physical presentation and that he had been well presented, well fed and nurtured. However when concerns about his disruptive behaviour in class had been raised with the Applicants, his teacher had felt threatened and intimidated by the male applicant and they had removed him from the school (though the male applicant denied that).

However it appears that those reports from both these sources related to periods when the grandparents were on hand to supervise the care of the children.

In effect it appears that the Respondents, the grandparents, have been on hand to care for or supervise the care of the children for most of their lives, apart from a short period of a few months when the boy A was taken to New Zealand before he came to Tonga.

One difference between this case and the cases referred to above as authority is that, at the time the children were brought to Tonga and at present, the children were not understood to be subject to any order by a court in Australia, so that if the children are returned to Australia they will not immediately be under the jurisdiction of eg the Family Court in Australia. But, although the Department of Human Services (Child Protection) has no current involvement with the children or their brother C, there had been 3 past notifications to them in December 2000, April 2003 and May 2003 raising concerns about the children's well-being due to parental health concerns and/or the absence of one parent. The Family Court/Children's Court had made one order, an interim accommodation order, which expired when that Court granted the Department's application to withdraw the protection application - the male respondent, the grandfather, said that had been in 2000 and the application had been withdrawn when the Respondents, who at that time lived in Australia very close to the parents, had undertaken to supervise the care of the children. Otherwise the children might have been given to foster parents.

Against all that background the ISS report, while noting that the male applicant's reported behaviour was a barrier which had the potential to impact on the level of parenting offered to the children, concluded that the Applicants appeared to be providing adequate care for the youngest child C and that the elder children A and B would not be at risk of significant harm were they to be returned to the care of their

parents. Its assessment was that the current separation was not necessary for the best interests of A and B. Among the recommendations in the report were that the Applicants should be made aware of support services to assist the children and the family as a whole; and that ISS should be informed if the children are returned so that at least 1 follow-up visit would be made.

Affidavits made this month by the maternal grandparents from South Australia and the maternal grandmother's sister, also from South Australia, have been presented to the Court. They state that if the male applicant is sentenced to imprisonment or deported to Tonga they are prepared and willing, and undertake, to take the female applicant and the 3 children into their care and look after them. That is rather different from the female applicant's statutory declaration in 2002 that her own family had failed to play the same role as the male applicant's family, which was supported by the male respondent's submissions. However, I am prepared to accept that matters may now have moved on and to take these undertakings at face value as a possible avenue for care of the children in Australia if things take a turn for the worse.

It is a well recognised principle that, other things being equal and if at all possible, children are best to be with their natural parents and with their siblings. I accept the submission for the Guardian ad Litem that it is a long time from late 2003/early 2004 - around 18 months - for young children of 6 and 7 to be separated from their natural parents and their young brother.

I also believe that stability, both day-to-day and long-term, is an important factor in the lives of children.

The male respondent submitted that the Applicants were not normal parents and that the Respondents had thought of keeping the children until they reached high school age and were more able to take care of themselves. But while that is a valid point of view, I feel that would be an unnecessarily long separation for the children from their parents. On the other hand, although the Respondents had lived in Australia for 20 years and have only been back in Tonga for a year and a half, the male respondent did not completely rule out the possibility of returning to Australia if circumstances.

Mr Niu made submissions about Australian courts being a more convenient forum for settling any disputes about custody of the children, as otherwise many people would have to come to Tonga to give evidence. That may be so, but equally a hearing in an Australian court is likely to be inconvenient for the Respondents. In any event Halsbury indicates that the concept of forum conveniens has no place in the wardship jurisdiction: Vol 5(2) para 1007.

The applicable test is therefore the best interests of the children, but the Court can order the return of the children to their original country of residence without a full inquiry into the facts if it is satisfied on the balance of probabilities that the children would come to no harm if it does so.

In this case I find that it is in the best interests of the children A and B to be re-united now with their parents the Applicants and their younger brother C. This is in principle desirable. Their home has been with their parents throughout their lives up until 18 months ago, they are Australian citizens, and their home and schooling has been in Australia until 18 months ago. Both are still very young and they wish to go back to their parents. I hope this will give them more stability in their lives by stopping the confrontational situation, where their parents are fighting their grandparents for the custody, with the children caught in the middle.

I consider it would be against the basic principle of the children's welfare being paramount to refuse this application by their parents, as it is not realistic or reasonable to consider depriving the children of life with their parents and younger brother - and that is the way the Court has to look at it - up to high school age, as envisaged by the grandparents.

I take this view even although it is clear from the reports by the Guardian ad Litem that the children are well settled and happy with their grandparents in Tonga and are being well cared for and provided with a good education here.

There are certainly factors indicating that the children might be at risk on return to Australia: their father's convictions for violence, including imprisonment; and their mother's mental health condition. I have considered these anxiously, but weighing up all the factors I have come to the conclusion that there is no objective evidence that the children or their younger brother have actually suffered violence or harm, even although 5 years ago they came under the Family Court/Children's Court in Melbourne. Both the family GP and A's school said the children appeared well cared for. There has been no evidence that the youngest child C has suffered any harm, even in the last 18 months in the absence of his grandparents the Respondents here in Tonga. There is a positive recommendation from the ISS social worker who has seen the parents within the last few months.

Therefore provided appropriate safeguards are put in place, I have considered the issue long and hard and I am satisfied on the balance of probabilities that the children are unlikely to come to actual harm with their parents in Australia. I do not consider that all these circumstances amount to special circumstances for ordering the retention of the children in Tonga. I therefore find that it is not necessary at this stage to hold a full inquiry and that in principle I should order the return of the children to their parents the Applicants in Australia.

But as I explained during the hearing I want my order to be supplemented if possible with a request to the Family Court in Melbourne to take up again the case of the children in view of their return; and with a request to the ISS and/or DHS in Melbourne to carry out at least one follow-up visit at an appropriate time. I also believe that the procedure for the children's return needs to be planned carefully to avoid any confrontation between the parties and to ensure that the children are returned safely to Melbourne.

I have made my decision now so that, if either party wishes to appeal it, they can do so within the next week in time for the forthcoming Court of Appeal Session from 11 to 22 July. For that reason I consider it will be appropriate that my order does not come into effect until around 22 July or after.

These matters can be discussed and finalised once I have given this decision.

In this respect I have doubts about the suggestion in the application that the female applicant should come by herself to Tonga to collect the children. Given the information about her mental health in the ISS report, I would be concerned whether she could cope with such a mission in the absence of her husband, especially as she may suffer a relapse under stress. Perhaps her mother or aunt may be able to accompany her.

I have to add that this decision is in no way a criticism of the Respondent grandparents. On the contrary, it appears that they have acted with a great sense of responsibility and have devoted an enormous amount of time and effort to assisting the Applicants in the upbringing of the children A and B over the last 7 years. It does

not appear that the grandparents' contribution is properly appreciated by the Applicants, but it appears to me that in reality the Applicants owe the Respondents a deep debt of gratitude for all that. I believe the children are attached to their paternal grandparents and there is no objection to my adding an order for reasonable access to the Respondents to A and B by mutual arrangement with the Applicants.

Tonga v Tonga

Court of Appeal, Nuku'alofa
Burchett, Tompkins, and Salmon JJ
AC 10/2004

11 July 2005; 21 July 2005

Dissolution – appeal against assessment of maintenance – appeal dismissed

On 14 April 2004 the marriage of the parties was dissolved by an Order of the Supreme Court. It was further ordered that the wife, who was the respondent to the divorce petition, should file affidavits of means and needs. The respondent wife appealed against the order dissolving the marriage; that appeal was dismissed on 30 July 2004. In the meantime both parties filed affidavits relating to the financial provision to be made for the wife and on 21 June 2004, the Supreme Court gave a ruling on that issue. It ordered that the respondent wife should have possession of the town allotment belonging to the appellant. That allotment was rented to a tenant for $900 per month. He further ordered that the name of the landlord in the lease agreement should be altered to that of the respondent and that she should have full rights to the rental and to negotiate any further lease of the premises and was to be responsible for the maintenance of the property. The appellant also had a tax allotment occupied by his sister. The Court decided that it would be appropriate for the respondent to receive further provision effectively in lieu of rent for this property. However the order the Court made in that regard was for payment of a further $2,000 per annum by the appellant to the respondent. The appellant appealed against those orders.

Held:

1. The six grounds of appeal were dismissed. The Supreme Court exercised discretion when it fixed the amount of maintenance payable to the respondent. It was not demonstrated that any ground existed to interfere with the exercise of that discretion.
2. The appeal was dismissed. The appellant was to pay costs.

Statute considered:
Divorce Act

Counsel for appellant : Mr Piukala
Counsel for respondent : Mr Niu

Judgment

[1.] By an Order of the Supreme Court made on the 14th April 2004 the marriage of the parties was dissolved. Ward C.J. further ordered that the wife, who was the respondent to the divorce petition, should file affidavits of means and needs.

[2.] The respondent wife appealed against the order dissolving the marriage. In a decision of this Court dated 30 July 2004 that appeal was dismissed.

[3.] In the meantime both parties filed affidavits relating to the financial provision to be made for the wife and on 21st June 2004 Ward C.J. gave a ruling on that issue.

[4.] He ordered that the respondent should have possession of the town allotment belonging to the appellant. That allotment is rented to a tenant for $900 per month. He further ordered that the name of the landlord in the lease agreement should be altered to that of the respondent and that she should have full rights to the rental and to negotiate any further lease of the premises. She is to be responsible for the maintenance of the property.

[5.] The appellant also has a tax allotment occupied by his sister. The Judge decided that it would be appropriate for the respondent to receive further provision effectively in lieu of rent for this property. However the order he made in that regard was for payment of a further $2,000 per annum by the appellant to the respondent.

The appellant has brought this appeal against those orders.

[6.] There are 6 grounds of appeal and we will deal with each in turn.

[7.] The first ground of appeal is based on s 11(1)(a) of the Divorce Act, which provides:

> *11(1) Where the Court has granted a decree nisi on the ground only of 2 years' separation pursuant to section 3(1)(f), the decree shall not be made absolute unless the Court has certified:*
>
> *(a) that proper financial provision has been made for either party and any children of the family.*

For the appellant, Mr Piukala argued that this provision required the Court to certify that proper financial provision be made for both parties whereas provision had only been made for the respondent. We reject this argument. The words used in section 11(1)(a) are "either party" which clearly directs attention to the party in need of financial provision - in this case the respondent.

[8.] The second and sixth grounds of appeal are based on the proposition that the Chief Justice made orders dealing with matrimonial property and that he had no jurisdiction to do so. We do not accept that was the effect of the orders. The orders do not deal with matrimonial property. They only give possession of the town allotment of the appellant to the respondent.

[9] The third ground of appeal challenged the orders made in relation to the appellant's town allotment. At the hearing Mr Piukala abandoned that ground and accepted that the respondent should have possession and control of that allotment. That concession was appropriately made given the grounds of the relief sought in the appellant's petition. There the appellant confirmed that the respondent and the

children would have all the rights to the assets, houses and all the incomes from the land of the appellant in the amount of $900 a month.

[10.] The fourth ground challenged the order relating to the $2,000 annual payment. The appellant's concern was the Judge's comment that it was appropriate to charge some rent for the tax allotment. We make no comment on the appropriateness of that remark. The fact is that in the end the order the Judge made was for a payment by the appellant to the respondent. Section 18 of the Divorce Act makes it clear that the Judge has that power.

[11.] The fifth ground of appeal asserts that $900 per month is sufficient and proper maintenance and that the Judge should not have made the order for payment of the further $2,000 per annum. The answer to this proposition is that the Judge was exercising a discretion when he fixed the amount of maintenance payable to the respondent. It has not been demonstrated to us that any ground exists to interfere with the exercise of that discretion.

[12.] Accordingly the appeal is dismissed. The appellant is to pay costs. In the absence of agreement the costs will be taxed.

Tonga Communications Corporation Ltd v Fonua

Court of Appeal, Nuku'alofa
Webster, Burchett, and Tompkins JJ
App 11/2004

12 July 2005; 21 July 2005

Employment law – pension scheme – not attained age of eligibility – appeal allowed

Mr Fonua, the Respondent, was the Chief Engineer of the Tonga Telecommunication Commission the liabilities of which – including "debts ... duties and obligations of every description (whether present or future, actual or contingent ...)" – were by s 7 of the Tonga Communications Corporation Act 2000 transferred to and became liabilities of the Appellant Tonga Communications Corporation Limited. Following a series of incidents recounted in detail in the judgment from which this appeal came, it was made very clear to Mr Fonua that if he did not resign from the Commission, he would be charged in disciplinary proceedings with serious misconduct and might be dismissed. He chose to resign. Subsequently, Mr Fonua brought a wrongful dismissal action against the Appellant. That action failed, so far as it sought damages for the alleged wrongful dismissal of the Respondent, it being held that Mr Fonua's resignation was tendered of his own volition, notwithstanding that his motive was to avoid the hazards of a disciplinary proceeding. The Respondent succeeded in one matter: he was held entitled to receive a pension pursuant to the Commission's pension scheme (*Fonua v Tonga Communications Corporation Ltd* [2004] Tonga LR 148). The provisions of the Pensions Act (Cap 8), which applied to the public service of Tonga, had been adopted by the Commission as stating the terms on which it would grant pensions to its employees. The difficulty that then faced the Respondent lay in the matter of his age. He was only 49 years old when his resignation took effect and the Pensions Act provided that no pension should be granted to a public officer who had not yet attained the age of 50.

Held:

1. The Court found that it was clear the grant must be "in accordance with" the regulations, which were contained in the Schedule to the Pensions Act, and regulation 2 specifies that an officer's pension "may be granted *on his retirement*". It was not granted later to one who *has been* an officer.
2. The Court concluded that the Respondent could not have been granted a pension on his retirement, which occurred at the age of 49 years, pursuant

to the only applicable pension scheme. It followed that the appeal must be allowed.

3. When an appeal involved a public body with much wider interests to serve in obtaining an appellate ruling than the personal interest of the other party, the Court on the appeal had a discretion with regard to the costs. The appeal was allowed and the Respondent's action was dismissed and the order for costs made below was set aside, but no order was made with respect to the costs of the action or the appeal.

Statutes considered:
Pensions Act (Cap 8)
Tonga Communications Corporation Act 2000

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Mr Niu

Judgment

[1.] Mr Fonua, the Respondent, was the Chief Engineer of the Tonga Telecommunication Commission the liabilities of which – including "debts ... duties and obligations of every description (whether present or future, actual or contingent ...)" – were by s 7 of the Tonga Communications Corporation Act 2000 transferred to and became liabilities of the Appellant Tonga Communications Corporation Limited. Following a series of incidents recounted in detail in the judgment from which this appeal comes, it was made very clear to Mr Fonua that if he did not resign from the Commission, he would be charged in disciplinary proceedings with serious misconduct and might be dismissed. He chose to resign.

[2.] Subsequently, Mr Fonua brought a wrongful dismissal action against the Appellant. That action failed, so far as it sought damages for the alleged wrongful dismissal of the Respondent, it being held that Mr Fonua's resignation was tendered of his own volition, notwithstanding that his motive was to avoid the hazards of a disciplinary proceeding. But, as to one matter which has led to this appeal, the Respondent succeeded. He was held entitled to receive a pension pursuant to the Commission's pension scheme.

[3] Of the pension scheme, the evidence was extraordinarily scanty. However, it was sufficient to sustain a finding that the provisions of the Pensions Act (Cap 8), which applies to the public service of Tonga, had been adopted by the Commission as stating the terms on which it would grant pensions to its employees.

[4.] The difficulty that then faced the Respondent lay in the matter of his age. He was only 49 years old when his resignation took effect. Section 6 of the Pensions Act provides:

> 6. Except in cases of abolition or reorganization of office no pension, gratuity or other allowance shall be granted to any public officer who has not attained the age of 50 years unless on medical evidence to the satisfaction of the Privy Council that he is incapable by reason of infirmity of mind or body of

> discharging the duties of his office and that such infirmity is likely to be permanent:
>
> Provided that if the officer although not suffering from any particular illness or infirmity of mind or body likely to be permanent becomes unfit in the opinion of the Privy Council for the discharge of the duties of the office to which he has been appointed and such unfitness is not attributable to misconduct or gross negligence if the Privy Council consider that the special circumstances of the case justify the grant of a pension to him he may with the consent of the Privy Council be retired on a pension and be pensioned at a rate of pension not exceeding that for which he would be qualified if he were suffering from an illness or infirmity likely to be permanent:
>
> Provided further that if an officer is transferred to other public service as defined under regulations under this Act and ultimately retires at an age being less than 50 years at which he is permitted by the laws or regulations of that service to retire with a pension the pension which may be granted to him from the revenue of the Kingdom under this Act and the regulations thereunder shall be payable from the date of retirement of such officer notwithstanding that he shall not be 50 years of age.

[5.] In the judgment under appeal, the difficulty was recognized, but it was held that s.6 did not deny a pension upon a resignation before the age of 50 years; it merely postponed the receipt of it until the attainment of that age. The appeal raises the short point whether this construction of the section can be accepted.

[6.] One of the problems about the Respondent's approach to the meaning of the section is its open-endedness. It would leave no stopping point. At however early an age a qualified public officer might resign, that resignation would create a potential pensioner in the future. No sensible policy reason for such a situation is apparent – particularly in the case of a non-contributory pension.

[7.] Section 6 is limited by careful provisos enabling early retirement with pension for (among others) the permanently unfit through illness and also for persons who have transferred to other public service where early retirement is permitted. The reference to retirement "at an age being less than 50 years at which [an officer] is permitted by the laws or regulations of [some other] service to retire with a pension" clearly implies that officers of the Tongan public service are not in general permitted to retire with a pension (that is, with a right to a pension) at an age being less than 50 years.

[8.] Mr Niu, in attempting to support the construction of s 6 that would allow a pension to be paid, notwithstanding an earlier resignation, upon an officer attaining the age of 50 years, referred us to ss 2 and 4 of the Pensions Act where the expression is used "persons who have been in the public service of the Kingdom" to describe those who may be granted a pension. But each of these sections makes it clear the grant must be "in accordance with" the regulations, which are contained in the Schedule to the Act, and regulation 2 specifies that an officer's pension "may be

granted *on his retirement*" (emphasis added). It is not granted later to one who *has been* an officer.

[9.] The Respondent also sought to rely on the proposition that some other employees, or at any rate another employee, had been permitted by the Commission to retire with a pension before attaining the age of 50 years. However, on examination, the example relied upon was revealed as rather supporting the Appellant's case. For it turned out that, at a preliminary stage in the determination of the application in question, the payment of a pension was proposed; but upon further consideration, the point concerning the age of retirement being raised, the Board of the Commission unanimously decided the applicant was ineligible for a pension, and made other provision.

[10.] For these reasons, we conclude that the Respondent could not have been granted a pension on his retirement, which occurred at the age of 49 years, pursuant to the only applicable pension scheme. It follows that the appeal must be allowed. However, the question of the true construction of s 6 is a large one, affecting the public service of Tonga and the employment of many persons by the Respondent. When an appeal involves a public body with much wider interests to serve in obtaining an appellate ruling than the personal interest of the other party, the Court on the appeal has a discretion with regard to the costs. In the circumstances, it is appropriate that the order of the Court be: the appeal is allowed and the Respondent's action is dismissed and the order for costs made below is set aside, but no order is made with respect to the costs of the action or the appeal.

South Pacific Produce Ltd v Procorp Company Ltd

Court of Appeal, Nuku'alofa
Webster, Burchett, and Salmon JJ
App 12/2004

12 July 2005; 21 July 2005

Contract law – special terms claimed – counterclaim – appeal allowed to set aside orders below

For the full facts and the Supreme Court decision, see *South Pacific Produce Ltd v Procorp Company Ltd anor* [2004] Tonga LR 88.

10 In the squash season of 2000, the Appellants grew and harvested 261 tonnes of squash for export to Japan. It was common ground at the hearing in the Supreme Court that the export was arranged under some agreement with the First Respondent of which the Second Respondent was the managing director. But the Appellants claimed, and the Respondents denied, that this agreement was of a special nature, giving the Appellants a higher share of the profits to be derived from the export than was usual with such contracts. On this issue, the Appellants failed at the hearing, the judge found the special agreement had not been established. The Supreme Court also found that the Respondents succeeded in their counterclaim but only to a limited extent.

20 Held:

1. There was no basis on which the Respondents could properly be said to have succeeded upon their counterclaim. The lower Court must have overlooked the fact that the items in the Counterclaim were not freestanding claims but contra-items standing against an admitted liability of $104,400 which, had they been allowed in full, would have exceeded that liability by only $9,550. As soon as they fell below that figure, the Counterclaim failed, and as they fell far below it, the Counterclaim failed by a wide margin. Looking simply at the pleadings, the Appellants were entitled to have the Counterclaim dismissed, and to have an order made in
30 their action, under their prayer for "any other order or relief as may be just", for the payment of the balance found due to them plus interest. An order in respect of the balance found due was appropriate instead of a direction for the taking of accounts because the scope of the issues actually raised in the Counterclaim had produced the result that the Court had effectively taken an account.

2. The appeal was allowed; the orders made below were set aside; there was judgment for the Appellants on their claim against the First Respondent for T$53,907.98 plus interest at 10% per annum from 1 January 2001; the Counterclaim was dismissed; and because the Appellants failed in their claim for a special agreement, there was no order as to the costs of the hearing at first instance except that earlier interlocutory orders for costs of adjournments were not disturbed. The Respondents must also repay to the Appellants the amount of $7,500 security for costs together with the sum of $561.13 interest thereon paid out to their solicitor, and the Respondents must pay the Appellants' costs of the appeal, to be agreed or taxed.

Counsel for appellants : Mr Niu
Counsel for respondents : Mr Kaufusi

Judgment

[1.] In the squash season of the year 2000, the Appellants grew and harvested 261 tonnes approximately of squash for export to Japan. It was common ground at the hearing in the Supreme Court that the export was arranged under some agreement with the First Respondent of which the Second Respondent was the managing director. But the Appellants claimed, and the Respondents denied, that this agreement was of a special nature, giving the Appellants a higher share of the profits to be derived from the export than was usual with such contracts. On this issue, the Appellants failed at the hearing, the judge finding the special agreement had not been established.

[2.] In the normal course, one would have expected such a finding to have led to a conclusion about the nature and consequences of the arrangements actually entered into shorn of the effects of the special terms that had not been accepted by the Court. There was much that was not in dispute concerning the production, delivery to the Respondents and export of the crop, and the parts actually played by the parties respectively as grower and exporter. In their Statement of Defence, the Respondents had pleaded "that the second plaintiff (appellant) agreed to grow squash as an ordinary grower of the first defendant" (respondent) and that "the cost of production inputs and expenses were provided by the first defendant on credit to be deducted from the growers proceed [*sic*] derived from export". The final version of the Appellants' Amended Statement of Claim had alleged, in addition to the special terms, the usual obligation of the Respondents to ship and market in Japan and to "provide a full and proper accounting of all proceeds received and deductions made together with the payment to be made to each party". It was pleaded the Respondents had failed to provide such an accounting and had paid only $25,000 to the Appellants for 261.5 tonnes of squash. It was pleaded the Appellants had repeatedly requested payment and an accounting but the Respondents had failed to comply, and that the Appellants had lost the use of the money withheld. Damages, interest and "other order or relief as may be just" were sought accordingly.

[3.] Unfortunately, the way the case was presented on each side below was calculated to distract the Court's attention from the quite straightforward nature of the dispute. Having rejected the special agreement alleged, the judge turned to consider a

Counterclaim filed by the Respondents. That was natural; the Counterclaim had been prominent at the hearing, and the allegations made in it had actually been the ground of the withholding of a large part of the payment otherwise due to the Appellants. They included "the cost of production inputs and expenses" referred to in the Statement of Defence.

[4.] In the Counterclaim, the Respondents repeated the admissions and denials in their defence and claimed the following:

(a) cost of a diesel engine $4,000
(b) cost of ploughing 2,520
(c) cost of seeds 15,060
(d) cost of fertilizer 24,876
(e) cost of chemicals 3,040
(f) forklift hire and miscellaneous expenses 36,412
(g) cartage of bins 5,327
Total = $91,235

The pleading proceeded to acknowledge that the Second Appellant had contributed $9,500 towards various of these items and to allege that the Respondents had made payments to the Appellants in a total sum of $32,215. An important paragraph of the Counterclaim pleaded:

> "The second plaintiff exported 261 ton [sic] of squash to Japan. The payment to the growers was 40 cent [sic] per kilo. Therefore it is equivalent to T$104,400.00."

The pleading concluded with a prayer for judgment in the sum of T$9,550 plus costs.

[5.] The figures set out in the Counterclaim are illuminating. If one subtracts from $91,235, being the total of the items claimed against the Appellants, the amount of $9,500 contributed by them towards some of those items, the resulting figure is $81,735. If that figure be then deducted from the sum of $104,400 alleged to be the amount of the "payment to the growers" for 261 tonnes of squash exported to Japan, the resulting figure is $22,665, being so much of the payment due as is revealed by the pleading to be outstanding, not being balanced by any obligation owed by the Appellants. But the Respondents had already paid, not merely the $25,000 acknowledged by the Appellants, but an amount of $32,215, which exceeded the sum of $22,665 by $9,550. That was the exact figure claimed in the Counterclaim. It follows from these calculations, as well as from the language of the Counterclaim, that when that pleading was filed it was made clear the Respondents were acknowledging a liability to pay $104,400, subject only to the extent that contra-items existed.

[6.] At the hearing, two things happened to change the calculations on which the Counterclaim was based. In the first place, the Respondents failed to prove the full amount claimed in respect of any but one of the items alleged by them, the scale of their failure being such that the sum of $81,735 referred to earlier was reduced to $31,300, or by substantially more than half. In the second place, the Second Respondent, who as has been said was the managing director of the First Respondent, conceded in the course of his evidence that it had been agreed certain cash advances made by the Appellants would be added to the sum payable by the Respondents.

Those advances, all evidenced by receipts, totalled $13,022.98. The ultimate result was to convert the balance of $9,550 against the Appellants, which was claimed in the Counterclaim, into a balance of $53,907.98 in their favour. On the evidence, that balance was payable to them by the end of the year 2000.

[7.] It was in this situation that the judgment under appeal concluded, with regard to the Appellants' claim, that there was no such special agreement as was alleged, but the Second Appellant, as a registered grower, "would simply receive the same payout for his squash as any other registered grower"; and, with regard to the Counterclaim, that two of the items in it were not proved, one was admitted, and the others were proved only in part. Without calculating the effect of these findings, his Honour then wrote:

> "In summary, therefore, the plaintiffs fail in their claim and the defendants succeed in their counterclaim but only to the limited extent that I have detailed.
>
> In addition, the defendants are entitled to costs to be agreed or taxed."

[8.] With respect, there is no basis on which the Respondents could properly be said to have succeeded upon their counterclaim. Obviously, his Honour must have overlooked the fact that the items in the Counterclaim were not freestanding claims but contra-items standing against an admitted liability of $104,400 which, had they been allowed in full, would have exceeded that liability by only $9,550. As soon as they fell below that figure, the Counterclaim failed, and as they fell far below it, the Counterclaim failed by a wide margin. Looking simply at the pleadings, the Appellants were entitled to have the Counterclaim dismissed, and to have an order made in their action, under their prayer for "any other order or relief as may be just", for the payment of the balance found due to them plus interest. An order in respect of the balance found due was appropriate instead of a direction for the taking of accounts because the scope of the issues actually raised in the Counterclaim had produced the result that the Court had effectively taken an account. The Respondents' written submission had included the following:

> "The defendants worked out the proceeds from the sale of the plaintiffs' squash and also deducted the goods that were ordered and other expenses and the plaintiffs were overpaid in the amount of T$4,797" (this, of course, was a concession reducing the pleaded claim of T$9,550).

So the conduct of the case confirmed the approach which should have been taken to the findings.

[9.] Unfortunately, when counsel for the Appellants drew attention to the position, although he did so within less than one week of the delivery of judgment, the view was taken that it was too late to correct the orders of the Court except by consent, which was not forthcoming. This view was wrong, for a Court can correct its errors until a matter is concluded by the formal taking out of an order. But, an appeal having been brought, this Court has power to remedy the situation. The appeal should be allowed; the orders made below should be set aside; there should be judgment for the Appellants on their claim against the First Respondent for T$53,907.98 plus interest

170 at 10% per annum from 1 January 2001; the Counterclaim should be dismissed; and because the Appellants failed in their claim for a special agreement, there should be no order as to the costs of the hearing at first instance except that earlier interlocutory orders for costs of adjournments should not be disturbed. The Respondents must also repay to the Appellants the amount of $7,500 security for costs together with the sum of $561.13 interest thereon paid out to their solicitor, and the Respondents must pay the Appellants' costs of the appeal, to be agreed or taxed.

Lita Trading Enterprises Ltd v Moala

Court of Appeal, Nuku'alofa
Burchett, Tompkins, and Salmon JJ
App 13/04

13 July 2005; 21 July 2005

Contract law – undisclosed principal doctrine – no relevance
Contract law – duty to mitigate dames – no breach of duty proved

For the full facts and the Supreme Court decision, see *Moala v Lita Trading Enterprises Ltd* [2004] Tonga LR 151.

The respondent, the plaintiff in the Supreme Court, imported into Australia in September 2000 100 kg of kava that were supplied by the appellant, the defendant in the Supreme Court, who at that time was a supplier of kava in Tonga. The respondent was resident in Australia. Her brother, 'Amanaki Tupou, made the purchase of the kava from the appellant on her behalf. On arrival in Australia, the appellant sold 25 kg of the consignment, but the balance of 75 kg was confiscated by quarantine officials in Sydney because it contained E. coli bacteria to a degree that rendered it unfit for human consumption. The respondent claimed from the appellant A$7,500 damages for breach of contract and negligence. The Supreme Court found in favour of the respondent and assessed the damages suffered by the respondent at A$6,000 or its equivalent in Tonga Pa'anga. It also awarded interest at 10% pa and costs to be agreed or taxed. Judgment was entered accordingly. From that judgment the appellant appealed, challenging the findings on liability and damages.

Held:

1. The respondent's amended statement of claim made it perfectly plain that the respondent was alleging that her brother 'Amanaki Tupou was buying the kava on her behalf, and that could only mean as her agent. So the appellant was aware that it was alleged that 'Amanaki Tupou was buying the kava as agent for the respondent. As the appellant did not deal directly with the respondent, the appellant must have known that it was claimed in the pleading that 'Amanaki Tupou was buying the kava for a principal who was not disclosed at the time of purchase. Even if this were not so, there was nothing to show that the appellant was prejudiced by the lack of express pleading. The pleading ground for challenging the Judge's finding on liability did not succeed.

2. There was no evidence to suggest that the contract was, expressly or impliedly, confined in its operation to 'Amanaki Tupou and the appellant. There was no doubt that, at the time the contracts for the purchase of the kava were completed, 'Amanaki Tupou had authority to act on behalf of the respondent. Finally, there was no suggestion that the contract, expressly or impliedly, was intended to be confined to 'Amanaki Tupou and the appellant. The doctrine of undisclosed principal ground for challenging the Judge's finding on liability did not succeed.
3. The onus of proving that the respondent had failed to mitigate her loss rested on the appellant. The Court was left in no doubt that the appellant failed to discharge the onus resting on it to prove that the respondent had not mitigated her loss by sending the condemned kava back to Tonga. The challenge to the damages assessment did not succeed.
4. The appeal was dismissed.

Cases considered:

Humble v Hunter (1848) 12 QB 310
Murphy v Rae [1967] NZLR 103

Counsel for appellant	:	Mr Tu'utafaiva
Counsel for respondent	:	Mr Niu

Judgment

[1] The respondent, the plaintiff in the Supreme Court, imported into Australia in September 2000 100 kg of kava that were supplied by the appellant, the defendant in the Supreme Court, who at that time was a supplier of kava in Tonga. The respondent was resident in Australia. Her brother, 'Amanaki Tupou, made the purchase of the kava from the appellant on her behalf. On arrival in Australia, the appellant sold 25 kg of the consignment, but the balance of 75 kg was confiscated by quarantine officials in Sydney because it contained E. coli bacteria to a degree that rendered it unfit for human consumption.

[2] The respondent claimed from the appellant A$7,500 damages for breach of contract and negligence. Ford J found in favour of the respondent. He assessed the damages suffered by the respondent at A$6,000 or its equivalent in Tonga Pa'anga. He also awarded interest at 10% pa and costs to be agreed or taxed. Judgment was entered accordingly. From that judgment the appellant has appealed, challenging the findings on liability and damages.

The judgment in the High Court

[3] The events leading up to the purchase of the kava, its importation into Australia and its confiscation are set out in detail in the judgment in the High Court. In most, but not all, respects the events are unchallenged. The following is a summary of Ford J's findings:

- 'Amanaki Tupou made the purchase of the kava as agent for the respondent who remained an undisclosed principal.

- The limitations on when an undisclosed principal may sue on a contract made by his or her agent do not apply.
- The agency relationship was adequately pleaded and the appellant was aware that it was an issue before the Court.
- The appellant was aware that kava purchased by 'Amanaki Tupou was intended to be exported to Australia for resale.
- The appellant was aware of the stringent hygiene requirements imposed by the Australian authorities on the importation of kava.
- It was a term of the contract of purchase that the kava had to comply with the minimum hygiene standards imposed by the Australian authorities for the importation of kava powder into Australia.
- The consignment failed to comply with that condition, with the result that the respondent succeeded in her claim for breach of contract.
- On the negligence claim, there was no basis for concluding that the appellant's duties were wider in tort than in contract. The negligence cause of action did not succeed.
- On the basis of the respondent's sales figures, he assessed the loss from the seized 75 kg of kava at $6000.
- He did not accept the submission made on behalf of the appellant that the respondent did not do enough to mitigate her loss.

Liability

[4] Counsel for the appellant challenged the Judge's finding on liability on two grounds.

Pleading

[5] He submitted that the Judge erred in finding that the agency relationship, and in particular that the respondent was an undisclosed principal, was adequately pleaded.

[6] It is correct, as counsel for the appellant submitted, that the amended statement of claim did not expressly plead that 'Amanaki Tupou was acting for an undisclosed principal. The relevant paragraphs of the amended statement claim are:

> "4. In almost all occasions, *the purchases of the plaintiff from the defendant were done by her brother, 'Amanaki Tupou of Lakepa* who attended and ordered the kava, paid for it and collected it for shipment to the plaintiff in Australia.
>
> 5. The defendant was aware that Australia had minimum standards for cleanliness of produce, including kava, which were imported into Australia, and was accordingly particular about preparing the kava *ordered by the plaintiff through her*

> *brother* in order to comply with those standards for importation of kava into Australia.
>
> 6. On 31/8/00, *'Amanaki Tupou for and on behalf of the plaintiff* attended at the office of the defendant, as he had done on several occasions previously, and ordered 100 kg of kava ..." (Emphasis added)

[7] On this issue the Judge was satisfied that the agency relationship was adequately pleaded and also that the defendant was fully aware that it was very much an issue before the Court.

[8] We agree with that conclusion. The passages we have emphasised from the amended statement of claim set out in [6] made it perfectly plain that what the respondent was alleging was that her brother 'Amanaki Tupou was buying the kava on her behalf, and that could only mean as her agent. So the appellant was aware that it was alleged that 'Amanaki Tupou was buying the kava as agent for the respondent. As the appellant did not deal directly with the respondent, the appellant must have known that it was claimed in the pleading that 'Amanaki Tupou was buying the kava for a principal who was not disclosed at the time of purchase.

[9] Even if this were not so, there is nothing to show that the appellant has been prejudiced by the lack of express pleading. Closing submissions were in writing. Counsel for the respondent expressly dealt with the law relating to undisclosed principal in his submissions in reply. Counsel for the appellant had the opportunity to file further submissions in response, but elected not to do so. Nor did he ask for leave to call further evidence on this issue.

[10] This ground for challenging the Judge's finding on liability cannot succeed.

The doctrine of undisclosed principal

[11] Counsel for the appellant submitted that the Judge erred in holding that the limitations on the application of the doctrine of undisclosed principal have no relevance in the present case. The relevant passage in his Honour's judgment is:

> "Although the basis for the common law doctrine of undisclosed principal remains far from clear, it has long been established that an undisclosed principal may sue on a contract made by his or her agent even though the other party to the contract remains unaware of the principal or even of his existence. There are, as Mr Niu acknowledged, some limitations on the application of the doctrine but I am satisfied that they have no relevance to the present case."

[12] *Cheshire & Fifoot's Law of Contract* 6th Australian edition (1992) describes the doctrine at [1657]:

> "Where an agent, having authority to contract on behalf of another, makes the contract in his own name, concealing the fact that he is a mere representative, the doctrine of the undisclosed principal comes into play. By this doctrine either the agent, or the principal when discovered, may be sued and

> either the agent or the principal may sue the other party to the contract, save where the contract is expressly or impliedly, confined in its operation to the parties to it."

[13] At [1661] the authors state that the right of action possessed by the undisclosed principal is subject to two limitations:

> "First, the authority of the agent to act for the principal must have existed at the time of the contract, for, were the rule otherwise, any person would be free to intervene in the contract of another.
>
> Secondly, if the contract, expressly or by implication, shows that it is to be confined in its operation to the parties themselves, or the agent has contracted in such manner as to convey that he alone is the principal, the possibility of agency is negatived and no one else can intervene as principal."

[14] None of these considerations has any application in the present case. There is no evidence to suggest that the contract was, expressly or impliedly, confined in its operation to 'Amanaki Tupou and the appellant. There can be no doubt that, at the time the contracts for the purchase of the kava were completed, 'Amanaki Tupou had authority to act on behalf of the respondent. Finally, there is no suggestion that the contract, expressly or impliedly, was intended to be confined to 'Amanaki Tupou and the appellant.

[15] Counsel for the appellant relied on the decision in *Humble v Hunter* (1848) 12 QB 310 as authority for the proposition that for an agent to describe himself as "owner" or as "proprietor" precludes the undisclosed principal from suing. In *Murphy v Rae* [1967] NZLR 103, Moller J considered what he described as the line of cases starting with *Humble*, which, he said, has been the subject of judicial criticism. After considering several authorities in the United Kingdom and New Zealand, he concluded at 109 that *Humble* is still good law, but the principle derived from it is applicable only to cases where a person is described in a written contract as the "owner' or "proprietor" and where it is a term of the contract that he should contract as "owner" or "proprietor" of that property. However, this principle does not aid the appellant. There is no suggestion in this case that 'Amanaki Tupou told the appellant that he was purchasing the kava as owner, nor was he so described in the receipts that evidenced the sale.

[16] This ground for challenging the Judge's finding on liability cannot succeed.

Conclusion on liability

[17] Neither ground for challenging the Judge's finding on liability can succeed. The appeal against that finding fails.

Damages

[18] The only ground for challenging the damages award is that the Judge was wrong in not finding that the respondent had failed to mitigate her loss. It was submitted on

behalf of the appellant that the respondent should have returned the kava to Tonga where she could have recovered all or a substantial part of the cost.

[19] The judgment records the following events:

> "Mele [the appellant] had an exchange of facsimiles with To'imoana Takataka [on behalf of the respondent]. He confirmed in a fax dated 25 September 2000 that Lita Trading would replace the rejected 75 kg of kava but only in Tonga and Mele would need to meet all the costs of the returned shipment. He also required receipts and the packaging to be intact with the defendant's labels still attached....
>
> Mele replied by facsimile on the same date asking To'imoana to reconsider some of his demands and pointing out to him that the letter required from the Tongan Government Authorities meant the Tongan Government Health Department. Mele told the Court that she never received a response to that facsimile and she was unsuccessful in trying to contact To'imoana by telephone. In the end, she informed the quarantine people that she had no option but to authorise them to destroy the kava."

[20] The onus of proving that the respondent had failed to mitigate her loss rested on the appellant. So in the context of the present case, it was for the appellant to establish that the kava that had been condemned by the Australian authorities as unfit for human consumption could have been sent back to Tonga. The Australian authorities made it clear that this could only happen if there were express approval from the Tongan Health Department. It was no doubt for this reason that the appellant, in her fax of 25 September 2000, pointed out to the respondent that the letter approving the importation of the kava had to come from the Tongan Health Department.

[21] But the respondent did nothing. There is no evidence to show that it ever approached the Department. Nor did the respondent call evidence to establish that, if the Health Department had been approached, it would have consented to the importation of the condemned kava. On the contrary, the strong likelihood is that the Department would not have approved the importation of kava that had been condemned in Australia as unfit for human consumption.

[22] In these circumstances we are left in no doubt that the appellant failed to discharge the onus resting on it to prove that the respondent had not mitigated her loss by sending the condemned kava back to Tonga. The challenge to the damages assessment cannot succeed.

Result

[23] The appeal against the findings on liability and damages fails. The appeal is dismissed. The respondent is entitled to costs on the appeal to be agreed or taxed.

Taufa v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, and Salmon JJ
AC 17/2004

13 July 2005; 21 July 2005

Sentencing – appeal against excessive sentence – appeal dismissed

For the full facts and the Supreme Court decision, see *R v Taufa* [2004] Tonga LR 337 and 337.

The appellant was found guilty of two charges of grievous bodily harm and one charge of bodily harm. He was sentenced to 4½ years imprisonment on each of the more serious charges and to 2 years on the lesser charge, all sentences to be concurrent. The Judge ordered that the appellant serve a term of 3 years cumulative on a term of imprisonment already being served. The balance of 18 months was suspended for 3 years on conditions. He appealed against the sentences imposed.

Held:

1. The Court concluded that there was a period when the appellant was under control and was capable of making the decision to walk away rather than place himself in the situation where control was lost. When he went after his mother-in-law he made a considered decision to take the cane knife. This being so the Court was satisfied that a period of actual imprisonment (rather than a suspended term) was justified.
2. The Supreme Court Judge gave a generous discount for the mitigating factors, principally his mental disorder, and then suspended 1/3 of the resulting sentence. The Court did not consider the sentence to be excessive. Consequently the appeal was dismissed.

Case considered:

R v Graham (New Zealand Court of Appeal, CA 391/96, 27 February 1997)

Counsel for appellant : Mr Niu
Counsel for respondent : Mrs Taumoepeau

Judgment

Introduction

[1.] The appellant was found guilty after trial before McElrea J of two charges of grievous bodily harm and one charge of bodily harm. He was sentenced to 4½ years imprisonment on each of the more serious charges and to 2 years on the lesser charge, all sentences to be concurrent.

[2.] The Judge ordered that the appellant serve a term of 3 years cumulative on a term of imprisonment already being served. The balance of 18 months was suspended for 3 years on conditions. He has appealed against the sentences imposed.

Background

[3.] The appellant attacked three people with a cane knife. They were his wife, his mother-in-law and a complete stranger.

He had walked out of prison, something which he had done on a number of occasions. What followed is described by the Judge in his sentencing remarks as follows:

> On this day he went to see his wife and mother-in-law, being upset about rumours he had heard of his wife having an affair with another man, which she had persistently denied. He confronted her in the early hours of the morning in the presence of the mother-in-law and an argument ensued which I have described in my verdict already. In the course of that it appears to have been admitted that in essence he had been deceived by both women.
>
> Shortly after that when he saw the mother-in-law leaving the house he told her to come back, and when she failed to return he chased her, picking up the machete that he had brought from the prison and attacking her about the head area. He stopped only when a neighbour to whose house the mother-in-law had run shouted out at him. He went back to the house and then struck the young man when he failed to open the door to let him in, and once he kicked his way in through the door and into the house he attacked his wife mercilessly with the machete about the head and shoulders and at the back of her neck, inflicting numerous and serious wounds. How she survived that, I do not know. She was taken by others immediately to the hospital, as was the mother-in-law, and fortunately the medical assistance given was sufficient to save their lives. They still show the scars of that attack.

[4.] At his trial the essence of the appellant's defence was insanity but the Judge found that had not been proved on the balance of probabilities. The defence of insanity was supported by the evidence of Dr Puloka a psychiatrist called for the defence.

[5.] The Judge found that the evidence of Dr Puloka established that the appellant suffered from a condition known as Intermittent Explosive disorder, which resulted in his having explosive episodes when he gets frustrated by other people. On such occasions he responds in a way that is quite out of proportion to what is involved. It seems that the condition can be controlled by the drug Prozac which Dr Puloka had prescribed for the appellant, although unfortunately, on this occasion, the prison officers had lost his tablets. This Court was advised that since these events in February 2002 the appellant has been taking Prozac and has had no outbursts of violence. Of course he has been in prison over that period of time.

Sentencing remarks

[6.] In sentencing the appellant the Judge accepted that as a result of mental illness the appellant had a reduced level of self control. He acknowledged that this was a significant mitigating factor. Mr Niu for the appellant criticized the Judge's finding of "a reduced level of self control". He maintained that the evidence established a greater loss of self control that was indicated by the statement.

The Judge said later in his remarks:

> If somebody attacks somebody else with a machete and slashes them about the head and the neck they are very lucky that they are not on a murder charge or at least on attempted murder charge. In my view the starting point for sentencing in this case has got to be towards the upper end of the maximum sentence for grievous bodily harm, because it is about as serious as one can get without being on an attempted murder or murder charge. There were multiple wounds inflicted with a dangerous instrument on two people, not one.

Mr Niu criticized the Judge's reference to murder and attempted murder submitting that it was clear that there was never any intent to kill.

[7.] The Judge said that in the absence of mitigating factors the appropriate starting point would be 7 ½ to 8 years imprisonment. In arriving at that figure he noted the existence of a conviction in February 2001 for conspiracy to rob in respect of which the appellant was serving a term of imprisonment of 6 years.

Argument in this Court

[8.] Mr Niu submitted that the evidence of Dr Puloka established that the appellant was, as a result of his disorder, unable to resist the aggressive impulse of his acts. It was for this reason that he criticized the Judge's reference to "a reduced level of self control". Mr Niu submitted that there was no evidence of an ability to be able to exercise any self control at the time he inflicted the injuries on the victims. On that basis Counsel submitted that the appellant had no criminal responsibility for his acts and that it was therefore wrong to keep him in prison.

[9.] In relation to the expressed fears of the appellant's mother-in-law and the Probation Officer, that if he was released from prison further acts of violence would occur, Mr Niu noted that as long as the appellant took his medication such behaviour

would be prevented. He submitted that the normal requirements in sentencing of deterrence, punishment and retribution are absent in this case.

[10.] Mr Niu referred to the decision of the New Zealand Court of appeal in *R v Graham* CA 391/96; 27/2/97, where a sentence of 7 years for the manslaughter of the appellant's daughter was reduced to 5 years imprisonment, in part because the appellant suffered from the same condition.

[11.] Mr Niu did not seek a reduction of sentence but submitted that the whole of it should be suspended.

[12.] For the Crown Mrs Taumoepeau submitted that the appeal should be dismissed. She said that all the issues raised in mitigation had been properly considered by the judge.

[13.] She noted the findings of the Trial Judge that immediately prior to attacking his wife the appellant was demanding answers from her as to her conduct with another man and this indicated that his mind was engaged in a rational process. The Judge also noted that the appellant's initial response was to walk away and that he later decided to pick up the knife.

[14.] She emphasized that these offences were committed while the accused was serving a prison sentence for serious offending.

Consideration

[15.] We have considered carefully all that Mr Niu has put to us but have nevertheless concluded, for the reasons that follow, that the appeal should be dismissed.

[16.] We rely on the description of Intermittent Explosive disorder given in McElrea J's decision on conviction and sentencing notes. We have considered the facts as found by the Judge and the appellant's own description of his actions contained in his statements to the Police. We bear in mind that in reaching his factual conclusions the Judge had the advantage of considering all the evidence heard by him at the trial.

[17.] According to the evidence, Intermittent Explosive disorder is a recognized mental disorder and one of a number of "impulse control" disorders. It is characterized by discrete episodes of failure to resist aggressive impulses resulting in serious assaults or destruction of property.

[18.] The Judge accepted the proposition of the Crown that the judgment of the Court must be addressed to the moment of the first blow. He seems also to have accepted the proposition that the loss of control commenced when the attack on the mother-in-law and later the wife started.

[19.] The appellant's own statements seem to support this. Importantly the appellant did not lose control when he first established his wife's infidelity – he walked out but later returned. Even then he did not lose control. He spoke further to his wife. He then chased after his mother-in-law but exercised the decision to pick up the cane knife before doing so. He gave as his reason for chasing after his mother-in-law a desire to stop her from calling the police or the prison or getting some people to beat him up, another indication of rational reasoning at this stage.

[20.] We conclude therefore that there was a period when the appellant was under control and was capable of making the decision to walk away rather than place

himself in the situation where control was lost. When he went after his mother-in-law he made a considered decision to take the cane knife. This being so we are satisfied
160 that a period of actual imprisonment (rather than a suspended term) was justified.

[21.] We consider the Judge's starting point of 7 ½ - 8 years to be appropriate given the aggravating factors. These include the appellant's previous offending and the fact that this offending occurred after he escaped from the prison. Both his wife and his mother-in-law received very serious injuries. The mother-in-law has a permanent disfigurement to her face. The wife's injuries were life threatening.

[22.] The Judge has given a generous discount for the mitigating factors – principally his mental disorder - and has then suspended 1/3 of the resulting sentence. We do not consider the sentence to be excessive. Consequently the appeal is dismissed.

Sefo anor v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, and Salmon JJ
Cr App 15-16/2004

14 July 2005; 21 July 2005

Criminal law – fraud and forgery – appeal against conviction on Judge's summing up – appeal dismissed
Sentencing – appeal against sentence – Judge took earlier offending into account – appeal allowed

For the decision of the Supreme Court, see *Sefo anor v R* [2004] Tonga LR 366.

The first appellant ("Sefo") was charged with four counts of wilfully making a false entry in internal credit vouchers with intent to defraud the ANZ Bank of amounts totalling $18,063 and one count of forgery resulting in the bank making an unauthorised loan of $20,000. She was found guilty on all counts. On 29 October 2004, she was sentenced to 6 years imprisonment on each count, the final year of the sentence being suspended for 2 years from the date of her release, the sentences to be concurrent. She appealed against conviction and sentence. The second appellant ("Tu'ipulotu") was charged with five counts of wilfully making a false entry in internal credit vouchers with intent to defraud the ANZ Bank of amounts totalling $27,800. She was found guilty on all counts. On 29 October 2004, she was sentenced to 5 years imprisonment on each count, the final year of the sentence being suspended for 2 years from the date of her release, the sentences to be concurrent. She appealed against conviction and sentence. The grounds of appeal were substantially the same and were on the grounds of misdirection or inadequate direction in the summing up.

Held:

1. The Court found that the trial judge provided adequate and sufficient direction to the jury as to what regard to have to anything that the prosecutor may have said about any other possible charges. The jury could have been left in no doubt that they were to disregard that entirely. That ground did not succeed.
2. The Court found that the trial judge provided adequate and sufficient direction to the jury as to what regard to have to anything that the prosecutor said about the Crown never winning a jury trial in Vava'u. The jury could have been left in no doubt that comment should not have been made and that it must be totally disregarded. That ground did not succeed.

3. None of the grounds advanced by the appellants were made out. Both appeals against conviction failed.
4. In sentencing the appellants, the offences for which they had been convicted were properly taken into account. But offences for which they had not been convicted, had not pleaded guilty or had not otherwise admitted should not be taken into account. It was apparent that the trial judge placed considerable weight on what he regarded as serious other offending by the appellants over a longer period than the period covered by the counts that went to the jury. The Court of Appeal was required to consider afresh what were appropriate sentences for the offences of which the appellants were found guilty.
5. The appeals against conviction were dismissed. The appeals against the sentences were allowed. The sentences imposed were quashed. Sefo was sentenced to imprisonment for four years on each of the fraud charges, the sentences to be concurrent. She was sentenced to imprisonment for one year on the forgery charge to be cumulative on the sentences on the fraud charges. Tu'ipulotu was sentenced to imprisonment for four years on each of the fraud charges, the sentences to be concurrent. In both cases, the last year of the sentences was suspended for two years.

Cases considered:

R v Misinale (Court of Appeal, CA 13/99, 23 July 1999)
R v Tangata'iloa (Supreme Court, CR 99/00, 3 May 2001)
Wall v R (Supreme Court, CR 31/2000, 27 July 2002)

Counsel for first appellant : Mr Tu'utafaiva
Counsel for second appellant : Mr Fakahua
Counsel for respondent : Mr Sisifa

Judgment

[1] The first appellant ("Sefo") was, after amendments to the indictment, charged with four counts of wilfully making a false entry in internal credit vouchers with intent to defraud the ANZ Bank of amounts totalling $18,063.00 and one count of forgery resulting in the bank making an unauthorised loan of $20,000.00. Following a trial before Ford J and a jury, she was found guilty on all counts. On 29 October 2004, she was sentenced to 6 years imprisonment on each count, the final year of the sentence being suspended for 2 years from the date of her release, the sentences to be concurrent. She has appealed against conviction and sentence.

[2] The second appellant ("Tu'ipulotu") was, after amendments to the indictment, charged with five counts of wilfully making a false entry in internal credit vouchers with intent to defraud the ANZ Bank of amounts totalling $27,800.00. In the same trial before Ford J and a jury, she was found guilty on all counts. On 29 October 2004, she was sentenced to 5 years imprisonment on each count, the final year of the sentence being suspended for 2 years from the date of her release, the sentences to be concurrent. She has appealed against conviction and sentence.

[3] A third co-accused, Siniola Faletapu Leleifi was charged on an indictment containing one count of embezzlement. In the same trial, she was found guilty. She was sentenced to 2 years imprisonment, the final year of the sentence being suspended for 2 years from the date of her release. She has not appealed her conviction or sentence.

[4] The charges against another co-accused, 'Alilia Guttenbeil, were dismissed at the end of the case for the Crown on the basis of defects in the charges in the indictment.

[5] The appeals of Sefo and Tu'ipulotu were heard together. As the grounds of appeal are substantially the same, they can be dealt with together.

Background

[6] In the absence of a transcript of the evidence, or a statement of facts that ought to have been provided to the Court by the Crown, this summary of the events leading to the charges has been compiled from the Judge's summing up, counsels' submissions and the Judge's ruling on the application for bail pending appeal.

[7] All four accused were employees of the ANZ Bank at Vava'u. Sefo was the Branch Manager. Tu'ipulotu was the Reconciliation Officer and Leleifi was the Head Teller. It was the case for the Crown that the two appellants filled in fictitious internal credit slips purporting to make cash deposits to accounts in the name of the appellants or near relatives. When the credit slips had been processed, the appellants promptly withdrew in cash the amounts that had been fictitiously deposited. The internal credit slips were produced as were a printout of the computer pages relating to the relevant accounts, showing the fictitious deposits and the cash withdrawals of the same amounts.

[8] In the case of Sefo, she was alleged to have followed this procedure on the dates and for the amounts shown:

17 April 2003	$4,063.00
15 May 2003	$3,000.00
1 August 2003	$4,500.00
29 September 2003	$6,500.00

[9] In the case of Tu'ipulotu, she was alleged to have followed this procedure on the dates and for the amounts shown:

26 June 2003	$3,700.00
22 July 2003	$5,000.00
1 August 2003	$9,100.00
12 September 2003	$5,000.00
12 November 2003	$5,000.00

[10] The forgery count against Sefo involved a loan application in which the borrower was Mr and Mrs Latu'ila, who were the parents of a co-accused**.** The loan of approximately $20,000.00 was approved by Sefo. It was alleged that by photocopying an approval of an earlier legitimate loan application, Sefo forged this loan application by photocopying the loan approval on to the application. In the result, the loan was made and was subsequently repaid, so the bank suffered no loss.

[11] There were a number of other events in respect of which the Crown alleged the appellants had acted dishonestly. In the Magistrates' Court there were 1,234 charges laid against all the accused. At a preliminary hearing, the police withdrew 554 charges. By agreement, all the remaining charges were sent for trial in the Supreme Court.

[12] When the charges were called in the Supreme Court, the Judge directed counsels' attention to s 150 of the Criminal Justice Act. On 8 October 2004 an indictment was received in respect of Sefo containing 13 counts alleging offences from April 2003 to November 2003. On 11 October 2004 an amended indictment removed two of those counts. On 26 October 2004, the 12th day of the trial, after the Judge had ruled on the no case application by the accused, 2 counts of conspiracy were removed. On 27 October, the Judge ruled that the four theft counts should be deleted, leaving the five counts that went to the jury. We do not have the comparable information in respect of the charges against Tu'ipulotu, but assume they followed a similar pattern.

The appeals against conviction.

[13] The appeals by both appellants against conviction are on almost the same grounds and can be dealt with together. Other than a submission by counsel for Tu'ipulotu, they were all on the grounds of misdirection or inadequate direction in the summing up.

Other charges

[14] In the opening and closing addresses of counsel for the Crown and in the course of cross-examination, the Crown Prosecutor referred to there being other charges which could have been brought by the Crown against the appellant. The appellants submitted that the Judge erred in not firmly and sufficiently directing the jury to disregard that aspect of the Crown's case altogether.

[15] When summing up to the jury, the judge said:

> "The other point is that Crown counsel referred to other charges the Crown could have brought had they been able to do so. Again, whether that is right or wrong, the comment should not have been made. You have 11 (sic – in fact 10) counts in front of you and you must make findings on those counts in accordance with the evidence and the directions that I give you. You must put out of your minds everything Crown counsel said to you about any charges that are not before the Court."

[16] That was an adequate and sufficient direction on this issue. Indeed it is difficult to see what else the Judge could have said without repeating what he had already said. The jury could have been left in no doubt that they were to disregard entirely anything that the prosecutor may have said about any other possible charges. This ground cannot succeed.

Vava'u juries

[17] The appellants submit that the Judge erred in not firmly and sufficiently directing the jury to disregard the comment by the Crown prosecutor to the jury that there is a saying in Vava'u that the Crown never wins a jury trial in Vava'u.

[18] When summing up to the jury, the judge said:

> "There are just two points I want to make to you now about the prosecutor's address. First, you may recall that at one point Miss Simiki said words to the effect that in Nuku'alofa the perception is that the prosecution never wins before a jury in Vava'u. Now that statement should not have been made and counsel should have known better. Unfortunately, because I had to wait for a translation, I was unable to stop it being said.
>
> You must try and totally disregard the comment. Your function is to decide the case on the evidence before you and you must not feel intimidated in any way by such a remark."

[19] The difference between the ground of appeal and the Judge's summing up on whether the perception was in Vava'u or Nuku'alofa is immaterial. Again this was an adequate and sufficient direction. It can only have left the jury in no doubt that the comment the Crown prosecutor had made should not have been made and that the comment must be totally disregarded. This ground cannot succeed.

Reduction of counts in the indictment

[20] The appellants submitted that the Judge erred in failing to explain to the jury the reasons for the reduction of the counts in the indictment from eleven to five, with the consequence that the jury may have been under the impression that the remaining five counts are the ones of which the appellants should be found guilty.

[21] We have referred in [15] to the direction the judge gave on the 11 counts before the jury. In addition, shortly after that passage, the judge said:

> "The second point is that the indictments contain five counts against the first accused and five counts against the second accused. It is important that you consider each count separately and come to a separate decision about each.
>
> You will be asked for separate verdicts on each of them. You may reach different verdicts on different counts. You may conclude on the facts that if you find a defendant guilty or not guilty on one count then it would be difficult to come to a different conclusion on another count. That is entirely up to you."

[22] These passages in the summing up made it perfectly plain to the jury that they should consider each count separately and decide in respect of each whether the Crown had proved that the accused was guilty or not guilty. There is no basis for the possibility that the jury may have thought they were bound to find the accused guilty on these counts. This ground cannot succeed.

The accused Guttenbeil

[23] The appellants submitted that the Judge erred in failing to explain to the jury the reason for acquitting this accused. A reasonable effect of that failure, they submitted, is that the jury may have concluded that the remaining accused are the ones who should be found guilty.

[24] We do not accept this submission. Not only was there no reason for directing the jury on why the counts against this accused were dismissed, to have done so may well have caused some confusion in the minds of the jury. What was important was for it to have been made clear that the jury should consider the Crown case against each of the accused separately and that they should also consider separately the Crown case in respect of each count against each accused. This the Judge did in the passages to which we have referred.

The cash sheet summaries

[25] Four tellers from the bank gave evidence. A transcript of their evidence is not before this Court. As described by counsel, the witnesses gave evidence of the checking of the deposits slips and credit vouchers with the cash on hand. Counsel for the appellants told the Court that in cross-examination the witnesses referred to these shortages being recorded in the tellers' cash sheet summary. Those summaries were not produced in evidence because, at the time this evidence was given, they were at Nuku'alofa. The appellants submitted that the contents of the summary sheets can only be proved by primary evidence, that is by the production of the sheets in court.

[26] Although this ground is advanced under the heading of appeals against the summing up, it appears rather to be on the ground of the wrongful admission of evidence. It appears from the description of the evidence given by counsel that the cash sheet summaries were not part of the Crown case. Their existence emerged in the course of cross-examination. The primary evidence upon which the Crown relied was the deposit slips and created vouchers that were produced.

[27] On those documents and their recollection of what occurred, the tellers were able to say that there were cash deficiencies without reliance on the cash sheet summaries. Counsel could submit to the jury that, in the absence of the cash sheet summaries, their evidence should not be accepted. The issue was then one for the jury. Counsel for the appellants advised this Court that they did not make any formal application for the cash sheet summaries to be produced later in the hearing. No doubt they could have been obtained from Nuku'alofa if required.

[28] On the account of the evidence as given by counsel, the ground that the evidence of the tellers was wrongly admitted cannot be upheld.

Unanimous verdicts

[29] Counsel submitted that the Judge erred in failing to direct the jury that, notwithstanding the legal requirement that the verdicts have to be unanimous, if they cannot agree on the verdicts after full consideration of the evidence, addresses by counsel and the summing up by the Court, then that is the end of the matter. The jury may have felt or understood that they had no choice but to return a unanimous verdict.

[30] Early in his summing up the Judge said:

> "I referred just then to your "joint decision" because under our system of law your verdict, whether it be guilty or not guilty, must be unanimous. That is not to say that you must agree upon the same reasons for your verdict. You may individually rely upon different parts of the evidence or place a different emphasis upon parts of the evidence. However, by whatever route you each arrive at your decision, that final decision of either guilty or not guilty must be the decision of you all unanimously before it can become your verdict."

[31] At the end of his summing up the Judge said:

> "I have now completed all I have to say to you before asking you to retire to consider your verdict. I shall now tell you what will happen when you return with your verdict. You will take your places in the jury box. Your Foreman will then be asked to stand. He should be in a position to state clearly the verdict on each count. The Registrar will then direct this question to him, "are you all agreed upon your verdict?" If you are all agreed, the Registrar will then ask, "what is your verdict is the accused guilty or not guilty of the particular count?" The appropriate answers will then be given by the Foreman."

[32] Those directions are entirely appropriate. They leave the jury in no possible doubt that before a verdict can be delivered, it must be the verdict of them all. It follows inevitably that if they cannot agree upon a verdict unanimously, a verdict cannot be delivered. It is neither a legal requirement nor is it the practice for a judge expressly to direct the jury that if they are unable to agree on any count, they should not deliver the verdict on that count. Such a direction is unnecessary because it follows inevitably from the standard directions that the judge gave the jury. This challenge to the summing up cannot succeed.

The no case ground

[33] One of the grounds in the notices of appeal of both appellants was that the Judge erred in dismissing the application by the appellants for an order that there was no case for them to answer. At the hearing of the appeal counsel for Sefo abandoned this ground, but counsel for Tu'ipulotu did not.

[34] This ground cannot succeed. For the appellant to establish that there was no case to answer against her, she would have to put before this Court the transcript of all the oral evidence and all the relevant exhibits that had been before the Supreme Court to support her claim that that evidence was insufficient to justify the ruling she was asking the Court to make. She has not done so.

[35] There is a second reason. If the verdict of the jury cannot be challenged on the ground that there was insufficient evidence to justify it, and such a challenge is not made in this case, it follows that there must have been sufficient evidence to justify

the jury's verdict and therefore there must have been sufficient evidence for the case against the appellant to proceed.

Conclusion on the appeal against conviction.

[36] None of the grounds advanced by the appellants has been made out. Both appeals against conviction fail.

The appeals against sentence

[37] The principal ground advanced by the appellants in support of their appeal against sentence was that the Judge took into account offending by the appellants in respect of which they had not been found guilty. They also submitted that the sentences imposed were excessive having regard to the circumstances of the offences and of the appellants.

[38] In his comments when sentencing the Judge referred to a report from accountants. That report had been submitted by the prosecution at the hearing but ruled inadmissible. We have considered the report. It covers a period and amounts substantially more than the period and amounts in the counts for which the appellants were found guilty. That the Judge took into account offending in addition to the offences contained in the counts is apparent from the following passages in his comments:

> "Mr Tu'utafaiva suggested this morning that I should approach sentencing on the basis of the amounts represented by the counts on the indictment. He advises that that figure is $18,063. No authority was cited and I am not prepared to accept that approach."

[39] He goes on to say that he was satisfied that the offending commenced well before September 2003 and that the full extent of the loss will never be known but the figure would have to be in the order of a quarter of a million pa'anga. He believed that the offending most likely began in December 2002 although he said "I strongly suspect that accused number one had embarked on her criminal escapade long before that date."

[40] With respect to the Judge, the approach he adopted is not correct. In sentencing the appellants, the offences for which they had been convicted were properly taken into account. But offences for which they had not been convicted, had not pleaded guilty or had not otherwise admitted should not be taken into account. Archbold *Criminal Law,* 2000 edition at §5-2, page 487 says:

> "An offender must be sentenced only for the offences of which he has been convicted, or which he has admitted either by his plea or by asking for the offences to be taken into consideration."

[41] It is apparent both from the passages in his judgment to which we have referred and from other comments he made when sentencing that the Judge placed considerable weight on what he regarded as serious other offending by the appellants over a longer period than the period covered by the counts that went to the jury.

Counsel for the Crown responsibly accepted that the approach the Judge adopted could not be supported.

[42] In view of this conclusion, this Court is required to consider afresh what are appropriate sentences for the offences of which the appellants have been found guilty. We have regard to the following factors:

i. The offending involved large amounts, $18,063.00 in the case of Sefo and $27,800.00 in the case of Tu'ipulotu taken on separate occasions spread over a period of about six months from April to November 2003.

ii. It was a carefully calculated scheme of deception orchestrated mainly by Sefo and to a lesser extent by Tu'ipulotu.

iii. Both appellants were in positions where the bank placed total and absolute trust in them, particularly Sefo as the manager of the Vava'u branch of the bank. Tu'ipulotu was the Reconciliation Officer responsible for balancing the various funds. The Judge found that both of them concocted a juggling game whereby money was transferred from one account to another to hide the fraudulent withdrawals. In doing so they acted in flagrant abuse of the trust placed in them.

iv. The Judge found that the appellants showed no remorse, either in their actions or in the submissions of their counsel at the time of sentencing.

v. Offending on this scale by responsible bank officers has an impact on the confidence of the public in the bank and its employees, and, as the report of the accountant states, on the readiness of foreign owner employers to employ local staff. The Judge considered that the impact of the offending on the close community in Vava'u would be devastating.

vi. The forgery of the approval of the loan application for $20,000.00 did not result in any loss to the bank. But it did involve careful and deliberate acts in the photocopying processes used to carry out the forgery that was intended to and did deceive the bank.

vii. In the absence of probation reports, this Court does not have any knowledge of the personal circumstances of the appellants. Counsel for the appellants did not advance any personal or other circumstances in mitigation.

Comparable sentences

[43] Counsel for the Crown did not put before this Court details of sentences imposed for frauds committed in broadly similar circumstances. In appeals involving sentences, this information should be provided by the Crown.

[44] Counsel referred to the decision of the Court in *R v Misinale* CA 13/99, 23 July 1999. That was a Crown appeal on the ground that the sentence imposed was inadequate. The respondent had, over a 6 month period, taken $47,310.23 from his employer. He was sentenced to 3 years. He was ordered to serve 8 months of the sentence; the balance was suspended for 2 years from the date of his release. The Crown appeal was only in respect of the order suspending the sentence. This Court quashed the suspension and in lieu ordered that the last 12 months of the sentence be suspended for two years. As this appeal did not address the adequacy of the term of imprisonment, it is of limited value in considering an appropriate sentence for offending of the kind involved in this case.

[45] In *Wall v R* CR 31/2000 27 July 2002 the appellant pleaded guilty to 11 counts of embezzlement. The total amount involved was $181,000. He was sentenced to five years imprisonment on each count concurrently, the last twelve months to be suspended for two years from date of release. His appeal against sentence was allowed, the sentence was reduced to imprisonment for four years on each count to be serve concurrently, the last twelve months of the sentence to be suspended for two years from the date of release. The main distinguishing features between that case and this are the amounts involved and the plea of guilty, as well as other mitigating features we need not detail.

[46] In *R v Tangata'iloa* CR 99/00, judgment 3 May 2001 the prisoner had pleaded guilty to a series of charges involving the embezzlement of $6,627.40 while he was employed as a bank teller. He was sentenced to two years imprisonment on each count concurrently, the final six months of the sentence suspended for one year from the date of release. In that case also the main feature distinguishing that case from the present is the plea of guilty.

Conclusion

[47] A starting point for offending of this kind and scale is in the range of three to four years. The present case is aggravated by many of the factors to which we have referred, particularly the breaches of trust by both appellants. The breach of trust by Sefo is more serious than that of Tu'ipulotu, but when regard is had to the greater amount involved in the offending of Tu'ipulotu, we conclude that the sentences for the two appellants for the fraud charges should be the same. Regard also should be had to the absence of any significant mitigating circumstances. We conclude that the appropriate sentence for the fraud charges is a sentence of four years imprisonment on each charge. As all the charges were part of a single pattern of offending, the sentences should be concurrent.

[48] The forgery charge against Sefo is in a different category. The sentence for that charge should be cumulative on the sentences on the other charges. Taking into account the totality of the offending and the sentences, Sefo is sentenced to imprisonment for one year on the forgery charge, cumulative on the sentences on the fraud charges.

[49] We see no reason to differ from the Judge's conclusion that parts of the sentences should be suspended. In both cases, the last year of the sentences is suspended for two years.

Result

[50] The appeals against conviction are dismissed. The appeals against the sentences are allowed. The sentences imposed are quashed. Sefo is sentenced to imprisonment for four years on each of the fraud charges, the sentences to be concurrent. She is sentenced to imprisonment for one year on the forgery charge to be cumulative on the sentences on the fraud charges. Tu'ipulotu is sentenced to imprisonment for four years on each of the fraud charges, the sentences to be concurrent. In both cases, the last year of the sentences is suspended for two years.

Tukuafu v Latu anor

Court of Appeal, Nuku'alofa
Webster CJ, Burchett, Tompkins, Salmon JJ
CA 5/2005

15 and 20 July 2005; 21 July 2005

Land law – question of entitlement to tax allotment – appeal allowed

The facts are set out in the decision of the Land Court at *Tukuafu v Latu anors* [2005] Tonga LR 141.

Held:

1. The appeal was allowed and the decision of the Land Court was set aside.
2. The Court made the declaration that the appellant was entitled to the tax allotment in dispute.
3. Costs were awarded to the appellant.
4. The Court adjourned the question of the remedy to a future sitting to enable the parties to consider the matter further. Unless the first respondent chose to vacate the land, the first respondent must pay a reasonable occupation fee. The matter was remitted to the Land Court to fix the amount of such a fee, unless agreement was reached on it.

Counsel for appellant	:	Mr Niu
Counsel for first respondent	:	Mr Tu'utafaiva
Counsel for second respondent	:	Solicitor-General (Mrs Taumoepeau)

Summary of decision

[1] This was an appeal from the Land Court concerning the right to a tax allotment which is part of the Kanokupolu Royal Estate. A question of jurisdiction was raised after the conclusion of argument and the Court reconvened yesterday to consider that. The Court had reached a clear conclusion, which is the unanimous view of all of its members, that the Court does have jurisdiction. The reasons will be given in the full reasons for judgment which will be delivered in due course.

The decision of the Court is:

(1) that the appeal be allowed;
(2) that the decisions below be set aside;

(3) that the declaration be made that the appellant is entitled to the tax allotment in dispute known as Vakaloa;

(4) apart from the question of costs, which we award to the appellant here and below, the question of the consequential orders remains. As to that, the Appellant originally sought an order for removal of the Hawaiian restaurant resort built by the First Respondent and an order for payment by the First Respondent to him of mesne profits of $250 per month. That does appear to this Court to raise a number of practical issues, but at the hearing the Appellant's Counsel Mr Niu indicated that, if the appeal were to be successful, it might be possible for some agreement to be reached between the parties. The Court therefore adjourns the question of the remedy in this case to a future sitting to enable the parties to consider the matter further. In the meantime, unless the First Respondent chooses to vacate the land as sought by the Appellant, the First Respondent must pay a reasonable occupation fee. The matter is remitted to the Land Court to fix the amount of such a fee, unless agreement can be reached on it.

[2] It should be noted that, on the application of the Solicitor-General, and subject to the giving by her of an appropriate undertaking on behalf of His Majesty the King (which has been given) the entitlement of the appeal has been amended so as to delete the reference to His Majesty as the Third Respondent.

Tu'itavake v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, and Salmon JJ
AC 4/2005

15 July 2005; 21 July 2005

Sentencing – appeal against sentence for manslaughter – high degree of provocation – appeal allowed

After trial before the Chief Justice and a jury the appellant was found not guilty of murder but guilty of manslaughter. The jury rejected self defence but accepted the defence of extreme provocation. He was sentenced to 10 years imprisonment, the final two years to be suspended for two years. When imposing that sentence the Court took into account the fact that the appellant was a first offender, his remorse and his apology to the family. The appellant appealed against the sentence.

Held:

1. The Court noted that the sentencing Judge did not mention one factor which the Court considered was relevant in mitigation of sentence. The pre-sentence report referred to a considerable degree of restitution having been made by the appellant to the deceased's family.
2. The Court applied the principles set out in the paper published by the British Sentencing Advisory Panel and concluded that the 10 years sentence imposed was excessive. There was a high degree of provocation met by sudden retaliation.
3. The Court found that a sentence of five years imprisonment was appropriate. The suspension of the final two years of the sentence reflected the restitution which the appellant had made.
4. The appeal was allowed.

Cases considered:

R v Edwards (New Zealand Court of Appeal, CA 371/04, 13 April 2005)
R v Latham [1997] Crim LR 140 (UKCA)
R v Leuta [2002] 1 NZLR 215 (CA)
R v Rapira [2003] 3 NZLR 794
Solicitor General v Kane (New Zealand Court of Appeal, CA 154/98, 23 September 1998)

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for appellant	:	Mr Niu
Counsel for respondent	:	Mr Sisifa

Judgment

[1.] After trial before the Chief Justice and a Jury the appellant was found not guilty of murder but guilty of manslaughter. Webster CJ sentenced him to 10 years imprisonment, the final 2 years to be suspended for 2 years. This is an appeal against that sentence.

Factual Background

[2.] The following recital of the facts is taken from the notice of appeal. Mr Sisifa for the Crown accepts that it is an accurate account: The events recorded commenced at a nightclub:

> (a) the deceased swore at the Appellant and punched at the Appellant which started a fight between the Appellant and the deceased during which Vaka, a friend of the Appellant, kicked the deceased in the mouth which caused it to bleed. That was in the night club and the fight was stopped and the Appellant and his 2 friends, Vaka and Mafile'o, left the nightclub to go home.
>
> (b) the deceased, carrying a broken bottle like a knife, together with a friend, Tonga, went after the Appellant and approached him and his friends who were in their van, calling to the Appellant to come out and fight. The Appellant could not drive away because of other vehicles queuing out of the car park. He got out with the knife to scare the deceased off, and it did. The deceased backed off and they went away. The Appellant then got inside the van and drove slowly towards the exit behind other vehicles as well as in front of other vehicles.
>
> (c) the deceased, carrying a big rock in his right hand, his friend, Tonga, carrying a piece of timber, and another friend, Kaiveloni, carrying a rock as well, came around by the exit and towards the Appellant's vehicle. A rock thrown from some where had hit the roof of the Appellant's van just before then. It was a new van. The Appellant could not drive away and could not run away and leave his new van for fear of further damage to it. He got out with the knife again to scare them away. He stood by the van as before. His friend, Taufa, got out and stood beside him too. The deceased ran to and attacked the Appellant with the rock, swinging it at his head; the Appellant ducked and swung his knife at the deceased,

> who then grabbed and struggled with the Appellant, during which the Appellant stabbed the deceased repeatedly, a total of 9 times, which only ended when Mafile'o, the Appellant's other friend, called to the Appellant to stop.

[3.] As indicated above the appellant was charged with murder with an alternative charge of manslaughter. The defence to the murder charge was self defence which if successful would lead to an acquittal. The alternative defence was extreme provocation as provided for by s 89(a) of the Criminal Offences Act.

[4.] The manslaughter verdict indicates that the Jury rejected self defence but accepted the defence of extreme provocation.

Sentencing remarks

[5.] The Judge noted that the deceased was stabbed twice in the chest. One stab wound went right through his body. The Judge recorded his view that the Courts must take real steps to deter the ready use of knives in disputes. He took into account that the appellant was not the principal aggressor and that the crime was not premeditated but occurred in response to the deceased's final attack.

[6.] The Judge said that the appropriate level for violence of this kind with a knife has to be 10 – 12 years, as it is at least in the middle of the range of seriousness.

[7.] He noted that the law always regards the killing of another as extremely serious and the penalty must reflect that. Sympathy cannot be allowed to supplant the duty to impose an appropriate penalty.

[8.] After taking into account the fact that the appellant was a first offender, his remorse and his apology to the family he imposed the sentence referred to above.

Submissions in this Court

[9.] Mr Niu for the appellant submitted that the whole of the sentence of imprisonment should be suspended. He said that the appellant did not cause, nor was he responsible for, the circumstances which caused the extreme provocation which deprived him of his power of self control. He submitted that the deceased caused the circumstances which led to his demise. He said that deterrence was not called for because the circumstances were unique to this case.

[10.] Mr Niu submitted that the Judge erred in implying that the appellant took the knife to this fight when in fact he generally kept it in his van for his fishing. He said that the Judge also erred in suggesting that an innocent life had been lost because the deceased was to blame for his death. Mr Niu also submitted that the Judge ignored the element of extreme provocation in this case. He referred to the statement in Archbold at Chapter 19 para. 66 that sentences approved by the Court of Appeal in England in cases of provocation mostly fall in the range of 5 to 7 years imprisonment. He referred also to the New Zealand Court of Appeal decision in *Solicitor General v Kane* (CA 154/98, 23 September 1998) where the Court refused to increase a sentence of 4 years imprisonment where the offender defended himself with a knife when attacked, resulting in the death of the attacker. In that case, like this one, he carried the knife in his car for work purposes. He referred to the guidance given by

the New Zealand Court of Appeal in *R v Leuta* [2002] 1 NZLR 215 and affirmed in *R v Rapira* [2003] 3 NZLR 794 at [128]:

> "Culpability is higher in cases where manslaughter results from intentional harm. In such cases, the sentence imposed must reflect the need for deterrence of intentional conduct which risks serious harm or death. Other factors such as provocation or circumstances personal to the offender, which may diminish responsibility, may affect culpability significantly. Sentences in other cases where the death giving rise to liability for manslaughter is a result of intentional violence may provide guidance. But the culpability of each offender needs to be assessed in the particular context."

[11.] For the Crown Mr Sisifa submitted that the Judge had taken into account all relevant issues including extreme provocation. He referred to (and said the Judge took into account) *Attorney General's Reference* (No 33 of 1996) *R v Latham* [1997] Crim LR 140 CA [8]:

> "Even when a particular type of manslaughter is isolated from the rest it has to be recognized that it covers a wide field, and if justice is to be done sentencers must not be put in strait-jackets, but for the reasons identified in this judgment it seems to us that where an offender deliberately goes out with a knife, carrying it as a weapon, and uses it to cause death, even if there is provocation he should expect to receive on conviction in a contested case a sentence in the region of 10 to 12 years. The alternative would be to say that although the tariff should remain the same the indictment should contain a separate count in relation to the carrying of the offensive weapon for which a separate and normally consecutive sentence should be imposed, but that seems to us to be a somewhat cumbersome approach."

Consideration

[12.] Sentencing in cases of provocation presents special problems to a sentencing Judge. As in all cases of manslaughter there can be no set tariff. In each case the task of the Judge is to determine the true culpability of the offender in the particular circumstances of the case.

[13.] Appellate Courts in this and other countries have affirmed that sanctity of life is a fundamental value and society demands that the taking of life be met with the appropriate condemnation. But that still requires that the sentence imposed be related to the circumstances of the particular offence and the particular offender.

[14.] An appellate Court must also bear in mind that the sentencing Judge, who has had the advantage of hearing the evidence, has a broad discretion as to the appropriate sentence.

[15.] In this case the Judge obviously took his starting point from the judgment of the English Court of Appeal in *Latham.* However it should be noted that in *Latham* the

offender was carrying the knife when he went to the nightclub where the offence occurred. He said he carried it in case he had trouble with others with whom he had previously fought. In fact in that case the offender had received a sentencing indication before pleading guilty to manslaughter. For that reason the Court refused to interfere with the sentence imposed of 5 years.

[16.] In the present case we see no reason not to accept the appellant's claim that he carried the knife for the purposes of his fishing business and to that extent the case may be distinguished from the tariff indication given in *Latham*. The circumstances have more in common with the New Zealand case of *Kane*.

[17.] We do not accept the suggestion that the Judge overlooked the extreme provocation when he came to sentence the appellant. He had presided over the trial in which provocation was an important issue and he had obviously taken *Latham* into account in fixing his starting point for sentencing. However the Judge does not mention one factor which we consider is relevant in mitigation of sentence. The pre-sentence report refers to a considerable degree of restitution having been made by the appellant to the deceased's family.

[18.] Before turning to give our views on sentence there is one further matter to mention. In circumstances such as these a verdict of manslaughter may be reached on the basis of provocation or lack of murderous intent. The trial judge should determine which is the more likely explanation for the jury's verdict, and give reasons for his decision. In this case as we have indicated we think it is clear that the Judge had provocation in mind.

[19.] The appropriate sentence for manslaughter where provocation is present was given extensive consideration by the New Zealand Court of Appeal in *R v Edwards* (New Zealand Court of Appeal, CA 371/04, 13 April 2005). In that decision the Court discussed and referred to the work of the British Sentencing Advisory Panel which in March 2004 published a consultation paper: Consultation Paper on Sentencing of Manslaughter by Reason of Provocation. The panel considered in detail some 42 cases between July 2000 and June 2003 where juries had returned convictions for manslaughter on the grounds of provocation. The panel went on to review appellate authorities. They concluded at [26]:

> *Sentencing ranges (after a contested trial) to the extent that they may exist may be summarised as follows:*
>
> | **Sentencing range** | **Case Features** |
> |---|---|
> | [1.] 12 years after retaliation | Firearm carried and used |
> | [2.] 10 – 12 years | Knife carried and used or great brutality |
> | [3.] 7 years | Moderate provocation and sudden retaliation |
> | [4.] 5 years | A high degree of provocation, sudden retaliation, strong mitigation |
> | [5.] 3 years or less | Highest degree of provocation – violent attack, even terror, evoking extreme passion |

[Category numbers added]

[20.] We have also found the New Zealand decision of *Kane* of assistance. In that case Mr Kane was being attacked by two men. In the course of the attack he picked up a knife which he had in his car for work purposes and stabbed one of his attackers, killing him. He was sentenced to 4 years imprisonment. An appeal by the Attorney General maintaining that the sentence was inadequate was dismissed by the Court of Appeal. The principal difference between that case and this one was the finding by the Judge that the use of the knife was not premeditated. In this case it obviously was. On the other hand in this case the aggressors knew of the existence of the knife before they attacked the appellant. The appellant resisted the initial invitation to come out and fight. He tried to leave the venue but was caught in a line of cars. He was faced by two men armed with rocks and a piece of timber. One of them ran at him aiming the rock at his head. Obviously he needed to defend himself. Equally as obviously the force used to do so was excessive. There was a high degree of provocation met by sudden retaliation. Applying the principles set out above to the facts of this case we have concluded that the 10 years sentence imposed was excessive.

[21.] We conclude that this case comes within category 4 of the ranges set out above and that a sentence of 5 years imprisonment is appropriate. We would maintain the suspension of the final two years of the sentence to reflect the restitution which the appellant has made.

[22.] Accordingly the appeal is allowed and the sentence of 10 years imprisonment is quashed. In its place we substitute a sentence of 5 years imprisonment the final 2 years of which is to be suspended for 2 years from the date of release.

[23.] We make the following final comment. We endorse entirely the remarks of the Chief Justice concerning the use of knives in fights. If the appellant had brought the knife with him intending to use it in a fight the result would have been very different. But we have concluded this was not such a case.

Wiebenga v 'Uta'atu

Court of Appeal, Nuku'alofa
Webster CJ, Burchett and Tompkins JJ
App 14/2004

18 July 2005; 21 July 2005

Contract law – construction of term – context to be considered – appeal dismissed

For the Supreme Court decision, see *Wiebenga v 'Uta'atu* [2004] Tonga LR 285.

On 28 June 2002 a contract of employment was made relating to the services of the appellant, an Australian with expertise in information technology, rendered on behalf of the respondent, a Tongan public accountant practising in Nuku'alofa. The contract was to endure, if it was not earlier terminated, for a period of two years; but it contained a termination clause. A question arose as to the construction of the termination clause.

Held:

1. The most important rule of construction in practice was that which required attention to be given to the context. Words were to be understood as they were actually used.
2. The Court concluded that the trial judge was correct in deciding that clause 20 permitted the contract to be terminated by notice notwithstanding that it was not suggested the appellant had committed any form of misconduct or that any antecedent circumstance had arisen to justify the giving of the notice.
3. The appeal was dismissed with costs.

Counsel for appellant : Mr Garrett
Counsel for respondent : Mr Niu

Judgment

[1.] The only issue raised by the Notice of Appeal in this matter turns on the true construction of a contractual term.

[2.] The term in question is contained in a contract of employment made on 28 June 2002 relating to the services of the Appellant, an Australian with expertise in information technology, rendered on behalf of the Respondent, a Tongan public

accountant practising in Nuku'alofa. The contract was to endure, if it was not earlier terminated, for a period of two years; but it contained a termination clause, which was the clause in question, as follows:

> "20. Neither Employer nor Employee may unilaterally cancel the contract except for legal, just and valid cause.
>
> a) Termination by Employer.
>
> The Employer may terminate this contract, by serving a written notice to the Employee at least three (3) months before the intended date thereof or payment of separation / termination pay equivalent to two (2) months salary. The Employer shall bear the repatriation expenses of the Employee as outlined in Paragraph 9.
>
> The Employer may also terminate this contract immediately without a minimum notice period should the Employee's conduct be of such a manner as to place the Employer's firm in jeopardy of legal action and/or on the following just causes: serious misconduct, wilful disobedience of Employer's lawful orders, habitual neglect of duties, absenteeism, or engaging in trade union activities and/or when Employee violates customs, traditions, and laws of the Kingdom of Tonga and/or terms of this agreement. In these circumstances, the Employee shall shoulder the repatriation expenses.
>
> b) Termination by Employee.
>
> The Employee may terminate this contract by serving three (3) months in advance written notice to the Employer. If the Employee terminates the contract before the completion of one year, the Employee shall shoulder all expenses relative to his repatriation back to Australia.
>
> The Employee may also terminate this contract without serving any notice to the Employer for any of the following just causes: serious insult by the Employer, inhuman and unbearable treatment accorded the Employee by the Employer and violation of the terms and conditions of the employment contract by the Employer. In these circumstances, the Employer shall shoulder the cost of repatriation expenses (as outlined in Paragraph 9).
>
> c) Termination due to illness.
>
> Either party may terminate the contract on the ground of illness, diseases or injury suffered by the Employee. In this circumstance, the Employer shall shoulder the cost of repatriation."

The references in paragraphs (a) and (b) of the clause to paragraph 9 are obvious errors for clause 17.

[3.] Both paragraph (a) and paragraph (b) appear to contain provisions for termination simply by notice, with apparently appropriate consequences for repatriation, as well as provisions for termination for cause in the sense of conduct that might be thought to justify immediate termination. The question is whether, as the Appellant claims, the opening sentence of the clause so permeates the construction of every part of it that the provisions for termination on notice must be read down as permitting such a termination only for some antecedent event or situation, justifying the use of the power, that could constitute a "legal, just and valid cause". Presumably, on this construction, the antecedent justification, although giving rise to a "legal, just and valid cause", would be something less than the specified forms of misconduct that could lead to instant termination, albeit those are described simply as "just causes" in both paragraph (a) and paragraph (b). Difficult distinctions between degrees of conduct, in order to decide whether or not notice was required, would undoubtedly have to be drawn. In argument, counsel accepted that his interpretation of the clause did involve these problems.

[4.] The Respondent, on the other hand, would construe the clause having regard to the logic of the structure of its paragraphs, (a) and (b) each providing for the two broad situations, the one where a party simply wishes to terminate and must therefore give notice or something in lieu of notice, and the other where some reason should allow termination without notice, while (c) provides less complicatedly for the eventuality of illness. On this view, it may be said – as the learned judge held – that, in the context of the whole clause, the opening sentence should be understood as a statement that only a circumstance or event (including the giving of the proper notice) set out in the clause may be availed of by a party as a "legal, just and valid cause" causing the contract to come to an end.

[5.] A more technical approach to the opening sentence would lay emphasis on the contrast between the word "cancel" used in it and the word "terminate" in paragraphs (a), (b) and (c). A cancellation of a contract implies that, from the moment of cancellation, it ceases to exist. But the termination provisions govern the contract's continued operation with respect to such things as a period of notice and repatriation; despite the language, in reality it is only the term of the service that is terminated, and that not necessarily at once. What is done is not done by cancelling the contract, but by the implementation of its relevant provisions. On this construction, the opening sentence could never be in conflict with the balance of the clause, since it speaks of something different. In effect, the clause, so interpreted, is saying that neither party may cancel the contract, "except for legal, just and valid cause" sufficient to justify cancellation (perhaps, frustration of contract, *force majeure*, etc), but each party is given the rights of termination of it set out in paragraphs (a), (b) and (c).

[6.] The Respondent relies on the elaboration in clause 20 of termination by notice by either employer or employee, with provision for payment in lieu of notice by the employer, and provisions dealing with repatriation distinguishing between termination by the employer on notice, termination by the employee on notice, termination for the fault of the employee, and termination for the fault of the employer. Paragraphs (a) and (b) appear to be intended to cover comprehensively the cases with which they deal, being a series of quite particular cases, and the maxim

generalia specialibus non derogant would seem peculiarly applicable: the broad generality of the opening sentence of the clause does not derogate from the special provisions with respect to these cases.

[7.] The Appellant draws attention to another rule usually expressed in Latin, that enjoining a construction of a doubtful clause in an instrument *contra proferentem*, that is, against the party proffering or putting forward the particular clause. This is a rule to assist in solving ambiguities, but if the Court is able to see a clear meaning by reading a provision in accordance with its context, there will generally be no need to look further. A provision is not to be twisted into a meaning contrary to the interest of the party that drafted it where it properly bears a sensible construction.

[8.] The most important rule of construction in practice is that which requires attention to be given to the context. Words are to be understood as they are actually used. Sometimes, as where people are being ironic, words may convey even a meaning the opposite of that they would otherwise convey. Because of the governing role of context, Courts act on the principle stated in Pearce and Geddes, *Statutory Interpretation in Australia,* 4th ed. (1996), at 85:

> "The starting point to the understanding of any document is that it must be read in its entirety."

We should not interpret the opening sentence without appreciating the light cast on it by the whole. When clause 20 is read in its entirety, the specific provisions for termination by notice do not appear readily reconcilable with the Appellant's construction of the opening sentence of clause 20. As is said in Pearce and Geddes, *op. cit.* at 110:

> "It is commonsense that the drafter will have intended the general provisions to give way should they be applicable to the same subject matter as is dealt with specifically."

[9.] For these reasons, we conclude that the trial judge was correct in deciding that clause 20 did permit the contract to be terminated by notice notwithstanding that it was not suggested the Appellant had committed any form of misconduct or that any antecedent circumstance had arisen to justify the giving of the notice.

[10.] Although the Notice of Appeal raised no such ground, the Appellant's Outline of Argument suggested the judge also erred in a respect quite separate from the construction of clause 20. There was a general allegation in the Statement of Claim (which was admittedly incorrect at least as to some matters) that the Respondent "failed to pay the [Appellant] the two months salary, bonuses, accrued holiday pay, and overtime pay to which the [Appellant] was entitled pursuant to the terms of the agreement"; and it was also alleged that "[a]s a result of the [Respondent's] wrongful termination of the contract the [Appellant] suffered losses" the particulars of which were stated to include "Bonus for December 2003 in accordance with the agreement, a total of AUD 4,797". These allegations were denied in the Statement of Defence and, although of course it was unnecessary to plead to a particular, the pleading specifically stated that "[n]o bonus was due to the [Appellant] under the terms of the Contract".

[11.] It was in this state of the pleadings that the Appellant sought to argue the trial judge erred in failing to make a finding on the Appellant's claimed right to a bonus.

There were several difficulties about this argument: (1) the issue does not seem to have been raised clearly as a separate head of claim at the hearing; (2) it was certainly not raised in the Notice of Appeal; and (3) as a result, no doubt, of the form of the
170 Notice of Appeal, the relevant evidence was not included in the appeal papers. Having regard to these difficulties, and after some brief debate, the Appellant abandoned the point.

For these reasons, the appeal must be dismissed with costs.

Takataka anor v Hurrell anors

Court of Appeal, Nuku'alofa
Webster CJ, Burchett and Tompkins JJ
App 6/2005

19 July 2005; 21 July 2005

Civil procedure – application to call further evidence – no new evidence – application denied

In December 1999 a red Nissan registration number C6718 was bought by Ivan Prema. In May 2000, the first appellant, ("Lita") lent Prema $2,000, repayable in three months free of interest. As security for the loan, the car was transferred to Lita, but remained in the possession of Prema. In late 2000 or early 2001, Prema rented a property from the first respondent ("Hurrell"). Sometime later, Prema left the property owing approximately $600 in rent. He left the car on the property. It was in a damaged state, having been damaged in an accident. It sat in the garage for six months at which time the second respondent ("Taufalele") bought the car from Hurrell for $400. The second appellant ("Takataka") persuaded the Police to find the car. The result was that in March or April 2002, the Police found the car, seized it and took it to the Mu'a Police Station. The third appellant ("Taulahi") became involved. He was at that time a Police Superintendent and head of the Central Police Station. He checked the registration card at the Traffic Department. He was then contacted by Hurrell who informed Taulahi of the dealings he had had with Prema, as a result of which the car was released to Taufalele. Takataka made a formal complaint to the Police. The result was that about two weeks after the release, it was again seized by the Police and held at the Central Police Station. It was offered to Takataka, but he declined to accept it, claiming that it was then worth about $1,000 compared to what he said had been its former value of $6,000.

The appellants' claimed that the appellants had the sole right to ownership and possession of the car; that Hurrell did not have the right to sell the car, that the transaction between Hurrell and Taufalele relating to the car was unlawful, that the release by the police of the car to Taufalele was also unlawful and that the Kingdom was vicariously liable for the acts of Taulahi. The Supreme Court found in favour of the respondents and entered judgment for Hurrell, Taulahi and the Kingdom against the appellants with costs. The appellants were entitled to possession of the car. The appellants applied for leave to call further evidence. The respondents opposed the application.

Held:

1. The principles to be applied on an application for leave to call further evidence on an appeal were well-established. Leave would only be granted if these three conditions were fulfilled: if it was shown that the evidence could not have been obtained with reasonable diligence for use at the trial; if the further evidence was such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; if the evidence was such as was presumably to be believed.
2. The Court found that all the evidence referred to had been given and findings in relation to it made by the Supreme Court. Quite apart from the failure of the appellants to establish a proper ground for the granting of leave to call evidence, it was apparent that the evidence sought to be called was unnecessary because it had already being given.
3. The application to call further evidence was dismissed. The respondents were entitled to costs on the application to be taxed if not agreed.

Case considered:

Ladd v Marshall [1954] 1 WLR 1489

Counsel for appellants	:	Sione Kengike
Counsel for first respondent	:	Fatai Vaihu
Counsel for third and fourth respondents	:	Lu'isa Fukofuka

Judgment

Introduction

[1] The appellants, the plaintiffs in the Supreme Court, have applied for leave to call further evidence at the hearing of this appeal. The respondents, the defendants in the Supreme Court, oppose the application.

Background

[2] This case is all about a car, a red Nissan registration number C6718. It was purchased in December 1999 by Ivan Prema. In May 2000, the first appellant, ("Lita") lent Prema $2,000, repayable in three months free of interest. As security for the loan, the car was transferred to Lita, but remained in the possession of Prema. In late 2000 or early 2001, Prema rented a property from the first respondent ("Hurrell"). Sometime later, Prema left the property owing approximately $600 in rent. He left the car on the property. It was in a damaged state, having been damaged in an accident. It sat in the garage for six months at which time the second respondent ("Taufalele") bought the car from Hurrell for $400.

[3] The second appellant ("Takataka") persuaded the Police to find the car. The result was that in March or April 2002, the Police found the car, seized it and took it to the Mu'a Police Station. The third appellant ("Taulahi") became involved. He was at that time a Police Superintendent and head of the Central Police Station. He checked the registration card at the Traffic Department. He was then contacted by Hurrell who

informed Taulahi of the dealings he had had with Prema, as a result of which the car was released to Taufalele.

[4] Takataka made a formal complaint to the Police. The result was that about two weeks after the release, it was again seized by the Police and held at the Central Police Station. It was offered to Takataka, but he declined to accept it, claiming that it was then worth about $1,000 compared to what he said had been its former value of $6,000.

The proceedings and judgment

[5] These proceedings were then commenced. The appellants' claim was based on an allegation that the appellants had the sole right to ownership and possession of the car. It was alleged that Hurrell did not have the right to sell the car, that the transaction between Hurrell and Taufalele relating to the car was unlawful, that the release by the police of the car to Taufalele was also unlawful and that the Kingdom was vicariously liable for the acts of Taulahi.

[6] At some stage, judgment by default was entered against Taufalele, he having taken no steps in the proceedings. It is not necessary for the purpose of this application to set out in any detail the findings in the Supreme Court. The Judge found in favour of the respondents. He entered judgment for Hurrell, Taulahi and the Kingdom against the appellants with costs. Any judgment against Taufalele was aside as it was unsupported by the evidence. He held that the appellants are entitled to possession of the car and that they should indicate within 14 days to the Police if they wished to uplift it. We were informed from the bar that the car is now in the possession of the appellants.

The application to call further evidence

[7] The principles to be applied on an application for leave to call further evidence on an appeal are well established. Leave will only be granted if these three conditions are fulfilled:

> [a] If it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
> [b] If the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.
> [c] If the evidence is such as is presumably to be believed.

See *Ladd v Marshall* [1954] 1 WLR 1489, 1491.

[8] The affidavit or affidavits in support of the application must deal expressly with each of these requirements. As well as an explanation why the evidence was not available at the trial, a full description or a brief of the proposed evidence should be given or attached to the affidavit, together with any relevant information concerning the credibility of the proposed evidence.

[9] The application to call further evidence was supported by an affidavit from Takataka in support. In paragraph 5 he sets out four categories of evidence. They all involved evidence from the police. There is no explanation in the affidavit why this evidence was not given at the hearing. From the bar, counsel for the appellants

submitted that the police officers were reluctant to give evidence, but no evidence to establish this was submitted in support of the application, and of course the appellants were free to subpoena any police witnesses they considered necessary.

[10] We discussed each of the four categories with counsel for the appellants. It was apparent, and we understood him to accept, that all the evidence referred to had in fact been given and findings in relation to it made by the Judge in his judgment. Quite apart from the failure of the appellants to establish a proper ground for the granting of leave to call evidence in this Court, it is apparent that the evidence sought to be called is unnecessary because it has already being given.

Result

[11] The application to call further evidence is dismissed. The respondents are entitled to costs on the application to be taxed if not agreed.

[12] We add a further comment. Without in any way indicating how the appeal should be decided, we record our discussions with counsel for the appellants in which we pointed out that the material before the Court and the facts found by the Judge strongly suggest that if the appellants are entitled to recover against the respondents, the amount is unlikely to be more than the price at which Hurrell was able to sell the car, namely $400, that being a good indication of the value at the time it was sold. If this be so, it is difficult to understand, in view of the likely legal and other costs involved, why the appeal should proceed further. That must be a decision for the appellants to make.

R v Pohahau anors

Supreme Court, Nuku'alofa
Webster CJ
CR 316-318/03, CR 324/03, CR 342-344/03

2, 3, 5, 8, and 9 November, 6 December 2004, 22-24, 29, and 30 March, 4-8, and 20 April 2005; 18 August 2005

Criminal law – housebreaking, theft, and receiving – some guilty findings
Evidence – confession given under duress – limited admissibility

The prosecutions related to three alleged incidents of housebreaking, theft and receiving, all concerning the Tonga Communications Corporation [TCC], but each involving different premises, though with an overlap of the accused persons. The first accused, Mr Kusitafu Pohahau, was an uncle of the second accused, Mr Sitaleki (or Setaleki) Makahununiu, whose wife Mrs Nunia Makahununiu was the third accused. The incidents occurred within a month of each other in February and March 2003. The three cases were tried together because the second accused alleged that he had been assaulted and tortured by Police officers on 19 March 2003 while in Police custody in relation to the theft from the TCC phone shop on 7 March, and that any further statements he made to the Police about any of these offences were made in fear of the assaults being repeated. During the trial it was accepted by the prosecution that Police officers had assaulted Sitaleki on 19 March.

Held:

1. The Court had no doubt that the answers given by Sitaleki at all his interviews, to the charges, and in his so-called confessions were caused by an inducement, threat or promise relating to the charge, proceeding either from the prosecutor or from some other person having authority over Sitaleki, which afforded him reasonable grounds for supposing that by making them he would gain an advantage or avoid an evil of a temporal nature in regard to the proceeding against him.
2. The prosecution had to prove beyond reasonable doubt that there was no inducement, threat or promise which caused the accused to make the confession; and that there was no oppression and nothing was said or done to make it unreliable. The Court found that the prosecution did not do that.
3. The Court ruled that the answers in the interviews, to the charges and Sitaleki's so-called confessions and demonstrations and evidence about them were inadmissible; except evidence of the search and demonstration,

which occurred prior to finding those facts, was admissible to the extent that it related to the property recovered.

4. The Court therefore found that the evidence about the confession of Sitaleki that strictly related to the discovery of the parts of the safe, the fridge and washing machine, the Cash Summary Sheet, and concrete and the things held by Paea was all admissible.
5. The Court found that the elements of the counts against Sitaleki Makahununiu were not established beyond reasonable doubt and that he was not guilty of the counts and the charges were dismissed.
6. The Court found that there was sufficient evidence to establish beyond reasonable doubt that the first accused, Kusitafu, was linked to the theft of the particular mobile phones and hence to the related housebreaking and wilful damage. The Court therefore found that the elements of the counts against him were not established beyond reasonable doubt and he was found not guilty the charges were dismissed.
7. On all the evidence – as, notwithstanding the Police treatment of Sitaleki, there were good, credible, independent witnesses and stolen articles found – the Court found the counts of housebreaking and theft established beyond reasonable doubt in relation to both Kusitafu Pohahau and Sitaleki Makahununiu, but only in relation to the theft of the safe itself and the cash of $6,459.30, being a total of $11,459.30. They were both found guilty of those counts and were convicted accordingly.
8. The Court found that the count of receiving stolen property against Mrs Nunia Makahununiu was established beyond reasonable doubt and she was found guilty of that charge and convicted her of it.

Cases considered:

Commissioners of Customs & Excise v Harz & Power [1967] 1 All ER 177 (HL)
Fainga'a v Lelea & Ors (CV 38/03, 6 January 2005)
Kuruma Son of Kaniu v Reginam [1955] 1 All ER 236 (PC)
R v Bowe [2003] TOSC 8
R v Fainga'anuku [1989] TOSC 1
R v Mafi (CR 69/00, 18 March 2005)
R v Pailate [1989] Tonga LR 109
R v Sang [1979] 2 All ER 1222 (HL)
R v Smith [1959] 2 All ER 193

Statutes considered:

Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)
Police & Criminal Evidence Act 1984 (UK)

Counsel for the Crown : Mr Sisifa and Miss Guttenbeil
Counsel for accused : Mr Tu'utafaiva

Reserved Decision Given on 18 August 2005

Preliminary

These prosecutions related to 3 alleged incidents of housebreaking, theft and receiving, all concerning the Tonga Communications Corporation [TCC], but each involving different premises, though with an overlap of the accused persons. The 1st Accused Mr Kusitafu Pohahau is an uncle of the 2nd Accused Mr Sitaleki (or Setaleki) Makahununiu, whose wife Mrs Nunia Makahununiu is the 3rd Accused. The incidents occurred within a month of each other in February and March 2003.

The 3 cases were tried together because the 2nd Accused Sitaleki Makahununiu alleged that he had been assaulted and tortured by Police officers on 19 March 2003 while in Police custody in relation to the theft from the TCC phone shop on 7 March, and that any further statements he made to the Police about any of these offences were made in fear of the assaults being repeated. During the trial it was accepted by the prosecution that Police officers had assaulted Sitaleki on 19 March. It was then agreed that I should hear the whole evidence in all 3 cases without having a restricted voir dire and I reserved my ruling on the admissibility of statements etc by Sitaleki until this decision.

The trial was heard on 17 days, unfortunately in 4 sessions over a period of 6 months, due to the Court timetable, the confinement of the 3rd Accused Mrs Makahununiu and the illness of defence Counsel. The 3rd Accused Mrs Nunia Makahununiu gave birth to a son on 6 November and was not present on 8 & 9 November (when, with the consent of her Counsel, evidence relating to the alleged theft from the TCC phone shop on 7 March, over which she was not charged, was heard).

Evidence and submissions

Evidence for the prosecution was lead as follows from:

A - 17 February incident – theft over TCC counter

Mr Moahengi Tu'uhetoka, TCC Management; Mr Fifita'ila Fuko, former Security Officer, TCC; Mr Sione Telua, Clerk, TCC; Police Cadet Officer Peni Folaumoetu'i; and LCpl Peniola 'Ahofono, CID.

B - 7 March incident – TCC phone shop

Ms Mele Teukialupe (Lupe) Taumoepeau, Controller of Mobile Customer Services, TCC; Mr Paea He'ofa 'Iloa, Planter, Vaini, a neighbour of Mr & Mrs Makahununiu; Ms Fisi'iahi Tafolo, Sales person, Halaleva; Ms Salome Pomana, Nurse, Vaini, girlfriend of Mr Pohahau; LCpl Peniola 'Ahofono; and Mr Tangi Tiofilusi Nai, Fua'amotu.

C - 13 March incident – TCC safe

Mr Fifita'ila Fuko; Ms Lily Cocker, Assistant Manager, Westpac Bank of Tonga; Mr Paea He'ofa 'Iloa; Ms Salome Pomana; LCpl Peniola 'Ahofono; Mr 'Uatekini Halatoafa, Supervisor, TCC; Mr Siniasi Tupou, Clerk, TCC; Mr Vahanoa Uasila'a, Vaini, another neighbour of Mr & Mrs Makahununiu; Ms Salome Tupou,

Te'ekiu; Asst Chief Inspector (formerly Insp) Siaosi Helepiko; PC Patelesio Tu'itavuki; Acting Inspector (formerly Sgt) Tupou M 'Otutaha; Cpl (formerly LCpl) Feleti Paasi, CID; PC Niua Kama, formerly CID; and WPC Palepina M Tonga, Special Branch.

Evidence for the defence in the voir dire was lead from the 2nd Accused Mr Sitaleki Makahununiu. Evidence for the defence at large was led from Mr Makahununiu; Dr 'Ala'una Fuka, Senior Health Officer, Vaiola Hospital; and the 3rd Accused Mrs Nunia Makahununiu. The 1st Accused Kusitafu Pohahau did not give evidence.

Documentary exhibits and articles were also produced by the prosecution and the defence.

On 8 and 20 April written and oral submissions were made by Counsel.

Charges against the Accused

A - 17 February incident – theft over TCC counter

On this incident Sitaleki Makahununiu was the only one of the present accused charged with housebreaking contrary to section 173(1)(b) of the Criminal Offences Act and theft contrary to section 143.

The particulars of the alleged offences were:

> "(Count 1)
>
> SITALEKI MAKAHUNUNIU, did on or about 17 February, 2003 at Fasimoeafi, enter as a trespasser into the Cable and Wireless Building, which is managed and looked after by Tonga Communications Corporations and committed further crime therein.
>
> (Count 2)
>
> SITALEKI MAKAHUNUNIU, did on or about 17 February, 2003 at Fasimoeafi, take without any color of rights cash about $4478, belonging to Tonga Communication Corporations."

B - 7 March incident – TCC phone shop

Kusitafu Pohahau was charged over this incident, along with his brother Senita Pohahau who has since died, with housebreaking, theft and wilful damage to buildings, contrary to section 178.

The particulars of those alleged offences were:

> "(Count 1)
>
> KUSITAFU POHAHAU, on or about the 7th of March 2003 at Kolofo'ou, you did enter Tonga Communication Corporations Office as a trespasser and committed a crime therein.
>
> (Count 2)

KUSITAFU POHAHAU, on or about the 7th of March, 2003 at Kolofo'ou, you did take without any color of rights the following goods belonging to Tonga Communications Corporation but was managed and looked after by a Teualupe Taumoepeau and valued to a combined total of $9994.00;

10 x Alcatel Ucall 311 ($310.00) (valued at $3100.00)
10 x Alcatel Ucall 511 ($480.00) (valued at $4800.00)
2 x Nokia Ucall ($569 00) (valued at $1138.00)
1 x TV Screen (valued at $700.00)
others (battery, charger, leather case (valued at $256.00)

(Count 3)

KUSITAFU POHAHAU, did on or about 7th March, 2003 at Kolofo'ou, intentionally and unlawfully cause damage to Tonga Communications Corporations Office's door by breaking it inflicting a damage of $580.00."

Sitaleki (or Setaleki) Makahununiu was also charged over this incident with receiving stolen property, contrary to section 148.

The particulars of that alleged offence were:

"(Count 1)

SETALEKI MAKAHUNUNIU, did on or about 8th March, 2003 at Ma'ufanga, receive a mobile phone, about $311, brand Alcatel from a Senita Pohahau, knowing/believing that the mobile phone was stolen."

C - 13 March incident – TCC safe

Both Kusitafu Pohahau and Sitaleki (or Setaleki) Makahununiu were charged over this incident with housebreaking and theft.

The particulars of those alleged offences were:

"(Count 1)

Kusitafu Pohahau, on or about the 13th March 2003, at Fasi Moe Afi, together with Setaleki Makahununiu, you entered the premises of Tonga Communication Corporation as a trespasser, and committed the crime of theft therein.

(Count 2)

Kusitafu Pohahau, on or about the 13th March 2003, at Fasi Moe Afi, together with Setaleki Makahununiu, you stole 1 safe @ T$5000.00, cash @ T$6,459.30, F. POS @ T$23.17, various kinds of Cheques @ T$11,235.81, these amounted to

a total of $22,718.28, these properties belonging to Tonga Communication Corporation."

and:

"(Count 1)

SETALEKI MAKAHUNUNIU, did on or about 13th March, 2003 at Fasi, enter as a trespasser into Tonga Communication Corporations Office and committed another offence therein.

(Count 2)

SETALEKI MAKAHUNUNIU, did on or about 13th March, 2003 at Fasi, take without any color of rights the following goods total $22718.28, which belong to Tonga Communication Corporations;

- a safe - $5000
- cash - $6459.30
- cheques $11258.98"

Mrs Nunia Makahununiu was also charged over this incident with receiving stolen property. The particulars of that alleged offence were:

"(Count 1)

Nunia Fatai Makahununiu, on or about the month of March 2003, at Vaini, you did received cash of T$500.00, from Setaleki Makahununiu, knowing that these cash were stolen from Tonga Communication Corporation"

Elements of the offences in law

The burden is on the prosecution in a criminal trial to prove beyond reasonable doubt every element of the offence alleged. In this case the elements to be proved for housebreaking were that:

The accused had entered
A building or part of a building
As a trespasser

And committed a crime
In the building or part of the building.

In the case of theft the elements to be proved were:

Appropriation by the accused
Of property
Belonging to another

Dishonestly
With the intention permanently to deprive.

The elements to be proved for receiving stolen property were:

Receiving any property

(including dishonestly undertaking or assisting in its retention, removal, disposal or realisation, or arranging to do so)

knowing or believing it to have been stolen or obtained in any way whatsoever under circumstances which amount to a criminal offence.

Finally, the elements to be proved for wilful damage to a building were:

In any manner
intentionally and unlawfully
causes damage
to any building or vessel ... .

Chronology of events

It is helpful to set out at the start a general chronology of events from the time of the incidents until the release from custody of Sitaleki Makahununiu:

17 February Alleged Incident A over the TCC counter
18 February Incident A reported to the Police
7 March Alleged Incident B - TCC retail shop at Taumoepeau Building in Kolofo'ou broken into and mobile phones and goods stolen

8 March Incident B reported to the Police
13 March Night of Cyclone Ester
Alleged Incident C - TCC office at Fongoloa broken into and safe stolen.

14 March Incident C reported to Police
19 March Sitaleki arrested from Vaini, allegedly in relation to Incident B. Allegedly assaulted by Police officers questioning him en route to Central Police Station and further assaulted and allegedly tortured by Police officers at CID room in Central Police Station in presence of other Police officers
20 March Sitaleki taken before a Magistrate and charged in relation to Incident B, then later taken to Vaiola Hospital by Counsel Mr Laki Niu, where he was seen by Senior Health Officer Dr 'Ala'una Fuka
21 March Sitaleki interviewed by LCpl 'Ahofono in relation to allegation of receiving stolen property from Incident B from Senita Pohahau
24 March Search warrant executed at Sitaleki's home in Vaini, when he says that he

was frightened and handcuffed by Insp Helepiko during the search
27 March Sitaleki taken again to Vaiola Hospital and seen by Dr Fuka because of continuing pain to his right wrist
28 March Sitaleki interviewed by Insp Helepiko about Incident C in the presence of PC Kama after he says he was frightened and sworn at by those Police officers
31 March Sitaleki interviewed about Incident A by CO Folaumoetu'i in the presence of Insp Lutua, he says after being frightened.

By then Sitaleki had been in Police custody for 12 days.

Assaults on Sitaleki Makahununiu on 19 March 2003

The starting point in this decision has to be the now admitted ill-treatment of Sitaleki Makahununiu after his arrest on 19 March.

Sitaleki Makahununiu said that he was arrested by the Police on 19 March when he was waiting for a bus at Vaini, with his baby son with him. After he had been taken to Vaini Primary School to leave his baby son with his wife, Sgt Alipate Finau put handcuffs on him and put him in the back of the vehicle. He said that LCpl 'Ahofono told him to put them on loosely, but his tone and facial expression meant the opposite, so Sgt Finau squeezed the handcuffs and cut the circulation to both hands. He said he was terrified.

Sitaleki said he was then choked by Sgt Finau, who was pounding his ribs and his chest and he could not breathe, it seemed to him as if he was being kidnapped by a bunch of terrorists. LCpl 'Ahofono had said to him maybe he knew why they were there, but he said he did not know and LCpl 'Ahofono started choking him and punching him on the ribs and chest. LCpl 'Ahofono said he had received a statement from a person at Video Hut that he had been trying to sell her cell phones, but Sitaleki told him that was incorrect and begged him to stop beating him. He said he had been choked and beaten about 8 different times. LCpl 'Ahofono had asked him if Kusitafu Pohahau had called him and told him to clean up, but Sitaleki said he had no knowledge of what he was talking about.

When they got to the Central Police Station, Sitaleki said he had been taken into the Charge Office, where they had taken his belt and slippers and then he had been taken to the CID Room. Insp Helepiko, Tupou 'Otutaha, Niua Kama, Saia Halatanu and Feleti Paasi were there. He said that he still had on the handcuffs behind, and LCpl 'Ahofono had instructed him to go to the corner. He said he had been scared as he did not want to trigger continued beatings and wanted the Police officers to see him as co-operative so that they did not beat him. He had heard the Police saying what's wrong with this guy and another saying that Sitaleki did not want to talk. He said he felt violated. He speaks and understands Tongan fluently.

Sitaleki said that he felt a person behind him and PC Kama was calling with his fingers out, trying to gouge his eyes out. PC Kama had told him to sit down Indian style cross legged facing Sgt Finau between 2 tables. PC Kama had then come behind him with large sandals, standing on the chain between the 2 handcuffs and had

bounced up and down, causing him agonising pain. That had gone on for the best part of an hour and he could not feel his hands, which were swollen. As soon as PC Kama stepped on the handcuffs, Sgt Finau made a siren sound and asked if he liked that. LCpl 'Ahofono had then instructed him to move back and there was a counter-top there and a filing cabinet and an opening: LCpl 'Ahofono had stepped in front of him with his back to him and raised his right leg and kicked him backwards on the left side of his chest, so that he went flying into the open space between the cabinets.

Sitaleki then said that he needed his lawyer, but Sgt Finau had said "Oh no, we're not going to do nothing like that". Then Halatanu had instructed him to get up and sit on the bench facing the windows of the CID room and when he was sitting there he felt the presence of someone behind him – he was paranoid and aware of his surroundings – and felt the impact of a blow on his right ear, which was excruciatingly painful and caused him to fall to the ground. Halatanu then stepped on his leg and said to him "You're going to talk" and walked out of the CID room.

Then Halatanu told him to get back up on the bench and Fa'asolo had come in and told him to go to the corner on the other side of the CID room. Sitaleki said he wanted to go with his body but he was scared, hoping he would not inflict pain on him and he had felt a blow on the back of his head as soon as he started walking. Sitaleki said that he was still in handcuffs and his body was unbalanced and the blow had sent him stumbling down to the floor. As soon as Sitaleki fell to the floor he was being kicked and punched: "Why are you lying", "Why are you not telling the truth", "How does a young person come and deceive an old person like me", "How do you come and deceive the Royal Kingdom Police Force". Every time he came Sitaleki raised his leg up to block what was being done to him. Sitaleki said he was apologising, but he got a broken chair and picked him up to hit him with it, but he had blocked him twice and the third time he was slow and he hit him on the right side of the face with the leg of the chair. Sitaleki said he was dazed and was seeing lights and colours and something bad had just happened to him, he said he was being victimised.

Sitaleki said that he then told them that he would do whatever they wanted, but please stop hitting him and Fa'asolo had said to tell the Police everything, he would come back in 20 minutes, and he left the CID room. Then a Police officer, who was Taniela Faletau, came in and started talking, asking him about his family background: he had been sitting on the floor talking to Taniela Faletau and at the same time Insp Helepiko was there with a radio with a long aerial, saying "Just tell the Police what they want, they are going to love you after you tell them", but he was scared, the only person he wanted was his lawyer and he did not want any more beatings. Taniela Faletau had then just got up and left and Fa'asolo had come back.

LCpl 'Ahofono had still been in the room, but Sitaleki turned away from him as he did not want to trigger him. LCpl 'Ahofono was walking behind him and he heard a baying sound getting louder as he came to him. He saw it was a stun gun and Fa'asolo came close to him and asked LCpl 'Ahofono if he was talking, who said he was a very good boy, then he shocked him with the stun gun twice on the left forearm. He had felt terrible. After the first time he had done it again, saying just to be sure. Then LCpl 'Ahofono had come and asked him what happened and said "Oh, what the girl at Video Hut told me was true", but Sitaleki said in evidence that the truth was it was not true.

Another Police officer Paongo had come in and Sitaleki had asked him to loosen the handcuffs on his wrist, but he did not have the keys, so Sitaleki had asked him for

some water and asked him to take $10 out of his pocket, which he had done, but as his hands were still in handcuffs Paongo had to pour water into his mouth for him.

Then Sgt Finau had done questions and answers and after that was finished had taken him back downstairs and put him in the cells.

Sitaleki said that the next day, 20 March, LCpl 'Ahofono had come to the cell and put the handcuffs back on and took him to the CID room early in the morning and conducted an interview. After that he had told him they were going to the Police Magistrates Court and he was going to say that Senita Pohahau had given him a cell phone. Sitaleki said that because he had been over 24 hours in a torture house he knew that he had to say that. He was told that he was being charged with the crime. The case had called and the Magistrate had asked him if he had anything to say. He had been there at the same time as Senita Pohahau, who had told the Magistrate he did not know why he was arrested and wanted to go home. Then the prosecutor had stood up and said that his witness (ie Sitaleki) said that Senita Pohahau had given him the phone. Sitaleki said that he had been made to take the Bible in his hand and was put under oath and the prosecutor had asked him if Senita Pohahau had ever given him at a phone. Sitaleki had told the Magistrate that before that there was something he wanted to tell him, but he had been told to answer the question and he said that Senita Pohahau had given him the phone because he was scared, so the Magistrate saw enough reason to remand Senita Pohahau. Sitaleki had said that he wanted to go home, but the Magistrate would not have it and remanded him in custody for 8 days, to come back the following week.

Sitaleki said that when he came out he saw the lawyer Laki Niu and bumped into him with a feeling of relief, like a guardian angel. He had told Laki Niu that he had been beaten and needed to go to hospital, so Laki Niu took him inside the court to the prosecutor and said "Look at what's happening to this boy, he's been beaten", but the prosecutor said he knew nothing about it, then they took him back to the Police Station, but Laki Niu had given instructions that he was to be taken to hospital. They had taken him up to the CID room and there had been a call from downstairs to see if he needed to be taken to the hospital, but he had been so scared that he had told them he was alright. Then while Sitaleki had been in the CID room they had asked him again and he did not want to give any resistance and told them "No". Later in the afternoon the Police had come and got him from the cell and he had seen Laki Niu who had asked if he wanted to go to the hospital and he had told him that he did. Laki Niu himself had then taken him to the hospital with 2 Police officers (one a heavy set person Vea) in Laki Niu's personal vehicle. At the hospital he had been seen by Dr Fuka, from whom he got a report when he was released from the Central Police Station. Then he had been returned to the Central Police Station.

Medical reports on Sitaleki

The medical report [Def Exhibit 1] from that hospital visit, timed at 5.25 pm on 20 March, stated:

> "Type of case: Assaulted by Police Officer
>
> Examination & Finding:
>
> Fully conscious
> Vital signs BP 132/73 P – 72 SPO2 99%

Head Haematoma Lt Temporal 4 cm diameter
Rt eye Haematoma of Rt Maxilla just below Rt eye
Lt ear Small cut 1-5 cm on the Pinnac
Necro Few scratches on Lt anterior neck and Rt lateral neck
(Being squeeze with two hands against some hard object – no stiffness)
Lt forearm Swollen of Anterior radius around wrist

5-6 cm hypopigmented lesion

Two marks of stun gun 2 cm apart

Rt forearm Hypopigmented lesion across the anterior radius around wrist

Chest Lt anterior wall swollen compared to Rt side
AE Normal
Renal Normal

(sgd) Fuka"

Sitaleki said that he had gone to the hospital again on a separate date because his wrists were swelling and in pain. The report [Def Exhibit 2] from that follow up visit, timed at 2.35 pm on 27 March, was:

"Type of case: Refer to Report date 20/3/03 Time 5.25 pm.

Examination & Finding:

Above person came in for complaining

(1) Rt wrist still swollen and now it became sore.
2 cm width Not inflamed

Opinion: Rt Naprosyn / [*unclear*]

(sgd) Fuka"

Dr Fuka said that Sitaleki had been fully conscious when he saw him on 20 March, and his vital signs had been normal, with blood pressure 132/73; pulse 72 and the oxygen concentration in his body 99%. When he examined him he had a swelling (haematoma) on his left temple about 4 cm in diameter; a swelling on his right cheek bone just below the right eye; a small cut of 1.5 cm on the pinnac just behind his left ear; a few scratches on his neck just beneath his left chin and on the right side, as if it had been squeezed with 2 hands against some hard object, but there was no stiffness; his left forearm had a swelling of the anterior radius around the wrist, with 5-6 cm of hypopigmented lesion (ie having darker colour than normal), also 2 marks of a stun gun (as he was told by Sitaleki) (like small holes of about 0.5 in, but no blood as it had happened one or 2 days before) in the skin of the forearm; his right forearm also had a hypopigmented lesion across the anterior radius around the wrist; and on his

chest the left anterior wall was swollen compared to the right side. Below that the AE was normal and the renal region was also normal.

Dr Fuka considered that the marks on Sitaleki's wrists were caused by handcuffs locked too tightly with the Police key, due to Sitaleki's description of his cruel treatment by the Police; the wrists must have been swollen, but when the handcuffs were taken off the skin went back, leaving the hypopigmentation: only the top part of the skin would be affected and there was no mention of a cut. Dr Fuka said that the injuries had happened a day or two previously and the scars were drying up.

Dr Fuka said that none of Sitaleki's injuries seemed to be very serious and they would not affect him permanently or cause damage to the bones. No ice treatment had been given to Sitaleki that day.

Dr Fuka said that he had seen Sitaleki a week later, when he was complaining that his right wrist was still sore. The marks on it were 2 cm in width and not inflamed. He had given Sitaleki medication (a tablet or capsule to be taken by mouth) to take any time for joint pain.

Interview of Sitaleki on 21 March

Sitaleki was then interviewed again on 21 March by LCpl 'Ahofono about the thefts from the TCC phone shop, and gave answers to questions in interview, an answer to a charge of receiving, and a so-called confession, but as the prosecution withdrew these I do not record them here.

At this point I also have to record that I found the evidence of LCpl 'Ahofono about the confession on 21 March both not credible, in the sense that I found that he was lying in some instances, and also not reliable.

Search and Demonstration by Sitaleki at Vaini on 24 March

Sitaleki was taken out to his house at Vaini for a search under a search warrant to look for mobile phones. There were a number of Police officers with Insp Helepiko in charge. Prior to this the Police had received information from Sitaleki's neighbour Vahanoa Uasila'a about a metal cabinet being cut up at Sitaleki's allotment and along with the search team there was an engineer from the Ministry of Works, Mr Tonutonu.

Sitaleki was handcuffed during at least part of the search at his allotment, as the photographs show [Exhibit 11 Photos B2, B3, B4, B5, B6 & B8].

The evidence about what exactly occurred during the search was conflicting, even from the Police officers, and I do not think that the Police Diary of Action recorded all that took place, but I found that it was established beyond reasonable doubt that during the search Sitaleki was interviewed (apparently without a caution or any written procedure) and confessed that he had taken part in the theft of the safe, which had been cut up at his allotment, which tallied with the evidence of Vahanoa. Sitaleki had then shown the Police where the safe had been cut up in his new house under construction, and had shown them some of the concrete pieces from the lining of the safe and foreign coins buried beside his new septic tank, where the Police also found a TCC Cash Summary Sheet all crumpled up. However there was no evidence from TCC employees that the foreign coins had been in the safe. Sitaleki had also shown the Police a refrigerator in the small fale in which he was living on the allotment and a new washing machine still in its box on the verandah of the new

house, both of which he said he had bought from the proceeds of the theft. Sitaleki had further told the Police that part of the safe and the trolley used to move it had been thrown into a neighbouring bush allotment, from which the Police recovered them. The base of the safe on wheels was produced in court.

Sitaleki also told the Police that a TV set from the TCC phone shop was with another neighbour, Paea 'Iloa, and had gone with the Police to recover that, as well as a box which he had given to Paea and which contained ammunition and 2 of the mobile phones stolen from TCC. The Police also saw and photographed the remainder of the cabinet of the safe which Paea was using as a potholder for cooking outside.

The Police also recovered from Sitaleki's neighbour Vahanoa the trolley, which he had found in the bush allotment, together with a small money box identified, but the latter was neither photographed nor exhibited in Court.

The Police further recovered from Sitaleki's wife Nunia her Westpac Bank passbook no 0127800130 [Exhibit 6], as Sitaleki told them that from the proceeds of the cash in the safe he had deposited $500 into her account.

Items recovered at Vaini as recorded on the search sheet signed by Nunia were:

SEARCH SHEET [part of Exhibit 9]

1. Refrigerator in house
2. Washing machine in verandah of new building
3. 1 Bank account No 0127800130 Balance $651.04
   Bank book of Nunia
4. Pieces of rock part of safe
5. Overseas coins & piece of paper with summary

Photos at Vaini

The following photographs [Exhibit 11] were taken during the search and demonstration at Vaini on 24 March by PC Tu'itavuki, who spoke to them in evidence:

A1 Verandah with box
A2 Washing machine out of box
A3 Refrigerator
A4 Small house where refrigerator was

B1 Room of new build house directed by Sitaleki
B2 Room where safe opened with Sitaleki in handcuffs pointing
B3 Sitaleki pointing to metal filings
B4 Sitaleki on top of septic tank pointing to concrete from safe
B5 Other side of septic tank with Sitaleki pointing to coins
B6 Close up of Sitaleki pointing to coins
B7 Coins dug out from side of septic tank on top of septic tank
B8 Sitaleki pointing to bolt from safe (taken from bush on left of B4)

B9 Part of bushes where bolts found

C1 Paea 'Iloa's dwelling house
C2 TV screen Sitaleki admitted belongs to TCC
C3 Tin box (with 2 mobile phones inside)
C4 Inside of tin box showing other items
C5 Outer layer of safe with a fire in it, used to put pots when cooking

D1 Trolley

E1 Entrance to allotment where parts of safe thrown
E2 Part of safe in allotment

Diary of Action

The following are a number of entries from the Police Diary of Action [Exhibit 12] relevant to this decision. Those for 24 March were made by Sgt 'Otutaha:

Date & Time Diary No Particulars

14/3/03 1 Uate Halatoafa (m) 36 yrs of Tofoa complaint 1850 hrs about the TCC office being broken into at Fasimoeafi and 1 safe worth $5,000 stolen with $19,536.22 cash inside. Total cost of item stolen $24,536.22 more or less and was stolen on 13/03/03 at 0338 hours or thereabout.

1855 2 CO Folaumoetu'i register & diary this action.
3 A/CIP Latu requesting the IO to complete this docket to submit on 23 04 003 and to do it in due course so that paper work is prepared also.

17/03/03 9 Meeting for the next move completed.
0940 hrs Statement kept herein
(1) Uate Halatoafa (m) Complainant
(2) Loufa Fonua (f)
(3) Siosiani Fili (f)
(4) Lopini Moala (f)
(5) Salome Tupou (f)

Search warrant is to be made at 2 residence 1. Senita Pohahau. Information has specifically mentioned it that TCC Office was broken into and telephones and other items stolen @ $10,554. Night of 07.03.03 – witness Fisi'iahi Tafolo with 2 exhibits. U Call phone 9050925 & 9050404.

Andy Tapaatoutai re Salome Tupou statement and others

24/3/03 1 Inspector Helepiko with CID Officers arrived at 1623 hrs Sitaleki Makahununiu place together with Sitaleki.

Search Warrant read to him and his wife then search commences at the small house where they occupied. Search officers inside are LCpl 'Ahofono, LCpl Paasi, PC Tu'utafaiva, IP Helepiko & IP Halatanu.

1630 hrs 2 IP Helepiko interviewed Sitaleki Makahununiu in respect of the safe and he admitted that they brought the safe and dismantle at his place.

1632 hrs 3 IP Helepiko cautioned Sitaleki Makahununiu in respect of his admission to the TCC safe and he stated that the new washing machine and refrigerator were purchase with part of the money from the TCC safe.

1645 hrs 4 Inspector Helepiko seized Bank Passbook 0127800130. Balance of $651.04. Name Nunia Fatai.

1651 hrs 5 PC Tu'itavuki photographed refrigerator inside the house purchased with money from TCC safe as well as the washing machine which was still inside it's box and was at the verandah of the building under construction.

1700 hrs 6 Search continued to the new building under construction but no result.

1703 hrs 7 Proceeded outside the building and Sitaleki directed/showed the place where safe was dismantle. Cemented blocks used as the inside wall of safe and was photographed by PC Tu'itavuki and Sitaleki also directed/show where coins were thrown and they were left beside the septic tank. They were photographed. Parts of the safe were discovered in the area as well as a record of Coin Summary which were seized as exhibits.

1712 hrs 8 Search completed and was witnessed by Sitaleki's wife Nunia Makahununiu satisfied to the work carried out.

1720 hrs 9 Sitaleki admits that there are goods in the neighbour, 1 TV Screen – Sony ; 2 mobile Alcatel, 11 ammunition boxes No 45 and were put inside a metal box. He took and just left it in the neighbour's house – Paea 'Iloa.

1725 hrs 10 Exhibits collected and Paea 'Iloa was asked whether he is not satisfied with anything when work was carried out or the goods given to him by Sitaleki to be left at his house and he said he is satisfied and he signed his name Sgd P 'Iloa.

1730 hrs 11 Sitaleki again admit that the empty safe is at Paea 'Iloa's place. Work was carried out and discovered that Paea 'Iloa's home is using it as a 'pot-stand'. LCpl Paasi cautioned him, photograph was taken of it and was seized as exhibit and Paea 'Iloa again signed it. Sgd P 'Iloa.

1738 hrs 12 Sitaleki directed/showed the eastern bush area from his allotment where he threw parts of the safe and the trolley used for removing the safe from the TCC office.

> 1748 hrs 13 Search completed and signed by Nunia Makahununiu.
>
> .....
>
> 25.3.03 11 CIP V U Fa'aoa completed checking the actions taken regarding this complaint and there are lot yet to be done. Lots of charges yet to be completed and I do not know why. This is not a difficult case and has been sitting here for long without anything being done. No one from the search warrant officers has any statement filed. What are the exhibits being seized. The fact that Nunia was able to withdraw money from the bankbook is mere negligence. Applications should have been made to the Court to freeze the account immediately when it was apparent that this was stolen money. Please complete this to submit on 28/03/03. Isikeli Havea's statement is not included herein.

Interview of Sitaleki on 28 March

Sitaleki was then interviewed formally on 28 March by Insp Helepiko about the theft of the safe from TCC and gave answers to questions in interview, an answer to a charge of housebreaking and a so-called confession [Exhibit 10]. But these were all made after the facts relating to the theft and the questions had been discovered, and as these documents are not admissible, for the reasons given below I do not refer to them in detail.

Interview of Sitaleki on 31 March

Later, while Sitaleki was still in custody, on 31 March he had been taken upstairs to the CID room by Cadet Officer Peni Folaumoetu'i, who had asked him about Cable & Wireless with Insp Vili Lutua. Sitaleki said he told him he had no knowledge about what he was asking and Folaumoetu'i had laughed and said that LCpl 'Ahofono had told him that he had confessed to him and Folaumoetu'i told Sitaleki what LCpl 'Ahofono had told him. Sitaleki said that was wrong and CO Folaumoetu'i had said to him:

> "Well, you wait. When 'Ahofono comes I will ask him because he told me that you have already confessed to him. If 'Ahofono tells me that you are lying I will beat you up."

Sitaleki admitted that the answers in the interview accurately recorded what he said and that he had written the answers to the charge in his own writing. But he said that he had been a long time in that torture house and was scared, so he felt the best thing to do was what they wanted him to do, so that he would not be beaten any more. That had taken place on the last day he was at the Central Police Station, when he had been in custody since 19 March. Sitaleki said he had had to make a story for CO Folaumoetu'i so that he was satisfied.

Admissions by Police

While I consider that Sitaleki in evidence was greatly exaggerating the extent and seriousness of the assaults, the medical evidence and also the Photo B4 [Exhibit 11] on 24 March confirmed that he did suffer injuries.

Even taking into account Sitaleki's exaggeration, I therefore preferred the evidence of Sitaleki about the assaults on 19 March to the evidence of the Police witnesses, in particular LCpl 'Ahofono, who denied the assaults.

On 9 November 2004 the prosecution conceded that Sgt Alipate Finau admitted that he had assaulted Sitaleki Makahununiu on 19 March and that he would not give evidence; and that the prosecution would not proceed on the record of interview etc of Sitaleki of 21 March, which it withdrew, but that it would still proceed in relation to the theft of the safe on the record of interview etc by Insp Helepiko on 28 March (referred to below); and in relation to the theft over the counter on the record of interview etc by CO Folaumoetu'i on 31 March (referred to below).

In the course of his evidence PC Niua Kama also admitted that on 19 March in the CID Room he hit Sitaleki Makahununiu and kicked his handcuffs, because he was angry with him. PC Kama accepted that it was possible that when he kicked Sitaleki he would be frightened of the Police, and that there were other Police officers in the room at the time.

Other Police witnesses who admitted being present at the CID Room when Sitaleki Makahununiu was there on 19 March – ie Insp Helepiko, Sgt 'Otutaha and LCpl Paasi – denied any knowledge of Sitaleki being assaulted.

The Court has to say yet again that assaults by Police officers on a person in custody are illegal and completely unacceptable and must not be allowed to take place. In this case it appeared that the assaults on Sitaleki Makahununiu were either supported or condoned by senior Police officers, which is totally wrong and I shall send a copy of this decision to the Hon Minister of Police so that he is aware of it.

I repeat, as I have done before, that prosecutions are most likely to be successful if they are supported by good Police ground work and hard evidence, which appears to have been available in this case.

Admissibility of records of interview, answers to charge & confessions etc

Under the law of Tonga, section 21 of the Evidence Act (Cap 15) provides:

> "No evidence shall be given of any confession in any criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise relating to the charge and proceeding either from the prosecutor or from some person having authority over the accused person and sufficient in the opinion of the Court to afford the accused person reasonable grounds for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in regard to the proceeding against him ... ."

The principal objection of Sitaleki to the records of interview, statements of charges and answers and the so-called confessions, and also the demonstration at Vaini, was

that they were caused by the inducements, threats or promises relating to the charges, while he was in custody, proceeding from persons having authority over Sitaleki, which afforded him reasonable grounds for supposing that by making them he would gain an advantage or avoid an evil of a temporal nature in regard to the proceeding against him in terms of section 21. In addition, it was submitted for Sitaleki that the Court should exercise its discretion under the proviso to section 22 of the Evidence Act and exclude the demonstrations, records of interview, statements of charges and answers and the so-called confessions because the prosecution had not proved beyond reasonable doubt that (even if the demonstration and confessions may be true) there was no oppression or nothing was said or done to make it unreliable, taking into consideration the evidence as a whole from 19 to 28 March, with special regard to the evidence of Dr Fuka.

By Section 107 of the Evidence Act the burden of proving any fact, necessary to be proved in order to enable evidence of some other fact to be given, rests on the person who wishes to give the evidence, in this case the prosecution. Similarly under section 108 in a criminal case the burden of proving that the accused does not come within any exception lies on the prosecution. In other words the prosecution have to prove beyond reasonable doubt that there was no inducement, threat or promise which caused the accused to make the confession; and that there was no oppression and nothing was said or done to make it unreliable. For the reasons given below I find that the prosecution did not do that in this case.

Para 15-35 of Archbold says that in deciding whether an admission is voluntary, the court has been at pains to hold that even the most gentle threat or slight inducement will taint a confession (*R v Smith* [1959] 2 All ER 193). In *Commissioners of Customs & Excise v Harz & Power* [1967] 1 All ER 177 (HL) Lord Reid said:

> "It is true that many of the so-called inducements have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men or women; they may be very ignorant and terrified by the predicament in which they find themselves. So it may have been right to err on the safe side".

On the evidence I have no doubt that under section 21 of the Evidence Act the answers given by Sitaleki at all his interviews, to the charges, and in his so-called confessions were caused by an inducement, threat or promise relating to the charge, proceeding either from the prosecutor or from some other person having authority over Sitaleki, which in my opinion did afford him reasonable grounds for supposing that by making them he would gain an advantage or avoid an evil of a temporal nature in regard to the proceeding against him. These statements and so-called confessions were given by Sitaleki on 21, 28 and 31 March, after he had been in custody since 19 March, when he had been assaulted by the Police. While I consider that Sitaleki in evidence was greatly exaggerating the extent and seriousness of the assaults, the medical evidence showed that he did suffer injuries and it is not possible to rule out the fear of further assaults as a reason for him giving these so-called confessions and statements. From this it follows that I find that the prosecution has not proved beyond reasonable doubt that there was no inducement, threat or promise and I rule that the answers in the interviews, to the charges and Sitaleki's so-called confessions and

demonstrations and evidence about them are inadmissible, except as stated below in relation to facts found as a result of them.

Section 22 of the Evidence Act says among other things that a confession may be admissible even if no warning was given that the accused was not bound to make a confession (although that was not the case here on every occasion) and even if the accused need not have answered the questions. However the proviso is added that where a confession is made to a Police officer in answer to questions when the accused is in custody, the Court has a discretion to refuse to admit evidence of the confession. The exact terms of section 22 are:

> "When confessions are admissible.
>
> 22. It shall be no objection to the admissibility in evidence of a confession that it was made -
>
> (a) under a promise of secrecy; or
>
> (b) in consequence of a deception practised on the accused person for the purpose of obtaining such confession; or
>
> (c) when the person making it was drunk; or
>
> (d) in answer to questions which the person making the confession need not have answered; or
>
> (e) without any warning having been given to the person making it that he was not bound to make such a confession and that evidence of it might be given against him:
>
> Provided always that where a confession is alleged to have been made to a police officer by the accused person while in custody and in answer to questions put by such police officer, the Court may in its discretion refuse to admit evidence of the confession."

In this Court the then Chief Justice laid down that the test which should be applied in exercising that discretion under section 22 is the test in section 76 of the English Police & Criminal Evidence Act 1984: see *R v Pailate* [1989] Tonga LR 109; (see also *R v Fainga'anuku* [1989] TOSC 1, 38-67/88). That test is in essence that the prosecution must prove beyond reasonable doubt that (even if the confession may be true) there was no oppression; and that nothing said or done was likely to render the confession unreliable.

For the reasons already given him I am not satisfied beyond reasonable doubt that there was no oppression; and I find that things were said and done which were likely to render the confessions by Sitaleki at least partly unreliable due to the assaults by the Police established in evidence and his continued detention in custody, so that it is not possible to rule out the fear of further assaults as a reason for him giving these so-called confessions and statements. I also believe for admissibility purposes the confessions are not completely reliable for the reasons already given in relation to section 21.

There was also an apparently voluntary confession given by Sitaleki at Vaini on 24 March, again while he was still in custody. That was not formally recorded and

signed by Sitaleki, but it was recorded in the Diary of Action [Exhibit 12, Items 2-12] by Sgt 'Otutaha, whom I considered a credible and reliable witness in respect of these items, despite some of the procedural deficiencies which he accepted in cross-examination. Unfortunately the same could not be said about the evidence of Insp Helepiko. But that confession was also made while Sitaleki was in custody and cannot be admitted except as referred to below.

I therefore exercise the discretion under section 22, and I refuse to allow as admissible the records of interview, charges and answers and confessions and evidence relating to the search and demonstration in the mobile phone charge, and also the money over the counter charge and the theft of the safe charge, except as follows under the proviso to section 21 of the Evidence Act, which states:

> "Provided that where any fact has been discovered as the result of information contained in any such confession evidence may be given of such fact and of so much of the confession as strictly relates to such fact.
>
> Illustration
>
> B's watch is stolen. A is arrested on suspicion, and a police inspector tells him "you had better confess, it will be better for you". A thereupon makes a confession in the course of which he says "I hid the watch in a hole at the foot of a big ovava tree near the church at Vaini". The police discover the watch there. Without the discovery of the watch no part of A's confession would have been admissible, having been procured by the inducement of the police, but as the watch has been found as the result of the confession, so much only of the confession as relates to the hiding of the watch would be admissible."

There were no objects or cash recovered in relation to the money over the counter charge, but there were a number of mobile phones recovered and produced as exhibits in Court in relation to that charge, also a television set (identified by Lupe Taumoepeau as similar to the one stolen from the TCC shop), so that Sitaleki's record of interview etc of 21 March would have been admissible, if it had not been withdrawn, to the extent that it relates to those phones recovered and that television set (which is circumstantial evidence, even although Sitaleki was not charged with receiving it). There was also a considerable amount of property recovered at Vaini in relation to the theft of the safe charge, particularly the piece of the safe and the TCC list (which again is circumstantial evidence, even although it was a copy that was produced in Court): but Sitaleki's record of interview etc of 28 March is still not admissible to any extent as those facts were not discovered as the result of information contained in them, although evidence of the search and demonstration, which occurred prior to finding those facts, is admissible to the extent that it relates to the property recovered.

I gave some consideration to the relationship between the various provisions of sections 21 and 22 in relation to the situation in this case, where facts were discovered

as a result of the confession Sitaleki made at the search at Vaini on 24 March, but where that confession may have been caused by inducement, threat or promise when Sitaleki was clearly in Police custody and also thus subject to oppression in the circumstances as I found them.

I consider that the proviso to section 21 allowing for the admission of confession evidence relating to facts found is also relevant in relation to consideration of confessions under section 22, which ties in with the position in relation to evidence of the facts, considered below at page 19.

I therefore find that the evidence about the confession of Sitaleki strictly relating to the discovery of the parts of the safe, the fridge and washing machine, the Cash Summary Sheet, and concrete and the things held by Paea is all admissible. I accepted the evidence of Sgt 'Otutaha about these, especially as recorded in the Diary of Action [Exhibit 12], even though I found Insp Helepiko an unreliable witness to them.

I must also comment on the evidence which indicated that Police officers were asking Sitaleki informally about these various incidents at times when he was clearly strongly suspected of involvement in them. They conducted informal interviews before they conducted a formal question and answer session in a recorded interview. Detailed reasons why this is unlawful have been set out at length in *Fainga'a v Lelea & Ors* CV 38/03, 6.1.05 and in *R v Mafi* CR 69/00, 18.3.05. I must make it very clear that this practice is not lawful and that, once a Police officer suspects some criminal involvement by the person concerned, if any interview takes place it must be conducted under formal conditions including appropriate cautioning and recording.

Grounds of decision

A - 17 February incident – theft over TCC counter

As already mentioned, none of the stolen property was recovered and produced in Court, so the prosecution relied on the record of interview, answers to charges and so-called confession of Sitaleki on 31 March, which I have now found to be inadmissible, to establish his guilt. The prosecution accepted that there was no direct evidence as to the actual incidents of housebreaking and theft. While there was also some general evidence about the circumstances of the housebreaking and theft, that was so vague and incomplete that it barely established that the amount of money stolen was that in the charge against the accused. Indeed it also pointed to the possibility, in an office open to the public, of the theft having been carried out by some person or persons other than Sitaleki while the night watchman was otherwise occupied, thus raising a reasonable doubt about Sitaleki's involvement.

In relation to the statements etc in relation to these offences I also accepted the general terms of Sitaleki's evidence that in the CID Room on 31 March, when he told CO Folaumoetu'i and Insp Lutua that he knew nothing about this housebreaking and theft on 17 February, CO Folaumoetu'i then told him words to the effect, that:

> "Well, you wait. When 'Ahofono comes I will ask him because he told me that you have already confessed to him. If 'Ahofono tells me that you are lying I will beat you up".

Taking into account the history of Sitaleki in Police custody from 19 to 31 March and the admitted assaults on him, this was further evidence that I could not rule out that

Sitaleki was frightened before and during the recording of the interview, statement of charges and the so-called confession.

I therefore found that the elements of these counts against Sitaleki Makahununiu were not established beyond reasonable doubt and I find him not guilty of them and dismiss the charges.

B - 7 March incident – TCC phone shop

Kusitafu Pohahau faces the principal charges in relation to this incident of housebreaking, theft and wilful damage to a building.

Mele Teukialupe (Lupe) Taumoepeau was Controller of Mobile Customer Service of the then TCC Retail Shop at the Taumoepeau Building concerned, and by their confidential serial numbers she identified more than 8 mobile phones recovered by the Police as among those stolen. 4 of those were produced in evidence [Exhibits 1-4]. She said that the Police released to her 6 or 7 of the phones. She also identified the photo [Exhibit 11 Photo C2] of the TV set recovered from Paea 'Iloa as appearing to be the same as the one stolen from the shop.

Apart from the discredited statements etc of 21 March (which in any event could not be evidence against Kusitafu as Sitaleki's co-accused), the prosecution relies on witnesses to whom Kusitafu and Sitaleki distributed the mobile phones after the incident.

I found established beyond reasonable doubt from the evidence of Lupe Taumoepeau that the housebreaking, theft and wilful damage had occurred, and there was also evidence from Fisi'iahi Tafolo (whose identification of Kusitafu was unshaken in cross-examination), that Kusitafu had come to the shop where she worked and advertised 2 mobile phones for sale at $100 each, which after negotiation the owner of the shop bought for $90 each, then 2 weeks later Kusitafu returned and bought back the phones back. Kusitafu had given his girl friend Salome Pomana 2 mobile phones in March, which he told her were to keep, and he would fetch them later. It was after a day when the Police came and took possession of the mobile phones. Salome identified the colour of 2 of the phones produced in Court, based on her observation of the phones as identical to the phones produced in Court.

That evidence of those witnesses thus linked Kusitafu to being in possession of, or at least having dealings with, mobile phones similar to those stolen from TCC. However their evidence was not sufficient, as the mobile phones that they referred to in their respective evidence were not proved beyond reasonable doubt to be the property of TCC taken from their retail shop at Taumoepeau Building. Beyond that, there was nothing in the evidence of Fisi'iahi or Salome to establish that any phones which they had dealt with were among those 4 produced in court and identified by Lupe Taumoepeau as some of the phones stolen in this incident. The phones identified by Lupe were not proved to relate to Kusitafu's alleged offending. I regret that this appeared to be the result of sloppy Police work, perhaps the result of placing too much reliance on the confession from Kusitafu's co-accused Sitaleki, which is unfortunate because if that had not been so the results on these charges may have been different.

In any event the outcome was that I was unable to find that there was sufficient evidence to establish beyond reasonable doubt that Kusitafu was linked to the theft of

these particular mobile phones and hence to the related housebreaking and wilful damage.

I therefore found that the elements of these counts against Kusitafu Pohahau were not established beyond reasonable doubt and I find him not guilty of them and dismiss the charges.

The position in the charge of receiving against Sitaleki is very similar. There was evidence from Tangi Nai (whose evidence I preferred to that of Sitaleki where there was a conflict of evidence), plus the mobile phones and television set found at his neighbour Paea's house and Paea's evidence (which I accepted and again preferred to that of Sitaleki where there was a conflict of evidence) that he had been given them by Sitaleki, all of which pointed to Sitaleki having knowingly received the mobile phones. Tangi Nai said that Sitaleki, accompanied by his wife, approached him at the Hahake and Hihifo bus station on Saturday 8 March and said he had an extra phone and asked whether he wanted to buy it for $10. Tangi Nai said he bought the phone from Sitaleki as he could tell that he needed the money. Then after 2 weeks Sitaleki and 2 Police officers arrived at his home at Fua'amotu demanding the return of the phone, when Sitaleki told him to return it because it was a stolen phone.

There was also credible and reliable evidence from Lupe Taumoepeau and Paea that the television set stolen from the TCC shop at the same time as the mobile phones was recovered from Paea's house, as he had been sold it by Sitaleki, which was circumstantial evidence linking Sitaleki further with the theft of the mobile phones.

But again beyond that, there was nothing in the evidence of Tangi or Paea to establish that any phones which they had dealt with were among those 4 produced in court and identified by Lupe Taumoepeau as some of the phones stolen in this incident. Tangi Nai did not identify or prove that the phone sold to him was one of the 4 phones produced in Court.

While that part of Sitaleki's record of interview on 21 March relating to that phone might have been admissible, as it lead to the discovery of the phone which Tangi Nai had, and so established that Sitaleki knew that it was stolen property, the answers to questions, answer to charge and so-called confession were withdrawn as exhibits by the prosecution for the reasons explained earlier.

Once more this appeared to be the result of sloppy Police work, again perhaps the result of placing too much reliance on the so-called confession from Sitaleki, and once more if that had not been so the result on this charge might have been different.

Again the outcome was that I was unable to find that there was sufficient evidence to establish beyond reasonable doubt that Sitaleki was linked to receiving these particular mobile phones. I therefore found that the elements of this count against Sitaleki Makahununiu were not established beyond reasonable doubt and I find him not guilty of it and dismiss the charge.

C - 13 March incident – TCC safe

The evidence from the TCC witnesses Fifita'ila Fuko, 'Uatekini Halatoafa and Siniasi Tupou established beyond reasonable doubt that the safe valued at $5,000 was stolen from the TCC main office on the night of Cyclone Ester on 13 March 2003 and that it contained at least $6,459.30 (in terms of the Daily Counter Cash Summary Sheet [Exhibit 8].

Although the search warrant [Exhibit 9] for the house of Sitaleki at Vaini was obtained on 24 March for the purpose of searching for the mobile phones, which, following the assaults on Sitaleki on 19 March and his record of interview etc on 21 March, appeared to be the focus of the Police work at that time, in fact the major evidence recovered from the search related to the later theft of the safe, as detailed in the list of articles seized in the search [Exhibit 9].

But, following the reasoning set out by Ford J in *R v Bowe* [2003] TOSC 8, I do not consider that that affects the admissibility of the evidence found in the search. Cross & Tapper on Evidence, 8th ed (1995) states (at 536):

> "The English authorities on the admissibility of evidence procured in consequence of an illegal search are uniformly in favour of its reception although there are not many of them."

In *R v Sang* [1979] 2 All ER 1222 (HL) the House of Lords held that the trial judge has no discretion to refuse to admit relevant evidence on the grounds that it was obtained by improper or unfair means and approved, with some qualification, the judgment of the Privy Council in *Kuruma Son of Kaniu v Reginam* [1955] 1 All ER 236 (PC), which went further and held that evidence was not inadmissible even though it had been illegally obtained.

In relation to Sitaleki that therefore means that in addition to the evidence of the objects found at and around his house in Vaini - the base of the safe produced in Court, the TCC Daily Counter Cash Summary Sheet of the money in it [Exhibit 8], the concrete pieces from the safe's lining, the trolley produced in Court, and the refrigerator and washing machine - the Court can also take into account those parts of Sitaleki's demonstration, including in particular the articles produced in Court and the photos taken at the search and demonstration [Exhibit 11, Books A, B, C, D & E], which relate to the facts found as a result of the search and demonstration. But the Court still cannot admit any parts of the record of interview, answers to charge or so-called confession of Sitaleki on 28 March [Exhibit 10], as those were given after those facts had already been found and so in terms of the proviso to section 21 those facts were not discovered as the result of information contained in that so-called confession.

Although there were discrepancies as to the actual contents of the safe, such as foreign coins, the contents are only circumstantial evidence in relation to the theft of the safe itself.

There was also the evidence of Sitaleki's neighbour Paea 'Iloa that in March 2003, after the cyclone, he saw a metal object like a cabinet on the rubbish heap at Sitaleki's house and asked Sitaleki whether he could use the metal object for a potholder. Sitaleki had agreed and Paea had taken the metal object to his allotment, where it was photographed by the Police [Exhibit 11 Photo C5], although not exhibited in evidence.

All that evidence satisfied me beyond reasonable doubt that Sitaleki had been in possession of the safe and its contents on the day following the theft: but while I was satisfied that that would be conclusive evidence of receiving the stolen property, it is not in itself sufficient without more to establish beyond reasonable doubt that Sitaleki took part in the actual housebreaking and theft.

Although the stolen property was not found on Kusitafu or on his property, there was more circumstantial evidence to link him to the principal crime. There was the

evidence of Salome Pomana that he had borrowed her father's truck at the crucial time on the night of the theft, returning it at dawn; and also that he had a black car, which made a loud sound on acceleration.

There was also the evidence of another of Sitaleki's neighbours, Vahanoa Uasila'a, which was not contradicted and which I accepted, that he had seen and recognised Kusitafu driving that same truck on 2 occasions that night: at approximately 11-12 pm he had noticed from a kava party the truck belonged to Salome Pomana's father followed by a black car; and again, as he returned from the kava party that morning a truck almost hit him, which he noticed was the same truck he saw previously, that belonged to Salome Pomana's father.

Then there was the evidence of the eyewitness Salome Tupou, which again was not contradicted and which I accepted, that in the early hours of 13 March, she heard a loud car sound coming from the road at the cemetery. The car went and then came back to the same spot. She also heard a loud banging sound of some kind of metal being hit; and then heard the car leave again. Not long after that she heard a vehicle (a sort of a truck), which came and parked at the same spot where the car had parked: she further heard a sound like attempts to load a metal object onto the truck, and the truck then left.

The timings in some of the evidence from those 2 witnesses and Salome Pomana was to some extent contradictory and not entirely consistent and did not entirely correspond with the evidence from the Security Officer at TCC, Fifita'ila Fuko, as to the exact time when the housebreaking at the TCC office may have taken place, although I did not consider that Fifita'ila's evidence was entirely accurate as this occurred on the night of the cyclone warning. This was in any event circumstantial evidence which all went to building up the picture of Kusitafu's involvement and I did not consider that the exact timings were crucial in that picture, nor did they detract from the strength of the individual items of evidence which I found credible and reliable, given the way in which the various pieces of evidence came together.

Then Vahanoa Uasila'a gave evidence, which again was not contradicted and which I accepted, that early on the same morning (ie the morning of 13 March) Sitaleki approached him and asked for a grinder blade. Later that same morning, Vahanoa was woken by some grinding sound that came from Sitaleki's property and he went to that allotment to ask if he could render assistance. As he approached Sitaleki, he noticed someone running away from the scene (at the septic tank) and stated that Sitaleki had approached him and told him that everything was all right, giving him the impression that he was not wanted at that time. As he turned to leave, he noticed a metal cabinet-like object on top of the septic tank at Sitaleki's newly built house. Because this was an unusual morning, and he was suspicious, he went to his allotment and climbed a breadfruit tree, from which he watched Sitaleki and others dismantling the metal box. He later identified Kusitafu Pohahau and Salome Pomana as 2 of the people who were present with Sitaleki at the septic tank. Later Vahanoa noticed Kusitafu and another man carrying a part of the dismantled metal box from the septic tank and loading it into Kusitafu's car. Vahanoa also noticed Sitaleki throwing a trolley into a bush area close to his residence and took that trolley together with a small metal box that he had found in the same bush area. I preferred Vahanoa's evidence about all that to Sitaleki's denials.

That was further evidence which I accepted as credible and reliable as to Kusitafu's involvement in the housebreaking and theft, so that overall I had no reasonable doubt that, despite the discrepancies in the timings, Kusitafu had taken part in the housebreaking and theft.

Sitaleki also confessed at Vaini on 24 March that part of the money from the safe was used to purchase a refrigerator and a washing machine (Item 3 of the Diary of Action), and as the fact that the new refrigerator and washing machine were at his house and connected to the theft were discovered as a result of that confession, that part of that confession is admissible under the proviso to section 21 of the Evidence Act. Sitaleki and his wife Nunia explained in evidence that it was bought in January 2003, but the Police witnesses said, and the photos [Exhibit 11 Photo A1] showed, that the washing machine was new and was still boxed when it was discovered. Nunia said that they had used the washing machine since it was bought that January and after every usage, it was lifted and put back in the box. The prosecution submitted that if that had been the case then the appearance of the box would have been as it appears in photograph A2 (having been opened), but not as it appears in photo A1 (newly boxed). Because that evidence of Sitaleki and his wife Nunia was inherently improbable I was unable to accept it, and in this respect preferred the evidence of the Police officers and the photos.

I found that all that evidence, taken together with the objects found at Sitaleki's house, was sufficient to establish beyond reasonable doubt that Sitaleki had received a share of the money from the safe, with the uncontradicted inference that he also had taken part in the housebreaking and theft, as opposed to merely being in receipt of the stolen goods.

Even if I were wrong to admit the parts of the 24 March confession relating to the facts found, those facts themselves (ie the discovery of parts of the safe etc at and near Sitaleki's allotment) can be admitted and are very strong circumstantial evidence of Sitaleki's involvement in the theft.

On all the evidence – as, notwithstanding the Police treatment of Sitaleki, there were good, credible, independent witnesses and stolen articles found - I therefore find these counts of housebreaking and theft established beyond reasonable doubt in relation to both Kusitafu Pohahau and Sitaleki Makahununiu, but only in relation to the theft of the safe itself and the cash of $6,459.30, being a total of $11,459.30. I find them both guilty of these counts and convict them of them as amended accordingly.

In relation to the charge against Mrs Nunia Makahununiu of receiving $500 of the stolen property, Nunia in the record of interview on 13 May [Exhibit 13] acknowledges that Sitaleki paid that money into her account [on 18 March, Exhibit 6]. While that interview contains almost nothing direct in detail in relation to whether or not she knew that the money was stolen at that time or before her bankbook [Exhibit 6] was seized by the Police on 24 March, there was a strong inference, which was not rebutted, that she must have known that the money was stolen, supported by her answer to the charge on 13 May was "Yes, it is true" and her so-called confession "I feel very embarrassed for all that has happened" [Exhibit 13]. I was unable to accept her explanations about these to the contrary.

There was no reason why in her case the record of interview, answer to the charge and confession were not admissible. I concluded that these were genuine and voluntary, she is an educated person, being a primary school teacher, and wrote her

own answers, and there was no evidence that suggested that she was forced or coerced into making them.

The prosecution submitted that the evidence as to how Nunia had withdrawn the money from the Bank suggested that she had known that the money was stolen and was part of the safe, when it must have been obvious to her on 24 March that her bankbook had been seized and was under investigation by the Police, but she did not inquire with the Police as to the status of the bankbook and instead reported it as missing and withdrew the money. However, I did not find those actions to be unequivocally referable to her knowing that the money had been stolen, particularly as, although the Police had taken the bankbook, her account itself had not been frozen (as noted by CIP Fa'aoa at Item 11 of the Diary of Action on 25 March). But that action did reflect adversely on her credibility, and on her evidence overall I was unable to accept her as a completely credible and reliable witness.

I therefore find the count of receiving stolen property against Mrs Nunia Makahununiu established beyond reasonable doubt and I find her guilty of that charge and convict her of it.

Gough Finance Ltd v Westpac Bank of Tonga

Supreme Court, Nuku'alofa
Ford Acting CJ
CV 684/2003

14 September 2005

Costs – taxation of costs – overseas lawyers – not registered in Tonga – costs not recoverable

For the full facts see [2005] Tonga LR 302.

On 15 June 2005 the Court issued a Ruling which concluded that overseas lawyers were unable to claim costs on taxation in the Kingdom unless, at the material time, they held a valid practising certificate. The plaintiff filed an application for review. The plaintiff submitted that there was no provision in the Law Practitioners Act which prohibited costs such as those being claimed in the Buddle Finlay bill from being recovered. In the alternative, the plaintiff sought a deferral of the taxation exercise so as to allow Mr Palmer and his colleagues time to be admitted as law practitioners in Tonga in order that they might be issued with practising certificates with retrospective effect. The defendant opposed any suggestion that a retrospective admission and practising certificate could and should be issued.

Held:

1. A party could file for costs and expenses incurred by a law practitioner only if that law practitioner was registered and admitted under section 3 of the Law Practitioners Act. Section 12 provided that only costs incurred by a law practitioner could be recovered in proceedings. Therefore the relevant question to be considered at any taxation hearing was whether the law practitioner whose name was on the bill of costs i.e. the person who would receive the payment, was admitted and certified to practise in Tonga.
2. As neither Mr Palmer nor his colleagues were admitted and certified to practise law in Tonga the costs and disbursements listed in the Buddle Finlay bill were not recoverable upon taxation in Tonga.
3. The Court was not prepared to accede to the plaintiff's alternative request to defer taxation so as to allow the Buddle Finlay fee earners time to seek admission to the Roll of Law practitioners in Tonga with retrospective effect.

4. Had counsel found it necessary to obtain an opinion from a New Zealand solicitor or law clerk on any peculiarly New Zealand aspect of the case, then the costs of such an exercise would have been recoverable and could have been listed as a disbursement to the plaintiff's lawyer's bill of costs.

Case considered:

Polynesian Airlines v Kingdom of Tonga [2000] Tonga LR 145

Statutes considered:

Law Practitioners Act 1989
Personal Property Securities Act 1999 (NZ)

Rules considered:

Supreme Court Rules

Counsel for plaintiff	:	Mr Niu
Counsel for defendant	:	Mr Waalkens QC

Supplementary Ruling on Costs

Background

On 24 August 2004 I delivered judgment on an interlocutory issue, namely, whether this Court has jurisdiction to hear the present case (as claimed by the plaintiff) or whether the action should properly have been brought in New Zealand (as claimed by the defendant). I found for the plaintiff and held that Tonga was the appropriate forum. I also awarded costs to the plaintiff on that interlocutory application in a sum to be either agreed or taxed.

On 20 September 2004 two bills of costs were filed on behalf of the plaintiff. The first bill from Mr Niu claimed costs of $4515.50 together with disbursements of $325.50. The second bill of costs was in the name of W. J. Palmer, a Christchurch based partner with Buddle Finlay -- one of New Zealand's leading law firms. The "Buddle Finlay bill" (as I will refer to it) claimed costs incurred by Mr Palmer and various other named "fee earners" in his Christchurch firm totalling NZ $11,182.00 together with disbursements of NZ $206.00. Defence counsel opposed both bills of costs and they were subsequently referred to me for taxation.

I proceeded to tax Mr Niu's bill of costs in the usual way but I had concerns as to whether the Christchurch solicitors were entitled to recover costs upon taxation in Tonga and that is the short point at issue in this supplementary ruling. My concern was expressed in a Minute to counsel dated 3 June 2005. The Minute read:

> "MINUTE
>
> Both counsel are invited if they so wish, to file supplementary submissions within seven days of receipt of this Minute (a faxed submission from Mr Waalkens would be acceptable) as to whether the Court has jurisdiction and/or whether it is appropriate to make an award of costs in respect of

> attendances by persons outside the jurisdiction (Mr Palmer and his colleagues) who do not hold practising certificates under the Law Practitioners Act 1989."

As it turned out, neither counsel filed submissions within the stipulated seven-day period and, therefore, on 15 June 2005 I issued a Ruling in which I concluded that overseas lawyers were unable to claim costs on taxation in the Kingdom unless, at the material time, they held a valid practising certificate. My Ruling centred on the relevant sections of the Law Practitioners Act 1989 which make it an offence for any person to practise as a law practitioner without holding a valid practising certificate. The definition of a law practitioner is broad. The term encompasses anyone who advises any person on a matter of law or legal procedure.

Plaintiff's Supplementary Submissions

Shortly after I issued my Ruling, Mr Niu filed an application for a review of my decision. His application was accompanied by an affidavit deposing that my Minute of 3 June 2005 had not been placed in his "pigeonhole at the Registry" by Court staff until 9 June 2005 and, therefore, the seven-day period fixed for the filing of submissions should not have expired until 16 June. I accepted that explanation and I then proceeded to consider Mr Niu's supplementary written submissions on the point. I also allowed Mr Waalkens the opportunity to file submissions in reply. Both sets of submissions were succinct and helpful.

Mr Niu agreed that, on the face of it, the provisions of the Law Practitioners Act had the effect I had expressed in my Ruling but he submitted that such a literal interpretation of the statutory provisions is not what Parliament could have intended. As counsel expressed it:

> "4. On the face of these provisions, it would appear that costs of Mr Palmer and of his colleagues in New Zealand who have acted for the Plaintiff in connection with this matter may not be able to recover their costs against the Defendant, unless they are all admitted to the Roll and have been issued practising certificates in Tonga.
>
> 5. However, it is respectfully submitted that that is not what these provisions mean. These provisions were enacted and intended to ensure that only persons duly admitted by the Chief Justice, that is, persons with sufficient professional knowledge and experience, of good character and suitability and who intend to practice in Tonga (were admitted) to the Roll of Law Practitioners of Tonga. This was to ensure that the general public and the judiciary in Tonga are protected against unqualified persons acting as law practitioner(s) in Tonga.
>
> . . . .
>
> 8. Furthermore, if a literal interpretation is applied in this case, and it is held that Mr Palmer and his New Zealand colleagues are not to receive their costs (because they have

> acted as Law practitioners in this matter without having been admitted to the roll and without having in force a valid practising certificate) then they may be said to have committed offences under section 10 and 11 of the Act.
>
> 9. Such a position would be harsh and unreasonable. It would mean that no practitioner would want to act on instructions from a practitioner in another country unless he has become admitted and taken out a practising certificate in that country. Such a requirement would be cumbersome, expensive and time-consuming and would greatly impede the execution of legal duties of the practitioners to their clients."

Mr Niu submitted that there was no provision in the Law Practitioners Act which prohibited costs such as those being claimed in the Buddle Finlay bill from being recovered. He also referred to *Polynesian Airlines v Kingdom of Tonga* [2000] Tonga LR 145, where Finnigan J allowed costs on taxation for lawyers in the United Kingdom and in New Zealand even though they had held no practising certificate in Tonga, and he invited the Court to take a similar approach in the present case.

In the alternative, Mr Niu sought a deferral of the taxation exercise so as to allow Mr Palmer and his colleagues time to be admitted as law practitioners in Tonga in order that they might be issued with practising certificates with retrospective effect.

Defendant's submissions

In reply, Mr Waalkens submitted that the Court's Ruling of 15 June 2005 was correct. In relation to the *Polynesian Airlines* case (where he had appeared as counsel) Mr Waalkens submitted that the point now at issue had never been raised before Finnigan J and he, therefore, took issue with Mr Niu's contention that Finnigan J had "correctly dealt with the matter."

Mr Waalkens also took issue with Mr Niu's approach to the interpretation of the Law Practitioners Act. He submitted that the proper approach to any question of statutory interpretation: "requires the court to give effect to the plain and literal meaning of the words used in the statute." As Mr Waalkens expressed it:

> "The Law Practitioners Act 1989, with respect, could not be clearer. Indeed, in paragraph 4 of the plaintiff's supplementary submissions, it is acknowledged "on the face of those provisions" the interpretation arrived at by the Court is correct."

Mr Waalkens opposed any suggestion that a retrospective admission and practising certificate could and should now be issued.

Findings

I agree with Mr Waalkens's observations about the *Polynesian Airlines* case. I find that decision of limited assistance only because, for some reason, it did not directly consider the application of the Law Practitioners Act or how it fits in with the Supreme Court Rules relating to costs claims.

I also agree with Mr Waalkens's approach to questions of statutory interpretation. Mr Niu invites the Court, effectively, to ignore the literal interpretation of the relevant sections of the Law Practitioners Act and focus instead on what Parliament must have intended when the provisions were enacted. The problem with that submission is that it overlooks one of the primary principles of statutory construction, namely, that it is not permissible for the courts to speculate as to Parliament's intention. As is stated in **Halsbury,** vol 44 para 857:

> "If the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning."

In the present case there is no suggestion of any ambiguity of meaning and, as Mr Waalkens's observed in the passage cited above, Mr Niu freely acknowledged in his supplementary submissions that the plain and literal meaning of the relevant statutory provisions is the interpretation arrived at by the Court in its Ruling of 15 June 2005. That really is the end of the matter but it may be helpful if I try and summarise my analysis of the position:

(1). A successful party is entitled to lodge a claim for cost under Order 29 Rule 3(2) of the Supreme Court Rules;

(2). The successful party is entitled under that provision to claim costs incurred by the law practitioner in respect of:
- (a) the amount of time spent in preparation of pleadings and general preparation for trial;
- (b) the amount of time spent in court;
- (c) counsel's fee; and
- (d) any other disbursements;

(3). Order 29 Rule 4(1) provides that what shall then be allowed to the successful party are: "all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of any party";

(4). The Law Practitioners Act ("LPA ") provides that only a "law practitioner" is entitled to sue for or recover fees, outlays or expenses in relation to any act or proceeding (LPA s12);

(5). Therefore, only costs, outlays and expenses incurred by a "law practitioner" can be recovered in costs proceedings;

(6). "Law practitioner" is defined in section 3(2) of the LPA and section 3(1) of the LPA requires that a law practitioner must be registered on the Roll of Law Practitioners in the Kingdom of Tonga and hold a valid practising certificate.

It follows from the foregoing analysis that a party can file for costs and expenses incurred by a law practitioner only if that law practitioner is registered and admitted

under section 3 of the LPA. Section 12 of the LPA then provides that only costs incurred by a law practitioner can be recovered in proceedings.

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.

The Buddle Finlay bill covers work carried out by eight different fee earners in that firm. It is expressed in New Zealand dollars and it is in the name of "W. J. Palmer -- Solicitor for the plaintiff." As neither Mr Palmer nor his colleagues are admitted and certified to practise law in Tonga the costs and disbursements listed in the Buddle Finlay bill are not recoverable upon taxation in Tonga.

I am not prepared to accede to Mr Niu's alternative request to defer taxation so as to allow the Buddle Finlay fee earners time to seek admission to the Roll of Law practitioners in Tonga with retrospective effect.

There is a final matter I wish to touch upon briefly. The defendant in its challenge to jurisdiction had raised issues relating to the significance and application of the (New Zealand) Personal Property Securities Act 1999. On behalf of the plaintiff, Mr Niu submitted:

> "There was no choice in this matter for the plaintiff. Local counsel was not versed with New Zealand law or at least with the Personal Properties Securities Act. It had to engage Mr Palmer and his firm to attend to the submissions in respect of the issue of jurisdiction."

As perhaps the foremost senior counsel at the Tonga Bar, Mr Niu was perfectly capable of drafting and presenting submissions on the critical jurisdictional point and in dealing adequately with all other aspects of the case for the plaintiff. Had counsel found it necessary to obtain an opinion from a New Zealand solicitor or law clerk on the Properties Securities Act or any other peculiarly New Zealand aspect of the case, then no doubt the costs of such an exercise would have been recoverable and could have been listed as a disbursement to Mr Niu's bill of costs. It appears, however, from the submission quoted above that the plaintiff company elected to instruct Mr Palmer of Buddle Finlay to prepare all the submissions relating to jurisdiction. In his bill of costs Mr Niu makes no reference to the Buddle Finlay bill and he refers to Mr Palmer as his "instructing counsel".

It is always open to a party, of course, to proceed in such a manner but, as it is not an approach catered for under the provisions of the Supreme Court Rules and the Law Practitioners Act, the luxury of using overseas solicitors in such a way must be borne by the client itself.

As the issue dealt with in this Supplementary Ruling was raised by the Court rather than the parties, I decline to make any award of costs.

MBf Bank Ltd v Mangisi

Supreme Court, Nuku'alofa
Ford Acting CJ
CV 412/02

14 and 20 September 2005; 21 September 2005

Practice and procedure – application to set aside default judgment – dismissed
Practice and procedure – application to stay writ of execution – stay issued

On 23 March 2003 the plaintiff bank obtained judgment against the defendant, in default of the filing of a statement of defence, for a total amount of $115,681 together with interest. On 27 May 2005, the plaintiff sought to enforce the default judgment by taking out a writ of possession in respect of one of the buildings which the defendant had pledged as security for the bank loan. On 19 July 2005, the defendant sought an order setting aside the default judgment and a stay of execution of the writ of possession on the grounds that she instructed solicitors and did not know that she failed to file a defence and further that she did not know that the Court made judgment in default against her.

Held:

1. The defendant failed to advance a good reason for failing to file a statement of defence on time. She also failed to establish that she had an arguable case on the merits.
2. The application to set aside the default judgment is dismissed.
3. In relation to service of the default judgment, no certificate of service was filed and the affidavit subsequently filed by the plaintiff's recovery officer in support of the application for a writ of possession simply stated that, "service was effected as per the file reference in this matter." There was no evidence that service of the judgment order was effected within the prescribed 14 day period.
4. A party cannot disclaim responsibilty for the acts of a solicitor appointed to act for him.
5. The Court issued a stay of the writ of possession until the plaintiff's counsel was able to regularise the position regarding service of the judgment order.

Cases considered:

Currie v Tokoroa Earthmovers Ltd [1966] 1 NZLR 611
Evans v Bartlam [1937] AC 473; [1937] 2 All ER 646

Jewett Cameron South Pacific Ltd v Tu'uholoaki [1999] Tonga LR 51
Practice Direction No 1 of 1993

Rules considered:
Supreme Court Rules 1991

Counsel for plaintiff : Mrs Vaihu
Counsel for defendant : Mr Kaufusi

Ruling

The Application

On 23 March 2003 the plaintiff bank obtained judgment against the defendant, in default of the filing of a statement of defence, for a total amount of $115,681.00 together with interest. On 27 May 2005, the plaintiff sought to enforce the default judgment by taking out a writ of possession in respect of one of the buildings which the defendant had pledged as security for the bank loan.

The present application, filed by the defendant on 19 July 2005, seeks an order setting aside the default judgment and a stay of execution of the writ of possession. I heard oral submissions from counsel during the course of two Chambers hearings.

Grounds of Application

The grounds of the defendant's application to set aside the default judgment are set out in six short paragraphs in her affidavit in support. They read:

> "2. That when I received the writ and statement of claim I instructed and paid T.$400.00 to Petunia Tupou to defend this case.
> 3. That about a year after Petunia Tupou told me that she is busy and sick also and she asked me to look for another lawyer.
> 4. That I asked Mrs Mavae Fakatulolo but she told me she is busy.
> 5. That I asked (Mr) Kengike to handle the case.
> 6. That I did not know that Petunia or Kengike failed to file a defence.
> 7. That I did not know that this Honourable Court have (sic) already made judgment against myself."

The Law

The principles applicable to applications to set aside judgment when a defendant has failed to file a statement of defence on time are well established. Order 13 Rule 3 provides:

> "(1) A judgment entered under rule 1 may be set aside if the defendant satisfies the Court that:

> (I) there was good reason for his failure to file a defence in time; and
> (II) he has an arguable defence.
> (2) Application under paragraph (1) shall be made by summons supported by affidavit."

In reference to this rule Ward CJ, in *Jewett Cameron South Pacific Ltd v Tu'uholoaki* [1999] Tonga LR 51, noted that the Court always has a discretion and His Honour referred to what he termed the "classic statement of principle" by Lord Atkin in *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646. It needs to be borne in mind, however, that the discretion conferred by the equivalent English rule is an unconditional discretion (as is the case in New Zealand) whereas, as can be seen above, Order 13 Rule 3 confers a discretion which is to be exercised within the framework of the criteria specified in subparagraphs (I) and (II).

Halsbury, vol 37 para 403, states:

> "An application to set aside default judgment, should, of course, be made promptly and within a reasonable time of getting to know of the judgment. In the case of a regular judgment, it is an almost inflexible rule that the application must be supported by an affidavit of merits, stating the facts showing that the defendant has a defence on the merits, otherwise there may not be any point in setting it aside. For this purpose, it is enough to show that there is an arguable case or a triable issue."

In the Tonga context, the supporting affidavit would also need to set out the facts relied upon in order to establish that there was good reason for the defendant's failure to file a defence in time.

Findings

The first requirement on an application to set aside is for the defendant to satisfy the Court that there was good reason for his or her failure to file a defence in time. I need not go into the details of how service in the present case was effected pursuant to an order for substituted service but suffice it to say that, in terms of the substituted service order, the last day for filing the statement of defence would have been on the day the Court opened after the official 2002 Christmas and New Year vacation.

On 12 November 2002, after receiving notice that proceedings had been commenced against her, the defendant wrote a letter to the plaintiff bank from a post office box address in Auckland asking to be given a chance to pay off the debt. Significantly, in the context of the present application, she did not dispute the claim but stated in part:

> "I fully accept to pay the amount I owe the bank, but there is no need to take it to Court."

From the documentation before the Court, it does not appear that the bank did or said anything to mislead the defendant into thinking that it would not be necessary for her to file a statement of defence. Certainly no such suggestion has been made by the defendant in her affidavit. No statement of defence has ever been filed.

In the paragraphs quoted earlier from her affidavit, the defendant appears to blame her lawyers for the lack of action. But there is no corroborating evidence before the Court confirming any of the criticisms she makes about her legal advisers. In any event, as Woodhouse J (as he then was) observed in a not dissimilar situation in the New Zealand case of *Currie v Tokoroa Earthmovers Ltd* [1966] 1 NZLR 611, 614:

> "in general a party cannot disclaim responsibility for the acts of a solicitor appointed to act for him."

In that case Woodhouse J spoke of the category of potential litigant who:

> "Having given some broad instructions to a solicitor, is then content to lie back for an extended period of time leaving everything with nonchalant confidence to his professional adviser."

On her own admission, the defendant would seem to slot aptly into such category of litigant. She has failed to advance any good reason for failing to file a statement of defence on time.

The defendant has also failed quite spectacularly to establish the second criteria, which is that she has an arguable case. Her application and supporting affidavit are completely silent on this aspect of the Rule and, as noted above, in her initial letter to the bank, the defendant did not dispute the debt. Nowhere, therefore, has the defendant even suggested that she has an arguable case on the merits.

For these reasons, the application to set aside the default judgment is dismissed.

There is a final matter relating to service of the default judgment. The judgment order itself, dated 21 March 2003, stated that it was to be served on the defendant within 14 days of its issuance from the Court. It was issued on 24 March 2003. No certificate of service, however, has been filed and the affidavit subsequently filed by the plaintiff's recovery officer in support of the application for a writ of possession simply states that, "service was effected as per the file reference in this matter." Whatever is meant by "file reference", it is not evidence that service of the judgment order was effected within the prescribed 14 day period.

In the circumstances, I propose to issue a stay of the writ of possession until such time as plaintiff's counsel is able to regularise the position regarding service of the judgment order.

Normally costs would follow the event but given the omission of the plaintiff to comply with Practice Direction No. 1 of 1993 in relation to service, I decline to make any award of costs.

R v Kengike

Supreme Court, Nuku'alofa
Webster CJ
CR 139/05

24 October 2005

Sentence – theft of goods – activation of suspended sentence for previous offence – "special circumstances"

The defendant pleaded guilty to the offence of theft of goods to the value of $358.75. The maximum penalty was imprisonment for two years. At the time he was on a suspended sentence of two years imprisonment, suspended for three years from 20 November 2003, for robbery and grievous bodily harm. The Court sentenced the defendant for the latest offence.

Held:

1. Imprisonment for a purely property offence is not appropriate, unless there are unusual circumstances that render imprisonment necessary. The unusual circumstances were that the defendant was not a first time offender and it was not his first offence of dishonesty. He was given a suspended sentence for robbery in November 2003. It was therefore not appropriate for the Court to give him a further chance and a sentence of imprisonment was necessary and appropriate.
2. In considering whether to impose the suspended sentence, the Court took account of the fact that in response to his offending in 2003 the defendant had kept in regular employment and that had managed to avoid re-offending for 20 months.
3. The Court sentenced the defendant to serve half the original suspended term, one year, the commencement of which was backdated to the date when he was remanded in custody, 13 July. The remainder of one year of the original suspended term was to be suspended for one further year from his date of release on condition that he was on probation during that period. If he committed any further offences during that period of suspension he was unlikely to be given any further latitude by the Court. The Court ordered that the eight months sentence on the theft charge was to be served concurrently with that sentence, also backdated to 13 July.

Cases considered:

Crabtree v Hinchliffe (Inspector of Taxes) [1971] 3 All ER 967

Lyon v Wilcox [1994] 3 NZLR 422 (CA)
M, Re [1993] NZFLR 74
Mo'unga v R [1998] Tonga LR 154 (CA)
Peninsula Watchdog Group (Inc) v Minister of Energy [1996] 2 NZLR 529 (CA)
R v Ithell [1969] 2 All ER 449 (CA)

Statutes considered:
Criminal Offences Act (Cap 18)
Powers of Criminal Courts Act 1973 (UK)

Counsel for the Crown : Ms Tupou
Counsel for defendant : Ms Mangisi

Sentence

ELEVISI KENGIKE, you have pleaded guilty to the offence of theft of goods to the value of $358.75. The maximum penalty for this offence is imprisonment for 2 years.

At the time you were on a suspended sentence of 2 years imprisonment, suspended for 3 years from 20 November 2003, for robbery and grievous bodily harm. I shall deal with the question of activation of that suspended sentence later, but the appropriate procedure is for me first to sentence you for your latest offence: *R v Ithell* [1969] 2 All ER 449 (CA).

The circumstances of the present offence were that on the night of 29 March 2005 you were stopped by the Police carrying a sack. When you were asked what was in the sack, you replied "Nothing", but when the Police officer looked inside the sack he found the items included in this charge. I regret that I am unable to accept your explanation that you simply found the sack and looked inside it; and I consider that you must be naive to think that the Court would be so stupid as to accept such an explanation.

Miss Mangisi submitted that this offence was not sophisticated nor premeditated, involved minimal planning and lacked a degree of professionalism, so that it should be viewed as an isolated lapse. While I accept that up to a point, I do not consider that it significantly alters the approach the Court should take.

Imprisonment for a purely property offence is not appropriate, unless there are unusual circumstances that render imprisonment necessary: *Mo'unga v R* [1998] Tonga LR 154 (CA). But in your case there are such circumstances. You are not a first offender and this is not your first offence of dishonesty. When you were sentenced for robbery in November 2003 you were given a suspended sentence, which was intended to give you a chance to show that that first offence was a thing in the past and that you would keep away from crime in the future. Unfortunately you did not take that chance and only 16 months later you offended again, which demonstrates that the penalty imposed in the past has not acted as a deterrent, which can be a reason for imposing a longer prison sentence. That means that it is not appropriate for the Court to give you a further chance and that a sentence of imprisonment is necessary and appropriate.

I have to say that I have an impression from what I have been told about what happened after your previous offence and what has happened in this case that you feel that if you apologise and the victim is compensated, and then you work hard, you will incur no other penalty. But that is not part of the principles on which the Court has to sentence offenders and the Court has a duty to protect the public and punish offenders.

I am certainly impressed that after your previous offending you managed to get a job and by your hard work and enthusiasm gained the confidence of your employer, who I understand is willing to re-employ you. But that also goes against you, as despite having home support and earnings from a good job, you still committed this theft. I am afraid that I find little material for me to agree with the view of the Probation Officer that you are unlikely to re-offend.

I also note that since you first appeared in the Supreme Court in July you have undergone various courses directed to anger and violence, although I have to observe that these do not appear to be strictly relevant to these proceedings as there was apparently no violence involved in this theft.

As this was an offence in the middle of the range of offences of theft up to $500, I consider an appropriate starting point is a period of imprisonment of 1 year, which should be discounted to a sentence of 8 months due to your plea of guilty. In other circumstances I would have considered suspension of the final part of that sentence, but due to your previous suspended sentence that is not practicable.

Turning to your previous suspended sentence, section 24(3) of the Criminal Offences Act, dealing with suspended sentences, provides at paragraph (c):

> "(c) In the event of the offender being convicted of an offence punishable by imprisonment during the period of suspension he will thereupon be sentenced to serve the term of the suspended sentence in addition to the punishment imposed for such subsequent offence."

Your lawyer Miss Mangisi has very properly drawn my attention to the amended section 24(3)(e) of the Criminal Offences Act, which provides:

> "(e) In special circumstances the court may release an offender from the operation of paragraph (c) and may extend the original period of suspension for a further period not exceeding 1 year."

There is no definition of "special circumstances" in the Act and the corresponding English Act, the Powers of Criminal Courts Act 1973, does not use the same terminology as it stipulates (in section 23(1)) that a suspended sentence is to be activated "unless the court is of opinion that it would be unjust to do so in view of all the circumstances".

A variety of cases on the meaning of "special circumstances" are recorded in Words and Phrases Legally Defined and Stroud's Judicial Dictionary, the most helpful of which are the description "facts peculiar to the particular case which set it apart from other cases" (*Lyon v Wilcox* [1994] 3 NZLR 422,431 (CA), following the Full Court in *Re M* [1993] NZFLR 74); "A special consideration is one outside the common run of things, one which ... is exceptional, abnormal, or unusual, but something less than extra ordinary or unique" (*Peninsula Watchdog Group (Inc) v*

Minister of Energy [1996] 2 NZLR 529,536 (CA)); ""Special" must mean unusual or uncommon - perhaps the nearest word to it in this context is "abnormal"", and "For circumstances to be special must be exceptional, abnormal or unusual" (*Crabtree v Hinchliffe (Inspector of Taxes)* [1971] 3 All ER 967,976 (Lord Reid),983 (Viscount Dilhorne)).

Miss Mangisi submitted that there were special circumstances in your case in that your response to your offending in 2003 had been to keep in regular employment and that you had managed to avoid re-offending for 20 months now. She submitted that you had also shown an ability to reform by participating in the courses I have already referred to and that for the first time in your life you appeared to be making substantial progress towards rehabilitation.

I have to say that, measured against the legal authorities I have referred to about the meaning of "special circumstances", I have very grave doubts about whether the facts of your case are exceptional, abnormal or unusual and whether they really set it apart from other cases. The salient fact is that, having been given a suspended sentence for 2 very serious crimes, you re-offended within 16 months. It must also count against you in that balance that, other than the suspended sentence, you did not receive, and so have not undergone, any other punishment, such as community service or probation, for those offences, although compensation of $1000 was paid to your victim. It is thus very borderline whether there are special circumstances, but in this instance I am prepared to consider whether or not I should impose the suspended sentence.

I also have considerable doubts about whether, as submitted by Miss Mangisi, I am able to go beyond the terms of section 24(3)(c)&(e) of the Criminal Offences Act of Tonga and apply the approach in section 23(1) of the English Act, ie considering a lesser term of imprisonment in addition to extending the original period of suspension.

However, I have come to the conclusion that in the circumstances of your case the English precedent is a good one to follow and, while I do not consider it would be unjust in all the circumstances to activate at this stage the whole period of suspension, that could be harsh, given the positive aspects of your behaviour.

For all these reasons I shall therefore sentence you to serve half the original suspended term, ie 1 year, the commencement of which is backdated to the date when I remanded you in custody, ie 13 July. The remainder of 1 year of the original suspended term will be suspended for 1 further year from your date of release on condition that you are on probation during that period. If you commit any further offences during that period of suspension you must realise that you are unlikely to be given any further latitude by the Court.

I shall be lenient and order that the 8 months sentence on the theft charge will be served concurrently with that sentence, also backdated to 13 July.

I have to add that I am very surprised to find that your 2 original offences of robbery and grievous bodily harm, both of which carry maximum terms of imprisonment of 10 years and are indictable offences which ought to be dealt with in the Supreme Court, were dealt with in the Magistrates' Court.

R v Vola

Supreme Court, Nuku'alofa
Webster CJ
CR 65/2005

10 November 2005

Sentencing – murder conviction – life imprisonment

Tevita Vola was found guilty of the murder of Salesi or Paini Taufalele at Tatakamotonga on 31 January 2005 by repeatedly hitting his head with an iron bar and thus causing his death. The jury did not accept the defence of provocation. There were two alternative punishments for murder, to be sentenced to death or to imprisonment for life.

Held:

1. The Court did not find that the offence was of an exceptionally depraved and heinous character or constituted, on account of its design and the manner of its execution, a source of grave danger to the society at large. The Court did not find circumstances evidencing aggravation of an abnormal or special degree. It was probable that in due course the accused could be reformed and rehabilitated. It was not one of the rarest of rare cases where the alternative option of life imprisonment is unquestionably foreclosed.
2. The Court sentenced the accused to life imprisonment and recommended that while in prison he should undergo courses in alcohol awareness and anger management. The Court further recommended that, if his conduct in prison remained good, he took the courses in prison, and he avoided further violence, he should be considered for parole or release on licence after having served around 15 years.

Cases considered:

Bachan Singh v State of Punjab [1980] 2 SCC 475, [1980] AIR 890
Furman v State of Georgia 408 US 238 (1972)
Harmelin v State of Michigan 501 US 957 (1991)
Reyes v The Queen [2002] 2 AC 235 (PC)
State v Makwanyane 1995 (3) SA 391 (South Africa)
State v Nkwanyana 1990 (4) SA 735 at 743E-745G

Statute considered:
Criminal Offences Act (Cap 18)

Sentencing Decision

Tevita Vola, you have been found guilty by a Jury of the crime of the murder of Salesi or Paini Taufalele at Tatakamotonga on 31 January this year by repeatedly hitting his head with an iron bar and thus causing his death.

In making that finding the Jury did not accept the defence put forward on your behalf that you had been provoked by Paini.

This is the first verdict of murder in Tongatapu in over 20 years.

Circumstances of offence

The circumstances of the offence were that both you and Paini were drunk. The two of you started arguing and it appeared that you were the aggressor, although from the evidence it also seemed that Paini was coming to get you. But you had gone to get Nelson and Tongakilo to assist you and Nelson came armed with a long, thick iron bar 2-3 feet long and around 1-2 inches in diameter. You and Paini then fought and at first Paini got the better of you and you fell to the ground with Paini standing over you and punching you. From that position you called to your friends to come to your assistance and to attack, and Nelson hit Paini on the back of the head with the iron bar. Paini then crumpled and fell down, allowing you to get up. You took the iron bar from Nelson and stood over Paini and hit him repeatedly with the iron bar. In your interview with the police you admitted hitting Paini 2 or 3 times and one eyewitness described you as wielding the bar like an axe. As your Counsel accepted, the use of a weapon on a party lying helpless on the ground was an aggravating feature. Paini must have died almost instantaneously, and he was dead when Seionala arrived shortly afterwards.

As I have already mentioned, the Jury did not accept the defence put forward on your behalf that you had been deprived of the power of self-control by extreme provocation given by Paini in the form of an unlawful assault committed upon you by him, which was of such a kind either by reason of its violence or of accompanying words, gestures or other circumstances of aggravation as to be likely to deprive any person of ordinary character, being in the circumstances in which you were, of the power of self-control, in terms of section 89(a) of the Criminal Offences Act.

Punishments for murder

Under section 91 of the Criminal Offences Act there are only 2 alternative punishments for murder, to be sentenced to death or to imprisonment for life. The alternative to be imposed is within the discretion of the Court, to be exercised judicially after considering all relevant factors. The Court has no power to impose any lesser sentence.

Your Counsel Mr Tu'utafaiva has made persuasive submissions to assist me in that decision.

Death penalty

As I have to consider those 2 alternatives I must start with a consideration of the death penalty. There is much international legal authority about the death penalty and

its effect and effectiveness, and although these do not apply directly in Tonga, the principles in these cases are very important. My duty is not to consider whether or not the death penalty should exist in Tonga – that is a matter for Government and Parliament. However I do have to understand the death penalty to be able to take an informed decision between it and life imprisonment. I accept what Mr Tu'utafaiva has said about the sanctity of human life.

Much of the international legal authority is set out and discussed in a landmark case in the Constitutional Court of South Africa in 1995 after the end of its apartheid policy, *State v Makwanyane*; and in a recent case from the Caribbean country of Belize in the Privy Council in London in 2002, *Reyes v The Queen*. Both of these also refer to the well-known and much cited US Supreme Court Case of *Furman v State of Georgia* in 1972.

In *Makwanyane* the President of the Court, Justice Chaskalson, said:

> "The death sentence is a form of punishment which has been used throughout history by different societies. It has long been the subject of controversy. As societies became more enlightened, they restricted the offences for which this penalty could be imposed." [Para 33]

The statement of Justice Stewart in the American case of *Furman v State of Georgia*, further cited by Justice Scalia in another US Supreme Court case, *Harmelin v State of Michigan*, in 1991 also deserves repetition:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." [306]

There are other legal cases which I have taken into account, but I shall not take up time reading them out now, but I have set them out in an Appendix which I shall attach to the printed copy of this important sentencing decision.

Arbitrariness

There is also the question of the arbitrariness of the death penalty. Article 6.1 of the International Covenant on Civil and Political Rights 1966 provides that:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Although Tonga does not appear to be a party to that Covenant, again the principles it sets out are important.

On the issue of arbitrariness, Justice Brennan observed persuasively in the case of *Furman* that:

> "... the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others." [274]

He pointed out that no one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.

It is virtually impossible to avoid elements of arbitrariness in the imposition of any punishment.

Exercising the discretion

In relation to how the Court should decide between imposing a sentence of death and one of life imprisonment, the Privy Council in London in the Belize case of *Reyes* referred to the Supreme Court of India enlarged bench decision in 1980 in the case of *Bachan Singh v State of Punjab*. The Court referred to special reasons for imposing the death penalty being aggravation of an abnormal or special degree or being extreme depravity. The Court also referred to examples of possible aggravating or mitigating circumstances, but did not lay them down as guidelines. The Supreme Court's view can be summed up in 2 passages:

> "It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guidelines indicated by the Supreme Court, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy ... , viz, that **for persons convicted of murder life imprisonment is the rule and death sentence an exception**. **A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed**." [255 E-H, 256 A-C]

and in a passage referred to in the case of *Reyes* in the Privy Council in London, which as mentioned was a case from Belize, which held:

> "14. This problem of differential culpability has been addressed in different ways in different countries. In some a judicial discretion to impose the death penalty has been conferred, reserving its imposition for the most heinous cases. Such was the solution adopted in South Africa before its 1993 constitution, when it was held that the death penalty should only be imposed in the most exceptional cases where there was no reasonable prospect of reformation and the object of punishment would not be properly achieved by any other sentence: State v Nkwanyana ... . Such is also the solution adopted in India where the rule has been expressed by Sarkaria J in the Supreme Court in Bachan Singh v State of Punjab ... in these terms:
>
> > "(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so.

> Such reasons must be recorded in writing before imposing the death sentence.
> (b) While considering the question of sentence to be imposed for the offence of murder under [the] Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence."
>
> [at 515]"

These Indian Supreme Court statements were made against the background of its own Penal Code. I believe that in considering the position in Tonga, where the Court also has a discretion to select the death penalty or life imprisonment, the principles set out in all these decisions of the highest courts in other countries to which I have referred are highly persuasive and that it is right that this Court should adopt their reasoning in reaching its decision on the exercise of that discretion in this case.

Circumstances in this case

In your case, in mitigation I take into account all that Mr Tu'utafaiva has put forward on your behalf. The relevant circumstances to which I have had regard are:

> You were indicted and convicted of murder under section 87(1)(b) of intending to cause bodily injury to Paini which you knew was likely to cause death and were reckless whether death ensued or not: but you were not charged or found guilty of the more culpable charge under section 87(1)(a) that you intended to cause the death of Paini;
>
> This murder was not pre-meditated, except in so far as you went intending to attack Paini;
>
> You were on the ground being punched by Paini only a minute or so beforehand; and he certainly went looking for you. The Jury did not consider that that amounted to extreme provocation under the law, but it is still right for the Court to take it into consideration when passing sentence;
>
> Although this murder was horrible, it did not involve extreme brutality nor exceptional depravity;
>
> Intoxication does not constitute a defence or excuse to a criminal charge under the law of Tonga.
>
> You will have to live with what happened for the rest of your life.

Your motivation to change.

You have no previous convictions in Tonga, though you have in the US.

Your remorse and concern and the acceptance of a customary apology, the forgiveness from Paini's family and his widow Lute, and her plea for mercy and leniency and that you change and give your life to God.

Your cooperation with the authorities throughout.

I therefore did not find that your offence was of an exceptionally depraved and heinous character or constituted, on account of its design and the manner of its execution, a source of grave danger to the society at large. I did not find circumstances evidencing aggravation of an abnormal or special degree. I accept that it is probable that in due course you can be reformed and rehabilitated. This is not one of the rarest of rare cases where the alternative option of life imprisonment is unquestionably foreclosed.

Sentence

The court therefore sentences you to life imprisonment. I shall also recommend that while you are in prison you should undergo courses in alcohol awareness and anger management. As I have said earlier, the Court has no further discretion to impose any lesser sentence, but you are a young man with your life before you and a life sentence will last a very long time. Having heard all your case and the mitigating circumstances advanced by your Counsel Mr Tu'utafaiva, I shall recommend that, if your conduct in prison remains good, you take these courses in prison, and you avoid further violence, you should be considered for parole or release on licence after you have served around 15 years.

You have expressed concern for your own safety. I must add a warning against anyone taking the law into their own hands for retribution; and say that the law will treat anyone who does so with just as much severity.

Appendix to Sentencing Decision

R v TEVITA VOLA CR 65/05

Legal authorities

State v Makwanyane 1995 (3) SA 391 (South Africa)
Reyes v The Queen [2002] 2 AC 235 (PC)
Furman v State of Georgia 408 US 238 (1972)
Harmelin v State of Michigan 501 US 957 (1991)
Bachan Singh v State of Punjab [1980] 2 SCC 475, [1980] AIR 890
State v Nkwanyana 1990 (4) SA 735 at 743E-745G

Death penalty

The distinctive features of the penalty were emphasised by Justice Brennan in the case of *Furman v State of Georgia*, when he wrote that:

> "Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering ..." [287 & 288]

and he said that:

> "Death is truly an awesome punishment. The calculated killing of a human being by the state involves, by its very nature, a denial of the executed person s humanity. The contrast with the plight of a person punished by imprisonment is evident .... A prisoner remains a member of the human family ... In comparison to all other punishments...the deliberate extinguishment of human life by the state is uniquely degrading to human dignity." [290 & 291]

In *Makwanyane* Justice Chaskalson, the President of the Constitutional Court, said:

> "Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under ... the Constitution. ... In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment." [Para 26]

and in the same case of *Makwanyane* Justice Kentridge said:

> "It may be said that if the punishment is cruel so was the act of the murderer. That cannot and should not be denied. ... proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading. But that does not mean that the State should respond to the murderer's cruelty with a deliberate and matching cruelty of its own. ... that would imply that punishment must not merely fit the crime, but repeat the crime." [Para 197]

Also in *Makwanyane*, Justice O'Regan quoted Justice Brennan in the case of *Furman*:

> "The true significance of [cruel and unusual] punishments is that they treat members of the human race as non-humans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause [in the Constitution] that even the vilest criminal remains a human being possessed of common human dignity."
> [272 & 273]

Arbitrariness

Justice Brennan also stated in the case of *Furman* (in a context ... where a vast number of murders are committed, a large number of accused charged and convicted but relatively few ultimately executed) that:

> "No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible .... Nor is the distinction credible in fact." [274]

On the issue of arbitrariness, Justice Ackermann said in *Makwanyane*:

> "I am mindful of the fact that it is virtually impossible (save in the case of rigidly circumscribed mandatory sentences - which present other dangers) to avoid elements of arbitrariness in the imposition of any punishment. Arbitrary elements are present in the difficult decision to send an offender to prison for the first time, or in deciding what the appropriate length of the prison sentence should be in any case where it is imposed. However, the consequences of the death sentence, as a form of punishment, differ so radically from any other sentence that the death sentence differs not only in degree but also in substance from any other form of punishment. A sentence which preserves life differs incomparably from one which obliterates life. The executed person has, in fact, "lost the right to have rights." In this sense the death sentence is unique and the dimension and consequences of arbitrariness in its imposition differ fundamentally from the dimension and consequences of arbitrariness in the imposition of any other punishment." [Para 164]

Exercising the discretion

In *Bachan Singh v State of Punjab* the Supreme Court of India stated:

> "The Supreme Court should not venture to formulate rigid standards in an area in which the Legislature so warily treads. Only broad guidelines consistent with the policy indicated by the Legislature can be laid down. But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances", ... circumstances found on the facts of a particular case, must evidence aggravation of an abnormal or special degree." [243 E-F, 254 B-C]

> "For making the choice of punishment, ... the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man." ... In a sense, to kill is to be cruel and therefore all murders are cruel.

> But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" [for imposing the death penalty] can legitimately be said to exist."
>
> [251 G-H, 252 A-C]
>
> "There are numerous other circumstances justifying the passing of the lighter sentence, as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts ... ." [255 E-H, 256 A-C]

In the case of *Bachan Singh* the Indian Supreme Court, while not laying them down as guidelines, did refer to examples of aggravating circumstances where a Court might in its discretion impose the penalty of death, such as the murder having been committed after previous planning and involving extreme brutality; or if the murder involved exceptional depravity; or the murder of a member of the armed forces, the Police or a public servant in the course of duty. In the same manner, that Court also noted mitigating factors, such as the offence being committed under the influence of extreme mental or emotional disturbance; the young or old age of the accused; the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society; the probability that the accused can be reformed and rehabilitated; that in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence; that the accused acted under the duress or domination of another person; or that the condition of the accused showed that he was mentally defective and that that defect impaired his capacity to appreciate the criminality of his conduct.

R v Tsay anor

Supreme Court, Nuku'alofa
Ford J
CR 176-77/2004

7 and 8 December 2005; 13 December 2005

Criminal law – display of tobacco advertisement – penal Act - not all elements proved - acquitted

It was alleged that between June and December 2003 both accused permitted the display of a tobacco product advertisement contrary to section 3(a) of the Tobacco Control Act 2000. It was alleged that the words which constituted the "tobacco product advertisement" were printed on "other medium", namely, caps and packets of playing cards. The wording on the caps read "Kuonga New Age. The finest cigarette in the World" and the wording on the packets of playing cards read "Kuonga New Age". Each accused was charged with two identical offences under the Tobacco Control Act 2000.

Held:

1. The Tobacco Control Act was a penal Act and fell to be strictly construed. In a prosecution under the Act it was up to the Crown to establish all the essential elements of the offence beyond reasonable doubt. The prosecution could not rely upon the Court to draw inferences unless a sound factual substratum was established from which it could reliably be concluded that those inferences must inevitably follow.
2. The Court was not prepared simply to infer that "Kuonga" was a cigarette that fitted within the statutory definition of a "tobacco product" in the absence of any evidence on the subject.
3. The Court was not persuaded on the evidence that the defendants displayed or permitted the display of a tobacco product advertisement to the public.
4. Each accused was acquitted accordingly.

Statute considered:
Tobacco Control Act 2000

Counsel for the Crown : Ms Fukofuka
Counsel for the accused : Mr Tu'utafaiva

Judgment

Each accused is charged with two identical offences under the Tobacco Control Act 2000. It is alleged that between June and December 2003 they permitted the display of a tobacco product advertisement contrary to section 3(a) of the Act. A "tobacco product advertisement" is defined, relevantly, as any words "whether written, printed, spoken, broadcast or telecast, including on film, video recording or other medium, ... used to promote the sale of any tobacco product."

In this case it is alleged that the words which constituted the "tobacco product advertisement" were printed on "other medium", namely, caps and packets of playing cards. The wording on the caps read "Kuonga New Age. The finest cigarette in the World" and the wording on the packets of playing cards read "Kuonga New Age".

The wording of section 3(1)(a) of the Act which creates the offence is important and I set the section out in full:

> "Any person who displays, exhibits, announces, broadcast or telecasts, or causes or permits to be displayed, exhibited, announced, broadcast, or telecast or authorises the display, exhibition, announcement, broadcast or telecast to the public of, a tobacco product advertisement commits an offence."

The charge in the indictments is that the accused permitted the display of a tobacco product advertisement and the particulars in relation to each count seem to suggest that the "display" complained about was the action of distributing the caps and packets of playing cards bearing the words referred to. I set out the particulars of count 1 in relation to the first accused in full to illustrate the point:

> "Ming Sen Tsay of Halaleva, between the months of June to December 2003, at Tongatapu, as a director of the company International Metrople Corporation, you did permit the display of a tobacco product advertisement on caps which was (sic) distributed by the said company, and the said tobacco product advertisement read as "Kuonga New Age. The finest cigarette in the World", which was a promotion of the sale of the Kuonga cigarettes which the said company manufactures and sells."

In her helpful written opening statement, the Crown prosecutor summarised the facts upon which the Crown case was based. I will set the relevant passage out in full:

> "On or about the months of July to August 2003, the second accused gave prizes to his employees of a cap which read "Kuonga New Age, the finest cigarette in the World" and a pack of playing cards which read "Kuonga New Age"
>
> On or about the month of September 2003, the second accused gave to two customers, Li Bing Zi and Bi Gui Lin the same cap and playing cards as promotion of the sale of Kuonga cigarettes.
>
> On or about the month of October 2003, one Siosifa Lakalaka was conducting a survey for British American Tobacco and

> found two shops selling playing cards which read "Kolonga New Age".
>
> Also on or about October 2003, Police Officer Fifita bought a carton of Kuonga cigarettes from a delivery truck driven by Bi Gui Lin for his family shop when he was given a cap and playing cards as promotion of the Kuonga cigarettes.
>
> In the same month of October 2003, Police Officers Kama and Finau were investigating a theft and questioned the second accused relating to this. Following this the second accused gave both officers one cap each which read "Kolonga New Age, the finest cigarette in the world."

Putting to one side the allegation that the caps and playing cards were given out as a promotion of Kuonga cigarettes (because this was not established by the evidence), I am prepared to hold that the evidence called by the Crown did establish beyond reasonable doubt the other facts relied upon in the passage I have just cited from the prosecutor's opening.

The defence, as was their entitlement, did not give or call evidence but Mr Tu'utafaiva made a number of submissions in support of his basic proposition that the Crown had been unable to establish a case against his clients.

First, defence counsel submitted that the Crown had failed to prove that any of the wording complained of constituted a tobacco product advertisement because "Kuonga" had not been proved to be a "tobacco product" as that term is defined in the Act. Tobacco product is defined as meaning any tobacco or cigarette. Tobacco in turn is defined as meaning, "any product obtained from the leaf of the Nicotiana tobacum plant or other related plants" and "cigarette" is defined as meaning:

> "Any product which -
>
> (a) consist (sic) wholly or partly of count, shredded or manufactured tobacco, or of any tobacco derivative or substitute, rolled up in a single wrap of paper; and
>
> (b) is capable of being immediately used for smoking."

Mr Tu'utafaiva made the point that no expert evidence was called by the Crown to prove Kuonga came within that definition.

In response to this particular submission, the prosecutor sought to rely upon the evidence of one of the police officers, Constable Fifita. Constable Fifita told the Court that, apart from his police work, he also operated a family shop and he sold Kuonga cigarettes. Crown counsel submitted that as no challenge had been made to that statement by the police constable, it followed that Kuonga could be taken to be a tobacco product within the meaning of the Act.

The Court was, in fact, told nothing about the Kuonga product. No Kuonga cigarettes or cigarette packets were produced in evidence or shown in the photographs exhibited. In the absence of any evidence on the subject, the Court is, therefore, being invited to infer that the Kuonga cigarettes Constable Fifita referred to came within the statutory definition.

The Tobacco Control Act is a penal Act and, as such, it falls to be strictly construed. In a prosecution under the Act it is up to the Crown to establish all the essential elements of the offence beyond reasonable doubt. The prosecution cannot rely upon the Court to draw inferences unless a sound factual substratum has been established from which it can reliably be concluded that those inferences must inevitably follow.

If a penal Act has a particular definition of a crucial term making up the offence then it is up to the Crown to prove that the definition in question applies in the case before the Court. Not infrequently, to save having to call expert evidence on such a point, Crown counsel will be able to reach agreement on the issue with defence counsel prior to the trial but that was not the position in the present case. In the absence, therefore, of any evidence whatsoever on the subject, I am not prepared simply to infer that "Kuonga" is a cigarette that fits within the statutory definition of a "tobacco product".

Mr Tu'utafaiva's second submission was that there was no evidence that the accused had displayed or permitted the display of a tobacco product advertisement to the public within the meaning of the Act. Counsel made the point noted earlier in this judgment that the act of distributing a limited number of caps and playing cards would be insufficient in itself to constitute a display to the public. I accept that submission and I also accept that, although the punctuation marks may give rise to some ambiguity, it is a fundamental requirement of an offence under section 3(1)(a) that the display, exhibition etc must be "to the public."

The "Shorter Oxford English Dictionary, fifth edition (2002) defines display as:

> "The action or an act of displaying or exhibiting to view. The presentation of printed matter in such a way as to make it visually prominent."

During final submissions, the Court invited Crown Counsel to identify with precision the strongest evidence the Crown relied upon to support the proposition that there had been a display to the public. The prosecutor in response referred to the evidence of Constable Kama. Constable Kama told the Court that he and another police officer had gone to see the first accused, Mr Tsay, in October 2003 in the course of an investigation into the theft of some sandalwood. His evidence was that on that occasion Mr Tsay had given the two police officers two caps and three packets of playing cards. The officer said: "He gave them to us as a gift because we were acquainted with this person." When asked to identify a cap in one of the photographs, the Constable replied, "this is the cap I wore."

It was this particular passage in the evidence that Crown Counsel identified as the strongest point in the prosecution case to show that the accused had permitted the display of a tobacco product advertisement to the public. There was absolutely no evidence, however, to show where or when the Constable wore the cap. The constable was not asked any questions, in fact, about whether he wore the cap. The comment the Crown relies upon was simply a throwaway line in response to an invitation to identify the item shown in the photograph.

On the evidence, I have not been persuaded that the defendants did display or permit the display of a tobacco product advertisement to the public.

There is another section in the Tobacco Control Act, section 3(1)(c), which makes it an offence to distribute or permit to be distributed to the public any leaflet or

document that is a tobacco product advertisement. Crown counsel freely acknowledged that the word "distributes" would be a more appropriate description of the alleged activities of the defendants in giving away caps and packets of playing cards but she rightfully conceded that caps and playing cards could not be described as a "leaflet or document".

My findings on these two crucial aspects of the evidence really dispose of the case but Mr Tu'utafaiva also submitted that no evidence had been produced to show the status of the second defendant, International Metrople Corporation Ltd. In a statement to the police, Mr Tsay said that the printing on the caps and packets of playing cards was done without his knowledge by the "people in China". He referred to another director of the company who lived in Taipei, Taiwan, and he told the police that the work was carried out on that other director's instructions. Mr Tu'utafaiva stressed that no evidence had been called or produced to show that the second defendant had any legal status in the Kingdom.

In response, the prosecutor told the Court from the Bar that an officer from the Companies Office had been subpoenaed but was not called as a witness because he was unable to locate a file relating to the second defendant. I suspect that the Company would need to be registered in Tonga in order to carry on business in the Kingdom but given the references to China and Taiwan, it is conceivable, in the absence of any other evidence on the subject, that the second defendant may be based in one or other of those countries and again, therefore, I must uphold Mr Tu'utafaiva's submissions on this ground.

Finally, defence counsel referred to section 16 of the Tobacco Control Act which provides that if a body corporate commits an offence against the Act then each director or other person concerned in the management of the Company is also guilty unless the director or other person proves that he exercised reasonable diligence to prevent the commission of the offence. Mr Tu'utafaiva simply made the point that, as Mr Tsay had not been charged under that section, he was not subject to any statutory onus of proof. That would appear to be a correct analysis of the position although given my other findings, it is unnecessary to express a final view on this issue.

For the reasons set out above, I am not satisfied that the charges have been established and each accused is acquitted accordingly.

R v Tau anors

Supreme Court, Nuku'alofa
Ford J
CR 239-41/2005

14 and 15 December 2005; 15 December 2005

Criminal law – possessions of drugs – not proved beyond reasonable doubt – not guilty

On 8 March 2005 the police pursuant to a warrant conducted a search of a fale. They arrived at the property around midday. Inside the fale were the occupier, Nausaimone, and two of the accused, Latu Tau, a male, and Tilila Pousini, a female. The other accused, also a female, 'Ofeina Save, was outside the fale hanging out washing. Two items of cannabis were found. The three accused were each charged with one count of possession of an illicit drug contrary to section 4(a) of the Illicit Drugs Control Act 2003. The particulars in the indictment alleged that on 8 March 2005 at Popua they knowingly without lawful excuse had in their possession cannabis leaves and seeds. Each of the accused made an unsworn statement to the police denying any knowledge whatsoever of the cannabis found in the blue shorts and the Port Royal pouch. As was their right, they elected not to give or call evidence at the trial but they did reaffirm the accuracy of the statements they had made to the police. Their defence was that they had no knowledge whatsoever of the existence of the cannabis items in question.

Held:

1. Direct proof of knowledge of the presence of the items in question was not essential and that knowledge may be inferred or imputed from the circumstances. The question to be answered in each case was whether on the facts the accused was proved to have or ought to have imputed to him the intention to possess or the knowledge that he did possess what was in fact a prohibited substance.
2. The two accused, Latu and Tilila, said that they had arrived at the property only a short time before the police. This was not rebutted. The Court did not consider that the charges against Latu and Tilila were established beyond reasonable doubt.
3. The third accused, 'Ofeina, lived at the fale with her husband who pleaded guilty to possession of one seed that was found in his short's pocket. Given her husband's admission and the lack of any other evidence on the subject, the Court was not prepared to infer that 'Ofeina would have necessarily known about the presence of the one seed in the pocket of the shorts.

4. In relation to the specific charges faced by each accused the Court was not persuaded of their guilt beyond reasonable doubt and they were each accordingly acquitted.

Case considered:
R v Tongatu'a [2005] TOSC 30

Statute considered:
Illicit Drugs Control Act 2003

Counsel for Crown : Ms Guttenbeil-Pole'o
The three accused in person

Oral Judgment

The three accused are each charged with one count of possession of an illicit drug contrary to section 4(a) of the Illicit Drugs Control Act 2003. The particulars in the indictment simply allege that on 8 March 2005 at Popua they knowingly without lawful excuse had in their possession cannabis leaves and seeds.

The Crown's case was that on 8 March 2005 the police, pursuant to a warrant, conducted a search of a traditional Tongan fale at Popua occupied by Nausaimone Kitekei'aho. They arrived at the property around midday. Inside the fale were Nausaimone and two of the accused, Latu Tau, a male, and Tilila Pousini, a female. The other accused, also a female, 'Ofeina Save, was outside the fale hanging out washing.

The court was not given the dimensions of the fale but helpful photographs were produced and it would appear to be approximately 12 feet wide and perhaps 15 feet in length. It has a door at the front and another opening along one of the walls which witnesses spoke about either as a door or a window. I will refer to it as a window. The outside walls of the fale are made of dried palm tree leaves. The court was told that inside the fale two bedrooms have been created with walls made of cardboard and cloth. The rest of the inside of the fale appears to be an open living area.

Two items of cannabis were found. In one of the bedrooms a police officer found, inside the pocket of a pair of men's blue short pants, a small piece of tinfoil and inside the foil was one cannabis seed. Then, in the living room, another officer found a folded up Port Royal tobacco pouch and inside the pouch were four cannabis seeds and another small rolled up foil containing a mixture of seeds and brownish cannabis leaves and flowers weighing approximately 0.3 g. The Port Royal pouch was located on a stem of one of the coconut leaves which made up the exterior wall of the fale. It was only about 8 inches away from the frame of the window I have already referred to.

Another item found on the floor of the fale was a crumpled empty "Kist" orange drink can. The can had a small air hole punctured on one side and one of the officers from the drug squad was able to identify it as a can used for inhaling cannabis. The officer explained how the can is held on its side, cannabis seed is placed inside the can and then the bottom side of the can is heated. The user inhales the cannabis aroma through the tab opening at the end of the can.

There was no challenge made to the identification of the suspected cannabis items. The Crown called evidence from the Senior Medical Laboratory Technician at Vaiola Hospital Laboratory Services. He explained the test procedures he carried out and confirmed that, upon examination, the substances all proved positive for cannabis. Reliable evidence was also called from the police officers who had been involved in safekeeping the exhibits.

The three accused were unrepresented by legal counsel but Mr Tau did cross-examine a number of the police witnesses. The thrust of his cross-examination was directed to obtaining confirmation from the officers that none of the three items in question, or any other suspected substance, had been found on any of the accused.

Each of the accused made an unsworn statement to the police denying any knowledge whatsoever of the cannabis found in the blue shorts and the Port Royal pouch. As was their right, they elected not to give or call evidence at the trial but they did reaffirm the accuracy of the statements they had made to the police. In short, their defence was that they had no knowledge whatsoever of the existence of the cannabis items in question.

Crown counsel accepted that she had the onus of proving beyond reasonable doubt all the elements of the offences. The elements involved in establishing a charge of possession were recently reviewed by Webster CJ in *R v Tongatu'a* [2005] TOSC 30, 29 November 2005. The Chief Justice referred to the following text in **Archbold** 2005 at para 26.61:

> "A person is in possession of something when he has knowledge of its presence and some control over it; but he would not have possession unless he either knew, or the circumstances were such that he had the opportunity, whether he availed himself of it or not, to learn or to discover in a general way, what the items were."

The Chief Justice referred to other authorities noting that direct proof of knowledge is not essential and that knowledge of the presence of the items in question may be inferred or imputed from the circumstances. The question to be answered in each case is whether on the facts the accused was proved to have or ought to have imputed to him the intention to possess or the knowledge that he did possess what was in fact a prohibited substance.

There were no lay witnesses called by the Crown. Apart from the hospital Laboratory Technician, the prosecution's other seven witnesses were all police officers. In considering the factual scenario, therefore, it is necessary to refer to the unsworn statements made by each of the accused to the police.

It is clear from the evidence given in relation to the search warrants that the person the police were targeting on the day in question was Nausaimone. He had recently returned from Fiji. The court was told little about Nausaimone but he apparently has a wife and children in Fiji and, while in Tonga, he lives in a de facto relationship with the second accused, 27-year-old Tilila.

Nausaimone travelled to Fiji on 26 February 2005. Prior to that he and Tilila had been living in the Tongan fale at Popua. He returned to Tonga on Saturday 5 March 2005. Upon his return he took a taxi from the airport to Tilila's parents house in Haveluloto where Tilila was then living. He stayed there only a short time, however, on the Saturday before travelling on to the Tongan fale at Popua.

On the morning of Monday 7 March, Tilila visited Nausaimone at Popua and in the afternoon they travelled out to his parent's house at Houma where they both stayed the night. On the morning of Tuesday 8 March Nausaimone and Tilila returned from Houma. Tilila went directly to her parents' home at Haveluloto and Nausaimone carried on to Popua. Tilila told the police that later that morning she was waiting for a bus and the first accused, Latu Tau, came along, picked her up, and they travelled to Popua together.

Latu Tau is a married man. He said in his unsworn statement to the police that he was living at Kolonga at the time and he had travelled into town that day to hand in a visa application to visit New Zealand. He said that he also wanted to have a necklace made and that is why he wanted to see Nausaimone at Popua. He had known Nausaimone for some time and he was aware that he made and sold necklaces at the Talamahu market.

Continuing in his statement to the police, Latu said that he and Tilila arrived at Nausaimone's Tongan fale at Popua around midday and they were only there around two minutes when the police arrived to carry out their search. Two of the police officers had said that when they entered the fale to carry out the search, Latu was sitting on the floor close to the Port Royal packet which was found on the wall. In an unsworn submission Latu made to the court, he strongly denied that allegation. He said that he had been sitting just inside the door of the fale when the police arrived and he was the first to go outside. He said that he was outside the fale when the police read out the search warrant and he was not inside the fale when the police entered.

Although those statements were not presented as evidence on oath, I am inclined to accept them. I believe it would have been a natural reaction for Latu to have gone outside as soon as the police arrived to see what was going on. Moreover, I did not find the police evidence on this particular aspect of the case entirely convincing.

Like the other two accused, Latu denied any knowledge of the cannabis in the trouser pocket or the Port Royal tobacco pouch. Crown counsel submitted that knowledge of the presence of the cannabis could be inferred or implied from the circumstances of the case. Referring first to Latu, the prosecutor acknowledged that he was only a visitor to Nausaimone's fale but she stressed that the Port Royal tobacco pouch was "not hidden" and the Kist soft drink can was just lying on the living-room floor.

I accept that the Port Royal tobacco pouch was clearly visible but the small quantity of cannabis in the foil inside the pouch could not be seen unless someone unfolded the pouch and looked inside. I have no doubt, on the evidence, that the Port Royal tobacco pouch belonged to Nausaimone. The difficulty for the prosecution is that, although Nausaimone was apprehended with the others and taken to the police station, he apparently somehow absconded and is now believed to be living in Fiji.

Latu said in his statement to the police that he had only arrived at the property a short time before the police arrived. Tilila made a similar comment. Presumably that was a matter which the police could very easily have checked out as part of their investigation. They could for example, if it was available, have called evidence from neighbours or others to challenge the arrival time given by these two accused but no evidence of that nature was presented. There is no evidence before me, in other words, to rebut the statements made by Latu and Tilila that they had arrived at the property only a short time before the police.

I do not see the presence of the Kist soft drink can on the ground inside the fale as helping the prosecution case. Even accepting the evidence from the drug squad officer about the link between the can and the smoking of cannabis, the presence of the can does not, in my view, lead inextricably to the inference that the accused must have known that the cannabis seeds were inside the rolled up Port Royal tobacco pouch on the wall.

There was no evidence to suggest that anyone had been smoking cannabis in the fale when the police arrived. There were none of the usual tell-tale signs such as the presence of smoke or the distinctive cannabis aroma. There was no evidence that the Kist can was hot or warm from recent use.

The prosecutor emphasised that in relation to Tilila, she was Nausaimone's de facto partner and that she usually spent the night at the fale. While that is true, there is no evidence that she had spent the night at the fale since Nausaimone left for Fiji on the 26th of February and I cannot accept that the Port Royal pouch would have been sitting where it was since that date.

For these reasons, I do not consider that the charges against Latu and Tilila have been established beyond reasonable doubt.

With 'Ofeina the position is a little different. She lived in the fale at Popua with her husband, Takaunove Save, who is Nausaimone's half brother. As mentioned earlier, she was hanging out washing when the police arrived. Her husband was at work. Crown counsel submitted that as an illicit drug was found in her bedroom, her knowledge of its presence can properly be inferred. The drug, counsel is referring to in this regard, is the single cannabis seed found in one of the pockets of the pair of men's blue shorts.

'Ofeina's husband has been charged with possession of that seed and he has pleaded guilty. He is still to be sentenced. His explanation was that someone had given him the seed sometime earlier. Given her husband's admission and the lack of any other evidence on the subject, I am not prepared to infer that 'Ofeina would have necessarily known about the presence of the one seed in the pocket of the blue shorts.

In relation to the Port Royal tobacco pouch, the prosecutor sought to rely on certain answers 'Ofeina had given in her interview with the police. She was asked by the police about the marijuana leaves and seeds and she said that she knew nothing about them. She was then asked who they belonged to and she replied "Nausaimone". The accused was further asked:

> "Q. 33. 'Ofeina, all these things that you've just said in question 32, one foil that had one marijuana leaf and four marijuana seeds, where was this put in?
> A. Inside the Port pouch."

The problem with that question and answer is that no indication is given as to the timing of the accused's knowledge. If she knew before the police visit of the presence of the cannabis inside the tobacco pouch then it could properly be inferred that she had possession of the substance. What I suspect, however, is that the only reason she was able to give the answer she did was because, following the police search, she like everyone else involved would have been aware of the cannabis found inside the Port Royal tobacco pouch.

So although one cannot help but have suspicions about the involvement of all of the accused in the drug scene, suspicions alone can never form the basis for a

successful prosecution. In relation to the specific charges faced by each accused, therefore, I have not been persuaded of their guilt beyond reasonable doubt and they are each accordingly acquitted.

R v 'Ake

Supreme Court, Nuku'alofa
Webster CJ
CR 140/05

12-14 and 16 December 2005; 20 December 2005

Criminal law – murder – provocation – murder proved

There was a public holiday on 4 May 2005 and the accused, 'Alekisanita 'Ake, spent a large part of that day drinking homebrew with some companions in a drinking party, which included the eye-witnesses, and also at a later stage the victim Fekumi. They were drinking from a bucket which initially contained around 20 litres of homebrew. When the victim was drunk his behaviour sometimes provoked people to anger, in the sense that he was very hard to control. During the course of the day the victim attacked the accused at least twice and possibly up to four times. Later that night the accused was very angry with the victim and used an iron bar to hit him about the head. The victim was taken to hospital and died without regaining consciousness about two hours later. The accused was charged with murder, and alternatively manslaughter and grievous bodily harm. He pleaded guilty to the alternative count of manslaughter, but that plea was not accepted by the prosecution, so the case came to trial on the count of murder.

Held:

1. In a case of murder the Court was not entitled to find the necessary intention, unless it was sure that death or really serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the actions of the accused, and that he appreciated that such was the case. The prosecution only had to prove that the accused had the necessary intention at the time of the alleged offence: it need not have been a long-standing intent and it was sufficient for it to have been formed in a matter of seconds, for example in a sudden flash of temper.
2. It was not murder if it was proved that the accused was deprived of the power of self-control by an extreme degree of provocation given by the victim which was of such a kind either by reason of its violence or of accompanying words, gestures or other circumstances of aggravation, as to be likely to deprive any person of ordinary character being in the circumstances in which the accused was, of the power of self-control.
3. Provocation was not a complete defence; it reduced what would otherwise be murder to the lesser offence of manslaughter by reason of provocation.

Because the prosecution must prove the accused's guilt, once the issue of provocation was raised, it was for the prosecution to establish beyond reasonable doubt that this was not a case of provocation, and not for the accused to establish that it was.

4. The court found that the mode of resentment did not bear a reasonable relationship to the provocation. The prosecution established beyond reasonable doubt that it was not a case of provocation.
5. It was established beyond reasonable doubt that the accused was guilty of murder.

Cases considered:

DPP v Camplin [1978] 2 All ER 168,180 (HL)
R v Baillie [1995] 2 Cr App R 31, 38 [1995] Crim LR 739 (CA)
R v Brown [1972] 2 All ER 1328, 56 Crim App R 564 (CA)
R v Duffy [1949] 1 All ER 932 (CCA)
R v Hennigan [1971] 3 All ER 133 (CA)
R v McCarthy, 38 Cr App R 74, 80-82 (CCA)
R v Smith [1959] 2 All ER 193
R v Smith (Morgan) [2001] AC 146; [2000] 4 All ER 289 (HL); [2000] UKHL
R v Thornton 96 Crim App R 112 (CA)
R v Whitfield (1976) 63 Cr App R 39 (CA)

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown : Ms Simiki
Counsel for accused : Mr Fifita

Judgment

Preliminary

The Defendant 'Alekisanita 'Ake was charged with murder, and alternatively manslaughter and grievous bodily harm, following the death on 4 May 2005 of Fekumi Matekuolava. He pleaded guilty to the alternative count of manslaughter, but that plea was not accepted by the prosecution, so the case came to trial before me sitting as Judge alone on the count of murder.

Indictment

The principal charges against the Defendant were as follows:

> Count 1:
> MURDER, contrary to section 87(1)(b) of the Criminal Offences Act (Cap 18)
>
> 'Alekisanita 'Ake, on or about the 4th of May 2005, at Tokomololo, you did murder Fekumi Matekuolava when you had the intention to cause him bodily injury which you knew

was likely to cause death, and you were reckless whether death ensued or not, and you used an iron rod and hit him twice in the head causing severe head injuries leading to his death.

In the alternative:

Count 2:
MANSLAUGHTER, contrary to section 92 and 93 of the Criminal Offences Act (Cap 18)

'Alekisanita 'Ake, on or about the 4th of May 2005, at Tokomololo, you did cause the death of Fekumi Matekuolava when you used an iron rod to hit him twice on the head which caused severe head injuries leading to his death.

Evidence and submissions

The prosecution led evidence from PC Patelesio Tu'itavuki, Police photographer; Mrs 'Unaloto Matekuolava, Tokomololo, the victim Fekumi's mother; Mr 'Alaipulotu Tu'alau, Tokomololo; Mr Filimone Hafoka Finau, Mr 'Aufuato Kaufusi, and Mr Samuela Polota, all of Tokomololo and all eye-witnesses who were participants in the drinking party along with the Defendant and the victim; A/Chief Inspector Siaosi Helepiko, CID, who recorded the Defendant's interview, answer to charges and confession and subsequent demonstration; and Dr Siosaia Piukala, Vaiola Hospital, the surgical Medical Officer who saw the victim Fekumi before his death and prepared the Medical Report. The prosecution also produced a number of photographs and documentary and material exhibits. The defence led no evidence.

In general I accepted the witnesses for the prosecution as credible and reliable witnesses, though the members of the drinking party were drunk at the time, except that Samuela had slept at the bush allotment at Lomaiviti. Although Filimone appeared a somewhat reluctant witness, even he admitted hearing the Defendant saying he would hit Fekumi "to die".

On completion of the evidence I heard submissions in support of their respective cases from the defence and prosecution. These centred on the principal issue in this case of whether there was extreme provocation in terms of sections 88, 89 and 90 of the Criminal Offences Act.

Principal findings in fact

The basic facts were mostly undisputed, and the issues were about the conclusions and inferences to be drawn from them. These are the facts that I find established:

There was a public holiday on 4 May 2005 and the Defendant spent a large part of that day drinking homebrew with some companions in a drinking party, which included the eye-witnesses, and also at a later stage the victim Fekumi. They were drinking from a bucket which initially contained around 20 litres of homebrew.

Filimone said in evidence that when Fekumi was drunk his behaviour sometimes provoked people to anger, in the sense that he was very hard to control; that he would not like it if Fekumi acted with that sort of behaviour towards him; and that he would have lost control of himself. 'Aufuato said such provocation was

Fekumi's normal behaviour when drinking, and that was how he behaved that day, but no-one had ever attacked Fekumi before with something like an iron bar.

The drinking party began at a bush allotment in Tokomololo around 10.00 or 11.00 am but about an hour later the victim and some friends arrived, and the Defendant told the drinking party that he did not want the victim Fekumi to join the drinking party and that they should find another drinking spot. The drinking party then moved to another allotment near Fonongahina but the victim and his friends also came there, so the Defendant told in his friends to move back to Tokomololo to his family's bush allotment near Lomaiviti, but by the time they arrived there around 5.00 to 5.30 pm the victim also arrived and the Defendant realised that he would not be able to avoid the victim, so they all sat down to continue drinking the homebrew.

About 1 hour later the Defendant told the drinking party that he was upset about the victim Fekumi and on between 2 and 4 occasions the victim and the Defendant started to get into a fight but were stopped and held away from each other by other members of the drinking party. Filimone said Fekumi had been swearing and he and the Defendant had been attacking each other. Filimone said it was twice in his evidence-in-chief, but agreed in cross-examination that it could have been more than 4 times, then in re-examination said he only remembered it twice. 'Aufuato heard Fekumi say to the Defendant that if he wanted to fight they should fight, and if he did want to hit him he should come and do so. 'Aufuato was not sure that it was more than twice that Fekumi attacked the Defendant at that time. The Defendant had told Fekumi that he did not want to fight. In his recorded interview (see below) the Defendant said it was four times. However all the witnesses were drunk at the time, and, while it is not crucially relevant to this decision because it took place much earlier than the defendant's attack on Fekumi, on the evidence all I can be certain of is that Fekumi attacked the Defendant at least twice, but possibly up to 4 times.

Around a further hour later the Defendant and his friends left for the village of Tokomololo, which took around 5 minutes to reach, and they separated, but a few minutes later the victim Fekumi also arrived. During that time Filimone went home, with 'Aufuato and Fekumi, then they parked the vehicle at Tualau's house and checked at Kimami's house. 'Aufuato had told the Defendant not to worry about Fekumi's behaviour because he was drunk. Samuela invited the Defendant to come and eat with them, as his family were at Kimami's house, but he heard Fekumi calling out to the Defendant from about 20 m away.

After exchanging words, the Defendant was going away because of Fekumi's swearing and shouting, but then Fekumi began shouting and swearing at the Defendant, using the Tongan words Lemu and Matausi, coupled with the name of the Defendant and his village Tokomololo, which is very offensive in Tonga. He used these words twice or 3 times or more. 'Aufuato said Fekumi was also telling the Defendant to come and hit him. The Defendant told the victim to move aside, and Filimone heard the Defendant (who he said looked very angry and also very drunk) say he "would hit him to die". 'Aufuato also said the Defendant was drunk.

Samuela heard someone calling out to the Defendant whether he would be able to kill him. Samuela then heard the Defendant saying "I am sick of you carrying out these acts towards me, so just move over and I will hit you".

The Defendant was very angry at this stage and uprooted from a back kitchen nearby an iron bar used for coconut de-husking. It was produced in Court [Exhibit 4] and it was solid and heavy, about 3 feet long; and Samuela estimated it weighed about

2 kg. When Filimone saw the Defendant with the iron bar behind his back ('Aufuato said he was trailing it on the ground behind him), Filimone removed it and threw it away, but the Defendant came and attacked Fekumi and the others held him away. Fekumi was not holding anything when the Defendant went to attack him.

Filimone and 'Aufuato then got back into the vehicle and were intending to go for more alcohol to continue on with their drinking. Filimone was driving and said he did not clearly recall seeing Fekumi and the Defendant when they drove off, though I found that evidence rather incredible, as his passenger 'Aufuato clearly saw what happened.

The Defendant must then have picked up the iron bar again and walked up to the victim Fekumi. While Fekumi was lying on the ground 'Aufuato saw the Defendant hit Fekumi with the iron bar, twice on the left side of the upper part of his body. The medical evidence showed that Fekumi was hit twice on the head and once on the chest.

Samuela also saw Fekumi on the ground with the Defendant standing over him around his waist, facing his head; and he saw the defendant hitting him twice behind the ear and on part of his ear with the iron bar. Samuela demonstrated in evidence how the Defendant held the iron bar with 2 hands about waist level and swung it powerfully downwards in a golf- or cricket-type stroke to hit Fekumi with considerable force. Samuela then pushed the Defendant aside and bent down and kissed Fekumi and touched his face, when he noticed blood coming out of his ears and mouth. The Defendant was standing beside Samuela and apologised to him and asked Samuela to take Fekumi to hospital, which he did. During the journey Samuela continually called Fekumi's name and he answered "Ko au" (I am here).

The iron rod was later found nearby by 'Alaipulotu, who lived in Tualau's town allotment and had not been among the drinking party.

Fekumi died at Vaiola Hospital without regaining consciousness around 2 hours later at about 10.00 pm on 4 May.

The medical report [Exhibit 9] by Dr Siosaia Piukala, the surgeon who was called in to see Fekumi, was:

> "MEDICAL REPORT ON POLICE CASE
>
> MATEKUOLAVA FEKUMI M 23 yrs T
>
> TOKOMOLOLO 04/05/05 2145 hrs
>
> Type of case:
> Assault with Severe Bodily Harm
>
> Examination & Finding:
>
> Deeply unconscious with a Glasgow Coma Scale of 3
> Not responsive to anything
> Both pupil fully dilated, fixed and not reactive to light
> Laceration left temporo-parietal scalp and left side of upper face
> Skull X-ray – fracture through temporal region left side
>
> Opinion:

> Examination and findings were consistent with the deceased being hit with a hard object on the head several times sustaining severe head injury leading to his death."

Dr Piukala's evidence confirmed that Report and he said that with all the injuries Fekumi had the prognosis was not good, even if better medical attention had been available. A Glasgow Coma scale of 3 was very, very bad and the chances of survival were not good. He said Fekumi had been hit on the head several times with a lot of force with a very hard object.

The Defendant was arrested at around 2.00 am the following morning and later that day recorded an interview [Exhibit 5] with the police and subsequently attended and took part in a demonstration at the scene of the crime, where photographs were taken [Exhibit 1]. In the Record of Interview, the evidence of which was not challenged at this trial, the Defendant answered:

> "10. Were you intoxicated at the allotment before you moved into town?
> Yes
> 11. Did anything happen at the bush or was it time for you to come back to town?
> Yes
> 12. Approximately what time was this?
> Maybe 1 in the afternoon
> 13. What happened?
> We were drinking and the guy attacked me and I told him to stop again he attacked me and I told him to stop and the fourth time he did, I told him that I would hit him and then it was time for us to move into town.
> 14. Who was the guy that continually attacked at you?
> Fekumi Matekuolava
> 15. Why did he attack you?
> He was angry with me because he thought I was about to tell him to go away from our drinking
> 16. And when you came to town, where about in town did you go to?
> On the vacated land near the Free Wesleyan Church of Tokomololo..
> 17. What alcohol did you consume there?.
> Homebrew
> ...
> 20. Why did you finish drinking?
> It finished when I hit Fekumi Matekuolava.
> 21. Please explain what happened?
> We had moved our drinking into town, and this person again attacked me and I told him that I would hit him and I did hit Fekumi Matekuolava.
> 22. Alekisanita, please explain how you hit Fekumi Matekuolava?
> I went and got a crow bar and hit him twice on the head.

23. Where was the crow bar from?
A crow bar used for husking coconut at Palu Tualau's house.
24. Can you estimate the distance of where you were drinking to that of the crow bar?
Maybe about 30-40 feet.
25. Were you angry with Fekumi Matekuolava?
Yes.
26. When did you start getting angry at Fekumi Matekuolava?
It started when we were drinking at the bush.
27. If you were shown the crow bar that you used to hit Fekumi with would you be able to remember it?
Yes.
28. Please look at this coconut husking crow bar, Alekisanita was given the crow bar and he held and looked at it.
It is the crow bar."

The law

In relation to the charge of murder, the relevant sections of the Criminal Offences Act (Cap 18) are:

> Definition of homicide.
> 85. Homicide is the killing of a human being by any means whatsoever and is either culpable or not culpable.
>
> Definition of culpable homicide.
> 86. (1) Culpable homicide consists in the killing of any person either -
> (a) by an unlawful act;
> (2) Culpable homicide is either murder or manslaughter.
>
> When culpable homicide amounts to murder.
> 87. (1) Culpable homicide is murder in any of the following cases –
> *(a)* ...
> *(b)* if the offender intended to cause to the person killed any bodily injury which the offender knew was likely to cause death and was reckless whether death ensued or not; or ....

Essential elements of murder

Therefore the essential elements of Count 1, on which the Court must be satisfied beyond reasonable doubt to find the Defendant guilty of murder, are that it was the Defendant who:

1. by an unlawful act (ie not an act allowed by law);
2. intended to cause the victim Fekumi a bodily injury;
3. which the Defendant knew was likely to cause death;
4. and was reckless whether death ensued or not - what I shall refer to as an intention to inflict a lethal injury;

5. and the unlawful act caused the death of the victim Fekumi.

In a case of murder the Court is not entitled to find the necessary intention, unless it is sure that death or really serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the actions of the Defendant, and that he appreciated that such was the case. The prosecution only has to prove that the Defendant had the necessary intention at the time of the alleged offence: it need not have been a long-standing intent and it is sufficient for it to have been formed in a matter of seconds, say in a sudden flash of temper.

Provocation

It is not murder if it is proved on behalf of the Defendant, as submitted by the Defendant's Counsel, that he was deprived of the power of self-control by an extreme degree of provocation given by the other person, the victim Fekumi, such as an unlawful assault committed on the Defendant by Fekumi, which was of such a kind either by reason of its violence or of accompanying words, gestures or other circumstances of aggravation as to be likely to deprive any person of ordinary character being in the circumstances in which the Defendant was, of the power of self-control.

If the Court finds that the Defendant was deprived of the power of self-control by such extreme provocation given by Fekumi, then the Defendant is deemed to be guilty of manslaughter by reason of provocation and not of murder.

The relevant provisions in the Act in relation to provocation are:

> When culpable homicide is manslaughter only.
> 88. A person who commits culpable homicide shall be deemed to be guilty of manslaughter and not of murder if any of the following matters are proved on his behalf; namely –
> *(a)* that he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 89 hereof; or
> *(b)* ... ; or
> *(c)* ...
>
> What matters amount to extreme provocation.
> 89. The following matters may amount to extreme provocation to one person to cause the death of another person namely –
> *(a)* an unlawful assault committed upon the accused person by the other person which was of such a kind either by reason of its violence or of accompanying words, gestures or other circumstances of aggravation as to be likely to deprive any person of ordinary character being in the circumstances in which the accused person was, of the power of self-control;
> *(b)* ... ;
> *(c)* ... ;
> *(d)* ...

When extreme provocation will not avail.

90. (1) Notwithstanding proof on behalf of the accused person of any such matter of extreme provocation as is mentioned in section 89 hereof, his crime shall not be deemed to be thereby reduced to manslaughter if it appears either from the evidence given on his behalf or on behalf of the prosecution –

(a) that he was not in fact deprived of the power of self-control by the provocation; or

(b) that he acted wholly or partly from a previous purpose to cause death or harm or to engage in an unlawful fight whether or not he would have acted on that purpose at the time or in the manner in which he did act had it not been for the provocation; or

(c) that after the provocation was given and before he did the act which caused the harm, such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control; or

(d) that his act was in respect either of the instrument or means used or of the brutal manner in which it was used, greatly in excess of the measure in which a person of ordinary character would have been likely under the circumstances to be deprived of his self-control by the provocation.

(2) ...

Provocation is not a complete defence, leading to a verdict of Not Guilty. It reduces what would otherwise be murder to the lesser offence of manslaughter by reason of provocation. Because the prosecution must prove the Defendant's guilt, once the issue of provocation is raised, it is for the prosecution to establish beyond reasonable doubt that this was not a case of provocation, and not for the Defendant to establish that it was.

Referring to Archbold (see now Archbold 2005 para 19-56) Ms Simiki referred to the classic definition of provocation given in *R v Whitfield* (1976) 63 Cr App R 39 (CA), 42, repeating what was said by Devlin J in *R v Duffy* [1949] 1 All ER 932 (CCA):

> "Provocation is some act, or series of acts, done [or words spoken] [by the dead man to the accused] which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."

In *Whitfield* Goddard LCJ then added:

> "There are of course, as is now well known, two features in that definition: the subjective feature requiring that the accused himself should have lost his self-control, and secondly the objective feature which requires that a reasonable man should have been similarly affected."

Referring to Archbold 2005 para 19-61, more recently in *R v Smith (Morgan)* [2001] AC 146, [2000] 4 All ER 289 (HL), [2000] UKHL in the principal speech in the House of Lords in London Lord Hoffmann said:

> "Judges should not be required to describe the objective element ... by reference to a reasonable man, with or without attribution of personal characteristics. They may instead find it more helpful to explain in simple language the principles of the doctrine of provocation. First, it requires that the accused should have killed while he had lost his self-control and that something should have caused him to lose his self-control ... . Secondly, the fact that something caused him to lose his self-control is not enough. The law expects people to exercise control over their emotions. A tendency to violent rages or childish tantrums is a defect in character rather than an excuse. The jury must think that the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter. This is entirely a question for the jury. In deciding what should count as a sufficient excuse, they have to apply what they consider to be appropriate standards of behaviour, on the one hand making allowance for human nature and the power of emotions but, on the other, not allowing someone to rely upon his own violent disposition. In applying these standards of behaviour, the jury represent the community and decide, as Lord Diplock said in *Camplin* ([1978] 2 All ER 168 (HL)), what degree of self-control 'everyone is entitled to expect his fellow citizens will exercise in society today' ... ."
>
> The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in an appropriate case be told, in whatever language will best convey the distinction, that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the particular case. So the jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonable have expected to him and which it would be unjust not to take into account. If the jury take this view, they are at liberty to give effect to it."

Referring further to Archbold 2005 para 19-62, drunkenness will not avail the accused, see *DPP v Camplin* [1978] 2 All ER 168,180 (HL) per Lord Simon:

> "The original reasons in this branch of the law were largely reasons of the heart and of common sense, not the reasons of pure juristic logic. The potentiality of provocation to reduce

murder to manslaughter was, as Tindal CJ said in *R v Hayward*, 'in compassion to human infirmity'. But justice and common sense then demanded some limitation: it would be unjust that the drunk man or one exceptionally pugnacious or bad-tempered or over-sensitive should be able to claim that these matters rendered him peculiarly susceptible to the provocation offered, where the sober and even-tempered man would hang for his homicide. Hence, I think, the development of the concept of the reaction of a reasonable man to the provocation offered, even thought it may have originally come into this branch of the law by way of testing the credibility of the claim of the accused (who could not at that time himself give evidence) that he had been so deprived of his self-control as to be incapable of forming the relevant intent. But it is one thing to invoke the reasonable man for the standard of self-control which the law requires; it is quite another to substitute some hypothetical being from whom all mental and physical attributes (except perhaps sex) have been abstracted."

See also R v McCarthy, 38 Cr App R 74, 80-82 (CCA) per Goddard LCJ:

"The test to be applied is that of the effect of the provocation on a reasonable man ... ; so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter. ...

We see no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication. It may be that an excitable, pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely upon his excitable state of mind if the violence used is beyond that which a reasonable, or as we may perhaps say an average, person would use to repel an act which can in law be regarded as provocation. ...

In view of the three decisions of the House of Lords to which we have referred, it is in our opinion now settled that, apart

> from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results."

The loss of self-control must be associated with the act which causes death: Archbold 2005 para 19-57. Circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think and reflect, and has done acts which require deliberation and a high degree of control, which would negative a sudden temporary loss of self-control, which is the essence of provocation: *R v Baillie* [1995] 2 Cr App R 31, 38 [1995] Crim LR 739 (CA).

Evidence of previous acts of provocation amounting to cumulative provocation is also admissible to place a defendant's reaction in context, although a temporary and sudden loss of self-control arising from an act of provocation is also essential: Archbold 2005 para 19-58; *R v Thornton* 96 Crim App R 112 (CA); *R v Brown* [1972] 2 All ER 1328, 56 Crim App R 564 (CA).

These are useful authorities giving guidance on the application of the law, but it has to be remembered that the primary source of the law here in Tonga is in the words of the Criminal Offences Act.

When considering the question of provocation, the Court must first ask whether the Defendant was provoked at all, ie caused suddenly and temporarily to lose his self-control by things that had been said and/or done by the victim, rather than just his own bad temper. If the Court thinks that he was or might have been provoked in that sense, it is then for the Court to decide whether or not the Defendant's loss of self-control was sufficiently excusable to reduce the gravity of the offence from murder to manslaughter. When deciding this, as mentioned above, the Court must bear in mind that the law expects people to exercise control over their emotions. If a person has an unusually volatile, excitable or violent nature (or is drunk) he cannot rely on that as an excuse. Otherwise, however, it is entirely for the Court, as representing the community, to decide what are appropriate standards of behaviour, what degree of control society could reasonably have expected of the Defendant, and what is the just outcome of this case. The Court must make allowances for human nature and the power of emotions.

However the crime is not reduced to manslaughter by reason of provocation if the Defendant was not in fact deprived of the power of self-control by the provocation; and the test of that is on an objective standard for the Court to decide.

If the Court is sure that the Defendant's loss of self-control was not sufficiently excusable to reduce the offence from murder to manslaughter, it must find the Defendant guilty of murder. Otherwise, its verdict will be "Not Guilty of murder but Guilty of manslaughter (by reason of provocation)".

Cause of death

As a matter of law a defendant is still criminally liable if he hit a blow which was a cause of death – meaning something more than a minor cause; the incident need not be the sole cause of death, nor even a substantial cause, but it must be one of

the causes and something more than de minimis: *R v Hennigan* [1971] 3 All ER 133 (CA). Even if something else happened after the original blow, it is enough that the original blow contributed significantly to the resulting death, if at the time of death the original injury was still an operating cause and a substantial cause, albeit that some other cause was operating: *R v Smith* [1959] 2 All ER 193.

Grounds of decision

As already mentioned, I believe it was agreed by both sides that this case hinges on the issue of provocation. The principal submission by Counsel for the Defendant was that the issue of provocation had been raised and the prosecution had failed to disprove provocation beyond reasonable doubt.

In Tonga the law on provocation is set out (as above) in sections 88, 89 & 90(1) of the Criminal Offences Act.

But as Crown Counsel submitted, there are useful authorities from England (set out above) giving guidance on the application of the law, provided one keeps in mind that the statute law is not identical.

In relation to this case it is important that the doctrine of provocation first requires that the Defendant should have killed while he had lost his self-control and that something should have caused him to lose his self-control. Secondly, the fact that something caused him to lose his self-control is not enough, the law expects people to exercise control over their emotions. A tendency to violent rages or childish tantrums is a defect in character rather than an excuse. The circumstances must be such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter. This is entirely a question of fact. In deciding what should count as a sufficient excuse, the Court has to apply what it considers to be appropriate standards of behaviour, on the one hand making allowance for human nature and the power of emotions but, on the other, not allowing someone to rely on his own violent disposition. (*Smith*)

In applying the test in this case, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool; and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow is a very different thing from making use of a deadly instrument – in *McCarthy* a concealed dagger was referred to. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter. (*McCarthy*)

I accept entirely that, once the issue of provocation has been raised, as it has been in this case, it is up to the prosecution to negative it or disprove it beyond reasonable doubt.

On the evidence I accept that in terms of section 98(a) there was an unlawful assault on the Defendant by Fekumi, though it must be said that there was no evidence that any assault by itself was so violent as to be likely to deprive the Defendant, or a person of ordinary character in his circumstances, of the power of self control.

But I do accept that there were accompanying words of aggravation (rude swearing in Tongan) which objectively might have deprived a Tongan of ordinary

character of the power of self control, though 'Aufuato advised the Defendant not to worry about Fekumi's behaviour.

I must also mention at this stage that what section 98 deals with is not just provocation, but "extreme provocation".

When I turn to the enumeration in section 90(1) of cases when extreme provocation will not avail, matters are much less clearly in favour of the Defendant.

In terms of paragraph (a) I considered on the evidence that subjectively the Defendant was not in fact deprived of the power of self-control by the provocation, even if I took into account the provocation all day. The Defendant had already had the iron bar taken away from him and been separated from Fekumi and, despite the renewed provocation, he had sufficient control to walk what he admitted in interview was 30-40 feet to get the bar again and back 30-40 feet to where Fekumi was. He had therefore done acts which required deliberation and control, thus negativing a sudden temporary loss of control. In addition his earlier words that he would hit Fekumi to die showed a desire for revenge which was inconsistent with provocation.

In this respect it is clear that the Defendant's drunken state will not help him. There is no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication. Apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results. (*McCarthy*)

It would be unjust that the drunk man or one exceptionally pugnacious or bad-tempered or over-sensitive should be able to claim that these matters rendered him peculiarly susceptible to the provocation offered, where the sober and even-tempered man would hang for his homicide: *Camplin.*

Then in terms of paragraph (c), after even the latest provocation and before the Defendant hit Fekumi, such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self control. The Defendant had time to walk 30-40 feet to get the iron bar again and back 30-40 feet to where Fekumi was. I did not accept that the aggravation or circumstances ran continuously from the tax allotment at Lomaiviti right up to the assault on Fekumi: there was both a lapse of time and intervening circumstances, as described in the findings in fact above, although Fekumi did start provoking the Defendant again at Tokomololo. But even taking all the events of that day cumulatively, I found objectively that a sufficient interval – albeit brief - had elapsed since the latest provocation to allow a reasonable man time to cool.

But while these aspects under paragraphs (a) and (c) may be open to debate on the evidence, with reference to paragraph (d), objectively I was quite certain that the Defendant's assault – both in respect of the vicious and lethal instrument used – ie the iron bar – and the brutal manner in which it was used, with a powerful swing to a man lying on the ground, was greatly in excess of the measure in which a person of ordinary character would have been likely under the circumstance to be deprived of his self-control by the provocation.

As a weapon the iron bar was far beyond what might have been excusable in the circumstances. Anything but a light tap with it was bound to produce a serious injury to the victim. As it was, it was used with considerable force by the Defendant in a

powerful downward golf stroke (as tellingly demonstrated in evidence by Samuela, on which he was not cross-examined). That occurred twice. I have no difficulty characterising that as using the iron bar in a brutal manner. This was not a simple blow in the heat of passion induced by provocation, but was the use of a deadly instrument, so that in this case I found that the mode of resentment did not bear a reasonable relationship to the provocation.

I therefore find that the prosecution has established beyond reasonable doubt that this was not a case of provocation in terms of sections 89 & 90 read together.

There was really no dispute about the other elements of murder and on the evidence I found that it was established beyond reasonable doubt that it was the Defendant 'Alekisanita who:

- by an unlawful act (hitting Fekumi with the iron bar);
- intended to cause Fekumi a bodily injury
(he said he would hit him to die);
- which 'Alekisanita knew was likely to cause death;
- and was reckless whether death ensued or not
(as death or serious bodily harm was a virtual certainty as a result of the Defendant's actions, and from his earlier words he clearly appreciated that that was the case);
- and the unlawful act was a substantial cause of the death of Fekumi
(as established by the medical evidence).

This is a tragic case, but I therefore find you guilty 'Alekisanita 'Ake on Count 1 of the murder of Fekumi Matekuolava.

Helu anors v National Pacific Insurance

Supreme Court, Nuku'alofa
Ford J
CV 669/2001

26 March and 20 September 2004; 28 September 2004

Insurance – questioned validity of licence – rejected defence – claim allowed

The plaintiffs claimed damages against the defendant Insurance Company that arose out of a motor vehicle accident. The statement of claim alleged that the motor vehicle was written off in an accident on 26 October 1996. The motor vehicle, a van used as a taxi, was insured for a maximum amount of $10,200 and the plaintiffs claimed that sum by way of relief together with other items of damages totalling $6,600 and various claims for interest. The defendant Insurance Company rejected the plaintiffs' claim on the basis that the driver of the insured's vehicle did not have any valid driving licence to drive a taxi class of vehicle. The defendant claimed that the Traffic Department had no authority to extend the licence to include the driving of taxis.

Held:

1. At the time of the accident the van was being driven for private purposes and not as a taxi therefore the legalities of the licence were irrelevant. The motor policy proposal form described the purposes for which the vehicle could be used as "taxi + private use".
2. The Court found that even had the status of the driver's taxi driving licence been an issue the extended taxi licence issued to her by the Traffic authorities in Nuku'alofa on 21 August 1996 complied with the Traffic Act.
3. The driver pleaded guilty to a charge of careless driving but there was no evidence that she had been driving in a "reckless/dangerous manner" and the circumstances of the collision itself were insufficient to satisfy the Court that she was driving in such a manner. The defence on that ground was, therefore, rejected.
4. A pleading was not evidence. If a party pleaded a specific matter of fact which he alleged made any claim or defence of his opponent not maintainable then he still needed to go on and prove that pleaded fact in the usual way. If at trial no mention was made of the matter then the Court was entitled to assume that it had been abandoned. That was the Court's conclusion.

5. The best evidence before the Court of the motor vehicle's pre-accident value was the figure stated in the Renewal Certificate that had been issued by the defendant Insurance Company shortly before the accident. The Renewal Certificate noted that the sum insured was $8,200 and the excess $600. The accident occurred only 28 hours before the Renewal Certificate was due to take effect.
6. Judgment was entered for the plaintiffs in the sum of $7,600 together with interest at 10% from 8 November 1996 down to the date of payment. The plaintiffs were also entitled to costs to be agreed or taxed.

Cases considered:

Lickiss v Milestone [1966] 2 All ER 972

Maamakalafi anor v Finau [2004] Tonga LR 218 (CA)

Marek v C.G.A. Fire & Accident Insurance Co Ltd (1985) 3 ANZ Ins Cas 60-665

Statute considered:

Traffic Act (Cap 156)

Counsel for plaintiffs : Mr Fifita
Counsel for defendant : Mr 'Etika

Judgment

The Proceedings

In this civil proceeding, the plaintiffs claim damages against the defendant Insurance Company arising out of a motor vehicle accident. The statement of claim alleges that the motor vehicle in question was written off in an accident on 26 October 2002. The date is obviously a typographical error. The evidence established that the accident, in fact, occurred on 26 October 1996. The motor vehicle, a van, was insured for a maximum amount of $10,200 and the plaintiffs claim that sum by way of relief together with other items of damages totalling $6,600 and various claims for interest.

The Claim

In 1995 the first plaintiff, Viliami Helu, purchased a 1990 Daihatsu van for use as a taxi. He told the court that he took out a loan with the Tonga Development Bank for $10,200.00, which was the total purchase price of the vehicle. Although no documentation was produced in relation to the bank loan, the second and third plaintiffs apparently acted as guarantors. They, together with the first plaintiff, are the registered owners of the van. Because, however, the second and third plaintiffs took no part whatsoever in the proceedings, for ease of reference, I sometimes in this judgment simply refer to "the plaintiff" as being a reference to Viliami.

The Tonga Development Bank required the van to be fully insured and a bank officer drew up the insurance proposal form for Viliami to take out motor vehicle cover with the defendant, National Pacific Insurance Ltd. The proposal form was duly

signed by Viliami. It is dated, for some reason, 27 October 1996. Counsel agree however, that the date should be shown as 27 October 1995. The maximum amount of cover is shown at $10,200. The authorised use of the vehicle is stated as "taxi + private use". The policy provided for an excess of $600. The premium of $663.00 was duly paid. The insurance period is shown as "from 27 October 1995 to 27 October 1996."

Almost one year to the day later, on Saturday 26 October 1996, the plaintiff's wife, Lose, had an accident and wrote the van off. She had taken a bundle of clothing and other goods down to a "flea market" at 5:30 a.m. that day and was returning to her home at approximately 10 a.m. when the van left the road and collided with a power pole. Lose's description of the accident in the insurance claim form reads as follows:

> "I went to the market and drop (sic) off some goods to be sold there. When I was on my way back home I slept and woke up when I hit the post. I was only about 200 metres before I reached home. I was just very tired because I drove all day on Saturday." ("Saturday" was obviously meant to be a reference to "Friday").

The first plaintiff completed a Motor Vehicle Accident Claim Form and the claim was lodged with the defendant company on 29 October 1996.

The Response

The defendant Insurance Company rejected the plaintiffs' claim. The claims supervisor 'Inoke Kalauta, sent a letter to the Tonga Development Bank dated 8 November 1996 setting out the reasons for declining the claim as follows:

> "We therefore deny any liability due to the driver of the insured's vehicle not having any valid driving licence to drive such class of vehicle."

A copy of the letter was sent to the plaintiff together with a copy of a legal opinion the insurance company had obtained from a local firm of solicitors, Stevenson Nelson Mitchell & Foliaki.

Driver's licence

Lose Helu gave evidence as to the position regarding her driver's licence. She told the court that at the time of the accident she, in fact, held a valid driver's licence to drive the van both for private use and as a taxi. The licence had been issued at Ha'apai on 30 May 1996 for private motor vehicle use only and on 21 August 1996 it had been extended by the Traffic Department in Nuku'alofa to include taxis. The licence in question was produced in evidence.

The Defence

The case for the defence, essentially, is that the Nuku'alofa Traffic Department had no authority to extend the licence to include the driving of taxis. Reliance, in this regard, was placed on section 15 (4) of the Traffic Act (Cap 156) which provides that no person shall be granted a driver's licence to drive a taxi unless he or she "had or

has already had" an ordinary driver's licence for a period of not less than 6 months and has passed a re-test by an Examining Officer.

The insurance company contended that as Lose's driver's licence had only been issued in Ha'apai on 30 May 1996, the 6 months did not expire until 30 November 1996. Hence, the Traffic Department in Nuku'alofa had no authority to extend the licence to cover taxis.

The Evidence for the Plaintiff

The plaintiff called evidence from Ului Taulua, the Examining Officer at Nuku'alofa who had extended Lose's licence to include taxis. Mr Taulua told the court that he had retired from the Ministry of Police in July 2003 after some 28 years of service with the Traffic Department. His recollection of Lose's application was impressive. He said that he recalled when she came to his office in 1996 to obtain the extension to her licence to cover taxis. At that time, he held the position of deputy inspector. He said that when he looked at the licence Lose had obtained from Ha'apai he could see that she had not held it for the required six-month period and so he asked her about it. Lose explained to him that she had obtained an earlier licence from Ha'apai back in the 1980s and that she had lost that sometime later when she and her husband moved to live in New Zealand.

Mr Taulua told the court, in evidence which I accept, that he then instructed one of his staff, Sergeant Siosiua Vea, to make contact with the Ha'apai police to check out what Lose had told him. The Sergeant did so and reported back to the inspector that Lose had obtained a driver's licence in Ha'apai in 1985. The former deputy inspector said that, upon receiving this confirmation, he was satisfied with Lose's explanation and so he proceeded to carry out the re-test required under section 15 (4) (ii) of the Traffic Act. He explained that the re-test was an oral theoretical examination with some 20 questions designed to assess the applicant's knowledge of the traffic laws. The witness said that Lose had been able to satisfactorily answer all the questions and so he instructed Sergeant Vea to issue an extension to her driver's licence to include taxis.

For her part, Lose told the court that she and her husband moved to New Zealand in 1986 and did not return to Tonga until 1993. In New Zealand they had lived in South Auckland and during that period Lose had obtained a New Zealand driver's licence. After the couple returned to Tonga they lived in Tongatapu. Viliami purchased the van for use as a taxi in 1995 but Lose did not drive the vehicle until after she had her licence extended in August 1996.

Lose told the court that in May 1996 she had travelled to Ha'apai to attend a church conference and while there she had decided to arrange to renew her lost driver's licence. Her original licence had been issued in Ha'apai in 1985. She said that the Officer in charge at the police station explained to her that if she had the old licence renewed then she would have to pay the annual renewal fee each year from 1986. The Officer suggested that a cheaper alternative would be for her simply to apply for a new licence and that is what she did. Lose said that the Officer, who she could only remember by the name of Sailosi, took her for a test drive and required her to undergo a written test also before issuing her with the new licence. She then paid the appropriate fee.

Lose confirmed that in August 1996 she had approached the Traffic Department in Nuku'alofa to obtain the extension to her licence to cover the driving of taxis. After explaining the background situation, she had been told to leave her licence with the Traffic Department and return the following day to pick it up with the extension. In cross-examination she was asked by Mr 'Etika if she had been required to carry out a written test. She replied that she could not recall. I am satisfied, however, from Mr Taulua's evidence that Lose did, in fact, undergo the required re-test.

The plaintiffs also subpoenaed but, for some reason, did not call evidence from Sailosi Fonua. As he was present at court, however, he was called as a witness by Mr 'Etika on behalf of the defendants. Fifty seven-year-old Sailosi told the court that he had been the Officer in Charge at the Ha'apai Police Station in May 1996 when Lose had called to renew her driver's licence. He confirmed Lose's account of how she had taken the alternative option of obtaining a new licence rather than paying the annual renewal fees in respect of the lost licence. Sailosi said that he had been with the Police Department in Ha'apai since March 1969 and it was he who had issued Lose with her first driver's licence back in 1985.

Findings in Relation to the Principal Defence

It is clear on any reading of the facts, as I have found them to be, that the reasons put forward by the insurance company for rejecting the plaintiff's claim simply do not measure up.

First, even had Lose not obtained the extension to her driver's licence to cover taxi work, the basic licence she had obtained in Ha'apai on 30 May 1996, which covered "Private Motor Vehicle" use, would have been all that was required for driving the van to and from the market on the Saturday morning of the accident. The question to be asked is what was the essential character or primary purpose of the journey. The evidence is clear. At the time of the accident the van was being used for social or private purposes only, not as a taxi. That proposition, it seems to me, must be a complete answer to the defendant's case. The motor policy proposal form described the purposes for which the vehicle could be used as "taxi + private use". It is difficult to understand the insurance company's preoccupation with the legality of Lose's taxi driver's licence when the van was not being used as a taxi at the time of the accident.

Secondly, even had the status of Lose's taxi driving licence been an issue, I have no doubt that the extended taxi licence issued to her by the Traffic authorities in Nuku'alofa on 21 August 1996 complied with the Traffic Act. The evidence clearly established that Lose had originally been issued with a driver's licence back in 1985 when she was living in Ha'apai and that was sufficient to satisfy the requirements of section 15(4) of the Traffic Act . The words "had or has already had" in subsection (4)(ii) are sufficiently broad to include a previous licence that, for some reason or other, is no longer operative.

In any event, an infringement of a statutory provision regulating the performance of an official act does not necessarily spell invalidity. As the Court of Appeal noted in the recent case of *Maamakalafi v Finau* [2004] Tonga LR 218 (CA), in each case it depends upon the true construction of the Act. No authorities or submissions were made to me on this aspect of the case and it is unnecessary for me to take the matter any further but it does appear to have been a basic fallacy of the

defendant's case that if it could establish some infringement of the Traffic Act then such a finding would of necessity invalidate the insurance cover.

Findings in Relation to Other Defences

There were two further defences advanced by the insurance company in its statement of defence although neither was mentioned in the initial letter the plaintiffs received from the claims manager declining their claim. It is alleged that Lose was driving in a "reckless/dangerous manner" which is one of the exclusion provisions in the policy. It is also alleged that the delay of almost five years on the plaintiffs' part in issuing proceedings caused the defendant to alter its position "believing that the plaintiffs have been satisfied with the refusal of their claim."

Reckless/Dangerous Driving

Lose pleaded guilty to a charge of careless driving contrary to section 25(1) of the Traffic Act but there is no evidence that she had been driving in a "reckless/dangerous manner" and the circumstances of the collision itself are insufficient to satisfy me that she was driving in such a manner. The defence on that ground is, therefore, rejected.

The Delay Defence

This defence is pleaded in the following terms:

> "12. That since November 1996 when the last correspondence from the defendant to the plaintiffs were made with regards to this matter the plaintiffs had kept quiet and done nothing to it while the defendant has led to believe from this conduct of the plaintiffs that they were satisfied with the refusal of their claim then.
>
> 13. The defendant relying on the above believe from the conduct of the plaintiffs in not pursuing their claim for almost five years have altered his positions believing that the plaintiffs have been satisfied with the refusal of their claim (sic)."

It is a fact that the proceeding was not commenced until 6 November 2001. There is an affidavit on the court file from the first plaintiff in connection with an interlocutory matter explaining how he had wrongly been led to believe by his then solicitor (who was not his present counsel) that proceedings had been filed much earlier and the reason for the ongoing delay was a hold-up in obtaining a fixture from the court. The first plaintiff also gave evidence about these matters, which I accept and he was not cross-examined on that evidence.

It is not clear from the wording in paragraph 13 of the statement of defence, quoted above, exactly what legal basis the defendant is relying upon when it states that it believed the plaintiffs were satisfied "with the refusal of their claim."

The "CONDITIONS" section of the policy states:

> "Under this heading are the rules by which the Policy operates. If these rules as they apply are not observed, we may refuse to meet a claim."

Condition (3) is headed "Claims Procedure" and paragraph (g) provides:

> "Should we decline to meet any claim which you make under this Policy or refuse you any other benefit and you wish to challenge the decision you must commence your action in Court within twelve months from the date of your (sic) advice to you of our decision."

Observations on Delay Defence

There are several observations, which can be made in relation to what, for ease of reference, I have referred to as the "delay defence". First, as already noted, the pleading in paragraphs 12 and 13 does not specify the legal basis for the defence. Secondly, if it was intended by the pleading to raise condition 3 (g) of the Policy Conditions as a defence then, in order to avoid a waiver situation, that fact should have been clearly stated in the statement of defence.

In *Lickiss v Milestone* [1966] 2 All ER 972, 975 Denning MR described the concept of "waiver" as follows:

> "The principle of waiver is simply this: that if one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do."

The issue of delay was obviously a factor that the defendant had focused upon, as is apparent from paragraph 13 of its statement of defence. Without having had the advantage of hearing submissions on the issue, it seems to me that the principle of waiver described in the above passage would be applicable to the defendant's pleadings in the present case. The failure to specifically plead condition 3 (g), in my view, amounts to a waiver of that particular requirement.

I should add that even had condition 3 (g) being specifically pleaded, I would have expected to have heard argument as to its legal effect. The plaintiff could well contend, for example, that such a condition was void in so far as it appears to be an attempt to oust the jurisdiction of the court -- see, in this regard, the observations in *Marek v CGA Fire & Accident Insurance Co Ltd* (1985) 3 ANZ Ins Cas 60-665.

Thirdly, no evidence was given by any witness on behalf of the defendant in relation to the defence pleaded in paragraphs 12 and 13 of the statement of defence; there was no cross-examination of the plaintiff on the subject and neither counsel referred to that part of the pleadings in the course of their submissions.

The reason for the six-month break in the hearing dates was to enable the defendant to call evidence from a former officer of the company who now apparently lives in New Zealand. When the hearing then resumed on the 20th of this month, however, the court was told that neither the witness from New Zealand or any other person would be giving evidence on behalf of the defendant. The only witness called by the defence, therefore, was Sailosi Fonua, the witness from Ha'apai who had only

been present in Court because he had been subpoenaed, but not called, by the plaintiff.

A pleading is not evidence. If a party pleads a specific matter of fact which he alleges makes any claim or defence of his opponent not maintainable then he still needs to go on and prove that pleaded fact in the usual way. If at trial no mention is made of the matter then the court is entitled to assume that, for whatever reason, it has been abandoned. That is my conclusion in the present case. In all events, the defence has certainly not been established to my satisfaction.

Damages

Finally, I turn to the question of damages. Again, an unfortunate feature of the case was the complete absence of evidence on this important aspect of the claim. No expert evidence was called from either side on motor vehicle valuations and not one question was put to the plaintiff either in examination-in-chief or cross-examination in relation to the damages aspect of his claim.

The motor vehicle was purchased from Si'i Kae Ola Motors in October 1995 for $10,200. That firm had provided a written valuation report at the time and had valued the vehicle at that figure. The valuation report was obviously relied upon by the Tonga Development Bank when it made its decision to grant a loan to the plaintiffs for the full amount so as to allow the purchase to proceed.

The insurance policy provided that, in the event of any loss or damage to the vehicle, the Insurance Company had the option of either repairing the vehicle or paying out the amount of the loss not exceeding the vehicle's market valuation at the time of the loss and, in any event, not exceeding the insured sum of $10,200.

As is common practice in civil cases, the discoverable documentation of both parties was produced at the hearing by consent. The bundle of documents provided included a letter from the Ministry of Works Motor Vehicle Inspecting Officer dated 28/10/96 confirming that he had inspected the vehicle after the accident and in his opinion it was a complete write off. The letter, however, contained no estimate of the vehicle's pre-accident value. There is another letter from Asco Motors addressed to the Tonga Development Bank also dated 28 Oct 1996, which simply reads:

> "Dear Sir,
>
> ESTIMATE TO REPAIR ACCIDENT DAMAGE TO DAIHATSU T2473 BELONGING TO VILIAMI T HELU.
>
> We have been examined (sic) the above vehicle and we found it is beyond economical repair and should be written off.
>
> Pre-accident $4000
>
> Salvage value $300
>
> If any further information required, please feel free to contact us. We will be happy to assist.
>
> Yours faithfully
>
> BPT (TONGA) LTD

VILIAMI KULU

(SERVICE MANAGER)"

It is not clear why the Bank did not seek a report from Si 'i kae Ola Motors which was the firm that had carried out the original valuation assessment on its behalf one year previously.

As I have already observed, no evidence was called from either the Vehicle Inspecting Officer at the Ministry of Works or the valuer from Asco Motors and no other evidence was given on the valuation issue. I am not prepared to place any reliance upon the estimates provided in the Asco Motors letter. If either party had wanted the court to accept those figures then they should have called evidence from the individual who actually carried out the vehicle inspection. In the absence of such evidence, I can only conclude that neither party was seeking to contend that the Asco Motors figure was an appropriate pre-accident value.

In fairness, it was clear from Mr 'Etika's submissions that he accepted that the pre-accident valuation figure would have been something higher than $4000. As counsel put it, "the market value would have been a little higher than $4,000 but not as high as $10,200." That still leaves a significant range of options.

At one point in his submissions, Mr Fifita referred to 10% as being the generally accepted appropriate depreciation figure in Tonga. That would give a pre-accident value of $9,180. The problem again, however, is that no evidence was provided in support of that submission and Mr 'Etika did not concede that such an approach was appropriate in the present case.

In the absence of any other evidence on the subject, it seems to me that the best evidence before the court of the motor vehicle's pre-accident value is the figure stated in the Renewal Certificate that had been issued by the defendant Insurance Company shortly before the accident. The Renewal Certificate noted that the policy was due to expire at 4 p.m. on 27/10/96 but it would be renewed automatically until 4 p.m. on 27/10/97 with the sum insured being $8,200 and the excess $600. The accident, of course, occurred only 28 hours before the Renewal Certificate was due to take effect.

Award

Under the first head of claim, therefore, I award the plaintiffs $8,200 less the excess of $600. The plaintiffs also claim $3000 for "injured feelings" and $3000 for "damage to reputation". No evidence or submissions were presented in support of either claim, however, and they are both, therefore, rejected. Likewise, there are additional claims for certain amounts of interest together with legal costs of $600 allegedly arising out of the defendant's rejection of the claim but, again, no evidence or submissions were presented in support and those claims are also rejected.

If a plaintiff seeks to recover damages under different heads of claim then he must do more than list the items in his prayer for relief. He must be prepared to prove all his claim entitlements in the usual way failing which they will be rejected.

Finally, the plaintiffs seek interest on the principal award at the rate of 13%. I accept that they have been wrongly deprived of the proceeds of their insurance claim and that they are entitled to interest. Judgment is, therefore, entered for the plaintiffs in the sum of $7,600 together with interest at 10% from 8 November 1996 down to the date of payment. The plaintiffs are also entitled to costs to be agreed or taxed.

R v Makafilia

Supreme Court, Nuku'alofa
Ford J
CR 70/2002

1, 10, 24 September 2004; 1 October 2004

Criminal law – causing bodily harm – self defence pleaded – excessive retaliation

The accused was charged with one count of causing bodily harm. It was alleged that on the night of Tuesday, 7 May 2002, he wilfully and without lawful justification caused harm to the complainant, Viliami Tupou, by stabbing him with a knife on his shoulder, arm and chest. The accused admitted to wilfully stabbing the complainant with a knife but relied upon the defence of self-defence. There was a sharp conflict between the evidence called for the Crown and the accused. Ultimately, the outcome was a credibility issue.

Held:

1. The Crown was required to prove all the essential elements of the charge beyond reasonable doubt. In a charge of causing bodily harm, the Crown must prove that the accused caused, and intended to cause, harm to the victim. The actus reus need not necessarily be an assault because assault was not a prerequisite of the offence but it was difficult to imagine a direct wounding or infliction of harm which would not constitute an assault.
2. The complainant was an impressive witness and the Court had no qualms in accepting what he told the Court. The Court did not believe the accused and his sister.
3. Even though the accused was punched by the complainant first, he was not entitled to retaliate with force that was clearly excessive given what he believed was happening at the time. Repeated stabbing with a knife could never be reasonable retaliation for a single punch to the jaw.
4. The Crown proved the charge against the accused beyond reasonable doubt and he was convicted accordingly

Case considered:

R v Whyte [1987] 3 All ER 416 (CA)

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown : Miss Simiki
Counsel for the accused : Mr Kengike

Judgment

There was a sharp conflict in this case between the evidence called for the Crown and the accused. Ultimately, the outcome is going to be a credibility issue.

The accused is charged with one count of causing bodily harm contrary to section 107(1) and (2)(d) of the Criminal Offences Act (Cap 18). It is alleged that on the night of Tuesday, 7 May 2002, he wilfully and without lawful justification caused harm to the complainant, Viliami Tupou, by stabbing him with a knife on his shoulder, arm and chest.

The case for the Crown is that on the night in question the accused and others were drinking alcohol, swearing and making a loud noise in a house in Tofoa. At one stage during the evening a neighbour had called the police and the noise died down while the police were at the scene. The disturbance then resumed.

The victim lived on his grandparents' property right next door to the house in question. He became concerned, in particular, about the swearing because brothers and sisters lived close by and in Tongan tradition any swearing in the presence of brothers and sisters or female and male cousins is strictly tapu.

During the hours of 10 and 11 pm, the complainant and his friend approached the house. The complainant knocked on the door and asked the accused if he could keep the noise down and stop the swearing. His friend had remained standing some distance back from the house. As the complainant then headed back towards his own home, his friend yelled at him to watch out because there were people coming from behind him. The complainant then turned around and struck the accused with his fist. The accused retaliated by stabbing the complainant a number of times with a knife in various parts of his body. The complainant was later rushed to hospital in a taxi where he was admitted and his wounds treated. He was discharged from hospital approximately two weeks later.

The 21-year-old complainant, Viliami Tupou, gave evidence substantiating the Crown's case and adding more details. He said that when he knocked on the back door he could see the accused and his brother-in-law in the house drinking. He yelled at them to stop their swearing and the noise. The accused came to the door and asked him what business he had interfering and at the same time he proceeded to shut the door.

Viliami told the court that as he did not want to become involved in a fight he turned and started walking back towards his home. The next thing he recalled was being confronted by the accused's sister, Kalo, who had appeared from around the side of the house. He said that Kalo had asked in a threatening manner why he had come to their house and she yelled out that they would "beat the shit" out of him.

The complainant told the court that he started to explain to the sister that he had only come to ask them to stop the noise and the swearing. At that point he saw the accused and the accused's brother-in-law (the sister's husband) come out of the house. The accused yelled at him that they would fight to the death. The complainant then continued walking away towards his own home when he suddenly heard his friend, Mo'ui, yell out to him. He turned around and saw the accused and the brother in law were coming after him. He asked why they were coming and the accused replied, "we

will fight." Viliami said that he then told Salesi (the accused) that, "we must fight" and I punched him on the head. He said that the accused then stumbled back but he did not fall down and when he came forward again he, Viliami, felt a sharp object pierce his chest and he realised that he had been stabbed with a knife.

The complainant told the court that he immediately felt dizzy and he stumbled back and fell to the ground on his left side. He then felt the accused stabbing him again on his right arm, right shoulder and right hand and the side of his face. The complainant said that the injuries to his right hand were the most severe. The knife had torn into his hand and the wound was bleeding profusely. Scars from the various stab wounds were still visible on the day the complainant gave his evidence which was some 28 months after the attack.

The complainant said that after the attack he managed to crawl to the fence around his grandparents' house and then climb over the fence. As he escaped from the scene he could still hear the accused yelling out, "where are you; we will fight. Tonight I will kill you." The witness said that he did not want to disturb his grandparents because they were elderly and had high blood pressure and so he managed to call a taxi which took him to Viola Hospital. He confirmed that he was in the hospital for almost two weeks.

The complainant's friend, Mo'ui, also gave evidence for the Crown. He confirmed all the evidence given by the complainant leading up to the attack. He said that as the complainant had started walking back towards his grandparents' house he noticed the accused and the others were following him and so he yelled out to the complainant to watch out. He then described how the accused had attacked the complainant with the knife. At one point he heard the accused yell out to his attacker to stop stabbing him. In cross-examination Mo'ui described the knife as being around 10 inches in length with a metal pointed blade approximately 1 inch wide at the end nearest the handle.

The complainant had said in evidence that Mo'ui had run off during the attack and he had not seen him again that night. In his evidence, however, Mo'ui told the Court that he had witnessed the whole incident and when the complainant jumped over the fence into his grandparents' property they had both ran to the house and then to a little hut on the same allotment that they had both been living in. Mo'ui said that he checked out the accused's injuries and noted all the blood. He recalled the complainant telling him that he was feeling dizzy. Mo'ui wrapped some cloth around his friend's hand to try to stop the bleeding but he was unsuccessful. He then took him to Viola Hospital.

I accept Mo'ui's description of what happened after the attack. I suspect that the complainant's memory of those particular events may have been affected by his state of shock and dizziness.

As in any criminal case, the Crown is required to prove all the essential elements of the charge beyond reasonable doubt. In a charge of causing bodily harm, the Crown must prove that the accused caused, and intended to cause, harm to the victim. The actus reus need not necessarily be an assault because assault is not a prerequisite of the offence but, as the learned authors of *Blackstone's Criminal Practice* (1993) note, (para B2.34): "it is difficult to imagine a direct wounding or infliction of harm which would not constitute an assault.

"Harm" is defined in section 107(2) of the Criminal Offences Act. The definition is broad enough to include serious or permanent injuries as well as wounds

which are not severe. In her closing submissions, Crown counsel sought leave to amend the indictment so that it referred to paragraph (c) of the definition of "harm" (any wound which is not severe) instead of paragraph (d) (any permanent disfigurement which is not a serious nature (sic). Mr Kengike did not consent to the amendment because the application was being made at such a late stage. Instead he indicated that he would leave it up to the court. I am satisfied that the amendment is appropriate in the interests of justice and that the accused will suffer no prejudice because of its timing. I, therefore, allow the amendment.

The essential elements of the offence of causing bodily harm are not really in dispute because the accused admits to wilfully stabbing the complainant with a knife but he relies upon the defence of self-defence. In evidence, the 27-year-old accused told the court that the house in question was his former family home but it is now occupied by his sister, Kalo Vakaola, and her husband. It is a one-room house made of roofing iron.

On the night in question the accused, who lives with his parents in Sopu, visited his sister and brother-in-law's house along with two friends from 'Eua who were brothers. He said that the four men began drinking around 8 pm and by 10 pm they had consumed two one litre bottles of gin. He denied that they were swearing or making any loud noises either prior to or after the police visit. He told the court that they were "playing music and just talking nicely."

The accused said that around 9 pm someone had thrown an object onto the roof of the house and he had gone outside but he could not see anyone. He said that around 10 -- 11 pm the two friends from 'Eua, who were intoxicated, had gone outside the house to leave. He said that his sister followed them to try and persuade them to go back inside the house but they had disappeared.

The accused said that he then heard someone banging on the door with an iron bar and he heard the person shout out, "open the door or I'll beat the shit out of you." The accused said that he recognised the voice and knew that it was the complainant. Shortly after that he heard his sister telling the complainant to get off her property otherwise she would lay charges against him. He heard the complainant respond to his sister, "get away or I'll beat the shit out of you."

At that point in time, according to the accused, he was cutting meat to cook for them to eat and he said that he opened the back door and saw the complainant. The complainant then started to walk back a short distance towards his own home. The accused said that the complainant told him to stop making noises or he would come and beat the shit out of them. The accused said that he told him to stop swearing and go home because he was not a policeman and they could not come and stop them making a noise. The transcript of the accused's examination in chief then continues:

> "Q. Did Tupou (the complainant) say anything else?
> A. He said to me you arsehole, I am coming tonight to beat the shit out of all of you. That's when I knew he was not going to get out of the house and that's when I walked towards him.
> Q. At the time, when you exchanged words with the complainant where were the people you were drinking with?
> A. They were staying outside the house.
> Q. What happened when you walked towards Tupou?

A. I walked towards him to make him go so he would stop swearing on our property.
Q. Did you do anything?
A. I was just talking with him.
Q. What were the words that were spoken?
A. As I walked towards him he was standing there with an iron bar." (At that point the witness described the dimensions of the iron bar as being the same length as the width of the witness box (approximately 3 ft.) and the diameter of his arm). He continued:
He was still holding the bar as I walked towards him. We were standing face-to-face; I was right in front of him. I told him, "you go home and stop interfering.
Q. What did they complainant say?
A. He did not say anything. He attacked me and hit me with the iron bar.
Q. How did he hit you?
A. He was holding the iron bar with his two hands. He attacked me with the iron bar, hit me and it landed on my left shoulder.
Q. What did you do?
A. I told him to go. After I told him to go he then attacked me a second time and hit me again with the iron bar and then I raised up my hand to protect myself and it landed on my arm. After that I did not do anything to him I was just telling him again "go home, if you want us to stop making noises you go and call the police because you are not a police officer to come and tell us to stop, that's a police officers' job." He threw the iron bar and he attacked me with a punch that landed on my left jaw.
Q. What happened to you?
A. When he punched me on the jaw, I doubled back and I noticed him attacking me again with another punch that was about to land on my face.
Q. What happened?
A. When he attacked me I was holding the knife in my hand. He punched me again and after that, that's when I stabbed him with the knife.
Q. And what happened?
A. When I stabbed him with the knife maybe that's when he felt he was injured and he turned around and ran.
Q. Where did he runs to?
A. He ran and jumped over the fence to go into their house.
Q. It is true that the injuries that he showed here in court were caused by the knife that you had?
A. Yes.
Q. What did you feel when he left your house?
A. When he jumped over the fence I felt that I was satisfied.

Q. Did you try to get him back?
A. No.
Q. What happened to you?
A. I came and went inside the house, it was dark outside, not really dark but I could not see clear. When I went inside the light was on and I was able to see. At that time I was not aware that the complainant was injured. When I went into the house I saw blood on me. That's when I realised that Tupou was injured.
Q. Did your brother-in-law, two friends and sister come inside the house again?
A. Yes."

That, essentially, was the description of the incident given by the accused in his evidence in chief.

In cross-examination he revealed for the first time a further alleged aspect of the case. He told the court that as the complainant ran off towards his house after the stabbing he (the complainant) was attacked and beaten up by the two brothers from 'Eua. Then, as the complainant climbed over the fence, his clothing became caught in the fence and the two brothers from 'Eua attacked and beat him up again. The accused said that he shouted at his two friends to come back. In re-examination the accused said that it was the complainant's feet that had become caught in the fence.

Crown counsel, in cross-examination, challenged the accused on virtually every aspect of his evidence. She put it to him that he had not said anything in his statement to the police about the complainant having an iron bar or the boys from 'Eua beating up the complainant at the boundary fence. The accused insisted that his evidence was the truth. He also said that he had told the police everything including the evidence about the iron bar but he had to agree that there was no reference to an iron bar in the police record of interview and no challenge had been made by his counsel to the accuracy of the police documentation.

The accused's sister, Kalo, also gave evidence on behalf for the defence. She and her husband live in the house in question. She said that on the night of the incident there had been no swearing or excessive noise coming from her home and she denied having sworn at the complainant at any stage. She said that the complainant had come over to their house swearing and he had refused to leave when asked. Then, when her brother (the accused) confronted him and told him to go home and stop interfering, the complainant had attacked and beaten up her brother with an iron pipe. The witness gave a description of the dimensions of the iron pipe, which matched the description that had been given earlier by her brother. She denied having seen her brother using a knife during the fight.

As I indicated at the outset of this judgment, the sharp and significant conflicts in the evidence make it necessary for me to make firm findings on the issue of credibility. Unfortunately for the accused, the complainant came across as an impressive witness and, apart from the observations I have made about his evidence after the attack; I have no qualms at all in accepting what he told the Court.

I cannot say the same about the accused and his sister. I simply do not believe their version of events. I am satisfied that their description of the incident itself is a tissue of lies.

The only defence evidence that caused me any hesitation related to the iron bar allegedly used by the complainant. As already noted, when the accused gave evidence he described its dimensions as being as long as the width of the witness box and the diameter of his arm. The iron bar had not been mentioned previously in the case and it was not referred to in the accused's statements to the police. The evidence seemed to have even taken Mr Kengike by surprise in that he had quite properly put to the complainant in cross-examination all the propositions he knew the accused would be giving evidence about but no mention was made of an iron bar.

When the accused left the witness box, however, his sister was called as the next witness and she also gave evidence about the complainant attacking her brother with, what she described as a length of iron pipe. She described the dimensions of the pipe as being equivalent to the width of the witness box and she said that it would have had the diameter of her arm. That evidence obviously corroborated what the accused had said and the question that then arose was if, as seemed to be the case, the accused had made up the story about the iron bar on the spot while giving evidence in chief, how was it that his sister, who had been waiting in the grounds outside the courthouse at the time, been able to give the Court the evidence she did about the dimensions of the weapon.

The answer was revealed in cross-examination. The Crown prosecutor, after what appears to have been a smart piece of observation or detection, obtained an admission from the sister that during the Court break, her mother, who had been sitting in the back of the Court throughout the trial, had gone outside and spoken to her about the evidence given in the case. The sister denied that the mother had talked to her specifically about the evidence that had been given by the accused relating to the iron bar but I did not find her denials convincing.

My rejection of the defence evidence does not, of course, mean that I can immediately jump to a conclusion of guilt. It is still necessary for me to be satisfied that the Crown has proved guilt beyond reasonable doubt.

On the complainant's version of events, he admitted that it was he who had struck the first blow. He said that after being challenged by the accused to a fight, he accepted the challenge and punched the accused on the head. There is evidence, therefore, to support a defence of self-defence. In that situation there is a burden on the prosecution to disapprove such a defence beyond reasonable doubt.

While the punch from the complainant would have entitled the accused to retaliate in order to defend himself, the law does not give him a blank cheque to use as much force as he likes. He is not, in other words, entitled to retaliate with force that is clearly excessive given what he believed was happening at the time. The principle applicable is summed up in the following passage from *R v Whyte* [1987] 3 All ER 416 (CA) at 418:

> "A man who is attacked may defend himself, but may only do what is reasonably necessary to effect such a defence. Simply avoiding action may be enough if circumstances permit. What is reasonable will depend on the nature of the attack. If there is a relatively minor attack, it is not reasonable to use a degree of force which is wholly out of proportion to the demands of the situation. But if the moment is one of crisis for someone

> who is in imminent danger, it may be necessary to take instant action to avert that danger."

In the *Whyte* case the Court concluded the best case that could be made out from the appellant's point of view was that he had stabbed the victim because the victim had hit him in the face with his hand. Lord Lane, delivering the judgment of the Court, said:

> "It is perfectly plain that on any view the use of an already prepared knife, the blade having been extended, in circumstances such as this, could not possibly be reasonable under any circumstances."

I respectfully agree with that observation. Repeated stabbing with a knife could never be reasonable retaliation for a single punch to the jaw.

I would simply add that I do not believe that the accused just happened to have the knife in his hand because he had been "cutting meat to cook", as he had claimed in his evidence. The evidence of his sister, which I accept in this regard, was that the group had had their meal earlier in the evening and the brothers from 'Eua, who had left for home by the time of the attack, had eaten with them. I am satisfied that the accused very deliberately picked up the knife and took it outside with him when he walked out to challenge the complainant to a fight. In other words, far from being an instantaneous reaction to an unprovoked attack, the violent stabbing with the knife was completely premeditated.

The Crown has proved the charge against the accused beyond reasonable doubt and he is convicted accordingly.

R v Taufa

Supreme Court, Nuku'alofa
McElrea J
CR 226/2003

21-24 September 2004; 1 October 2004

Criminal law – grievous bodily harm – defence of insanity - failed

The prisoner attacked three people with a machete - his wife, his mother-in-law and a young man who was a complete stranger to him. He inflicted very serious wounds on the two women. He was originally charged with attempted murder of the two women and in the alternative grievous bodily harm in respect of those victims, as well as bodily harm relating to the young man. The Crown accepted that the prisoner did not intend to kill the two women and therefore it offered no evidence on the charges of attempted murder. The trial proceeded in respect of the two charges of grievous bodily harm and one of bodily harm. The defence raised was one of insanity and in particular it was said that the accused did not know that what he was doing was wrong because he suffered from "intermittent explosive disorder", which caused his emotions to overwhelm his ability to understand that what he was doing was wrong. The illness could be controlled with the drug Prozac. The prison officers responsible for obtaining the medication failed to do so and as a result the prisoner was not on the medication at the time of the offence.

Held:

1. The onus of proof was on the accused to establish a defence of insanity on the balance of probabilities. This meant that unless the Court could say it was more likely than not that the accused was insane, the defence must fail. This required something more than 50% in terms of the balance between the two sides of the argument.
2. The Court accepted that the accused suffered from a disease of the mind but was not satisfied that at the time of the attacks he was insane.
3. The defence of insanity failed. The constituent elements of the charges as defined in the Criminal Offences Act were proved beyond reasonable doubt, and the accused was accordingly found Guilty on the two counts of causing grievous harm and one count of causing bodily harm. The evidence called concerning the accused's mental state would be relevant at the time of sentencing.

Cases considered:

Graham v R (Court of Appeal, CA 391/96, 27 February 1997, judgment of the Court delivered by Heron J)

Murcott v Police (High Court, Wellington, AP102/03, 18 June 2003, Goddard J)

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for prosecution : Mr Kefu
Counsel for the accused : Mr Niu

Judgment

Central Issue

The central issue in this case is whether the accused has established a defence of insanity based on "intermittent explosive disorder", a disorder of the mind affecting impulse control, which he is said to have suffered from at the time that he attacked three people with a machete.

Basic facts

There is no dispute as to the basic facts of this case. On the day in question, 23 February 2002, the accused escaped from the Hu'atolitoli Prison near the victims' place of residence and attacked all three of them with a machete, causing grievous harm to his wife and mother-in-law, and bodily harm to the third victim. The defence raised is one of insanity and in particular it is said for the defence that the accused did not know that what he was doing was wrong because he suffered from intermittent explosive disorder, which caused his emotions to overwhelm his ability to understand that what he was doing was wrong.

Although the accused has some previous convictions for violence, he had not previously attacked any of these three persons.

The charges

After the Crown had offered no evidence on charges of attempted murder, there were three remaining charges, one concerning each victim.

In respect of the first victim (the accused's mother-in-law) Kalatiola Tukuafu, there is one charge of grievous harm, the particulars of which are that the accused on or about 23 February 2002, wilfully and without lawful justification caused grievous bodily harm to Kalatiola Tukuafu's head, back, hands, right foot and other parts of her body.

A similar charge was laid in respect of the second victim, the accused's wife Mapa Taufa. Here the particulars allege that he wilfully and without lawful justification caused grievous bodily harm to her face, head, neck, back, hands and other parts of her body.

Lastly there is a count relating to a third victim, the particulars of which are that on the same date the accused wilfully and without lawful justification caused bodily harm to Sani Feivivini.

Legal definitions

I turn now to the legal definitions applicable. First, s 106 of the Criminal Offences Act creates the offence of committing grievous harm. It provides that every person who wilfully and without lawful justification causes grievous harm to any person in any manner or by any means whatsoever shall be liable to imprisonment for any period not exceeding 10 years. Grievous harm is defined to mean various things including (a) any harm endangering life, and (b) any severe wound. There is no doubt in this case that the injuries inflicted on the two women victims were grievous harm within one or both of those paragraphs. Either of them could have bled to death had early help not been provided, and certainly they suffered severe wounds.

Bodily harm is defined in s 107 to include any wound which is not severe. The third victim did suffer a wound as a result of the attack on him. It was not severe and there is no argument that the definition applies. As I say, the question really turns on the defence of insanity.

The law of insanity in the Kingdom of Tonga is similar to that in many other countries. Under the s17 of the Criminal Offences Act a person is not responsible at law for what would otherwise be an offence if he is proved to have been insane

> "in that he was suffering from such a state of mental disease as to deprive him –
>
> (a) of capacity to understand the physical nature and quality of such act or omission; or
>
> (b) of capacity to understand that such act or omission was wrong."

It is the second of these limbs on which this case turns.

A fuller account of the facts

The accused was serving a term of imprisonment of five years for robbery. The sentence was imposed in the year 2000. He was in prison at the Hu'atolitoli Prison which was almost adjacent to the petrol station where the three victims lived. It is a disturbing feature of this case that the accused seems to have been able to escape from that prison with relative ease and very often. It may well be of that if there had been proper security at the prison that the lives of these three people would not have been put at risk.

Nevertheless, although he said that on some occasions he was given permission to leave, on this particular day he did not seek permission but rather left during the time after the cells have been opened for prisoners to prepare for morning worship.

The accused had for some months heard persistent rumours that his wife was having an affair with another man. He had confronted her with this information but she had repeatedly denied it and this denial was apparently supported by her mother, with whom she was living. Her mother is Kalatiola Tukuafu, the first victim, and she was in charge of the petrol station.

On the morning in question the accused left the prison very early to visit his wife. He took with him another prisoner's machete which appears to have been very sharp. He says he took it with him to help him break out from the compound, and that he used it to get through some barbed wire at the back of the block in which he was living. I am prepared to accept that evidence from him. He walked to the petrol

station and leant through a louvre window at the back to wake up his wife and get her to let him in. He was carrying a backpack which he left at the back door, with the machete on top of it.

Whilst inside, a discussion ensued between himself and his wife and also at times involving her mother. There was a separate discussion between the accused and his mother-in-law in which he asked why she caused so much trouble in the marriage. It is clear there was a level of resentment by him against her. The wife's evidence of the discussion between the other two included references to a divorce. It reached the point where eventually there were accusations between the two women following an astute question by the accused as to who had invited this other man to the house. At this point the mother-in-law said the daughter had done so, and this led to an exchange between the two women in which it became clear that the wife had indeed had an affair, and that the accused had been lied to.

The accused's evidence is that at this point he was unable to speak and left the premises, walking at the direction of the prison. There is no evidence of his picking up the backpack and the knife at that point. Before he had gone far he was called back by his mother-in-law and then by his wife, to talk about matters. Indeed his mother-in-law suggested that they should make a "fresh start".

The discussion between the accused and his wife resumed at what was referred to as "bedroom two" in the trial. The accused was standing in the doorway and could see through a louvre window into "room one". He there saw his mother-in-law apparently running off. His wife's account of the conversation at this point suggests that he said to his wife that he was going to get the mother-in-law to come and join the discussions. That is perhaps why he called out to her to stop, or to ask her where she was going. She did not stop and indeed he says she continued to run, and he ran after her. It appears she went out the back door already referred to, and was heading for a neighbour's property.

The accused followed and I will refer to his own evidence now to indicate his account of what happened. He said he could not describe the feelings he had at that time, but he said "I came and stood at the back door and recalled my bag was outside. And I recall the knife was on top of the bag. So I took the knife and followed her."

He went on in his evidence to say that he caught up with Kalatiola and hit her from behind, he believes on the head. He could not recall the number of times he hit her. She fell into a room in 'Elisapeta's house whence she had run. It was a dark room and he was surprised to find another person shouting out to him, this being 'Elisapeta. At that point he stopped striking Kalatiola and he walked back to the road.

Kalatiola did not give evidence as she was apparently not available to do so.

The account by the second victim, the accused's wife, I will refer to also as given by her in the witness box. She referred at some length to the discussion which she had with the accused after he came into the house. There appears to have been a detailed discussion why she had not been visiting him, and questions such as, Was she sleeping with a police officer, and had she been to a certain police officer's home? Her account of the discussion immediately before the accused chased after her mother is that he said he needed to speak to her mother as she had said to her daughter to keep telling lies to the accused. At that point the wife said that he responded, "Stay here, I'll go and get her."

The witness said that the next thing she heard was some banging on the door, meaning the outside or back door to room one, and she knew then he had left the

house. She locked herself in the inner part of the house and tried to call the police. It was at this point that the accused demanded that the young man Sani who was sleeping on the floor in room one, should open the hallway door to the inner part of the house, but Sani was unable to do so. He was fearful of the accused's attitude and tried to run out the back door already referred to. He was chased by the accused who grabbed him by the collar and it appears that it was in that action of grabbing hold of him, perhaps while holding the knife, that he cut Sani's shoulder.

The accused then kicked in the door to the hallway that gave entry to where his wife was phoning the police. Her evidence was that he came in with the knife and started to hit her. She said she was crying and shocked and that he kept saying, Why was I lying, and why had I not told him the truth? In other words, there is evidence there that while the injuries were being inflicted, he was still trying to extract answers to questions. (This is relevant later to the question of insanity.)

The wife gave evidence that he was trying to cut her neck, and indeed she suffered a considerable number of cuts to her neck from the machete. She said that she saw a look in his eyes that she had never seen before, and when asked in cross-examination as to what that look was, she said it was "just pure anger". She contrasted this with other times that he would be angry but normally he would say he was sorry, or would smile or would cry, but this time there was no change.

She managed to get outside and I gathered that the attack continued out there. She said she felt the world blackening but he kept pulling her hair and she fell. She said he kept repeating, "Tell me the truth and stop lying to me."

The attack ended when the wife realised that their son was crying and she said, "Listen to our son crying", and the accused "stopped for a moment, and did listen to him crying, and softened up and dropped the knife and said sorry to me. It was like he awakened when heard the cry, and that it was the only reason he stopped. He then came and hugged me and kissed me on my head and then he left."

Injuries sustained

The medical evidence was not disputed as to the injuries received. These were helpfully summarized by Mr Niu in his submissions. By his count, which I think is correct, there were five cuts on the first victim Kalatiola Tukuafu, those being to her left hand and little finger, the right side of her neck and right cheek, her right shoulder blade and two on the back of her head. There were nine cuts to his wife's body - three on her hands, one on her forehead, one on the back of her head, and four around the back of her neck.

Mr Niu did not go into the number of cuts to the third victim but my study of the evidence suggests there was only one cut and it does not appear to have been a deep cut.

Evidence as to insanity

The expert evidence came from Dr Mapa Puloka. He is a well respected psychiatrist with ample qualifications. Unfortunately he is the only psychiatrist in the Kingdom of Tonga, so unless a psychiatrist is brought from another country the Court is unable to hear psychiatric evidence from both sides of the argument.

Dr Puloka said that he first saw the accused on 14 February 2002, which was a mere nine days before this incident. At that stage the accused was complaining that he

could not control his temper and it had become a problem. Secondly he was complaining of having what was translated as having "a frequent startled response". Thirdly, inability to sleep. Fourthly the accused felt that the wind usually affected his way of thinking. Fifthly, he complained of localized tremor of the eyelid. He complained that his problems had become more serious in prison because he had no marijuana to smoke.

At that stage Dr Puloka diagnosed his illness as cannabis dependency and prescribed Prozac which has the effect of decreasing depression and anxiety. He added that it also controls a disorder of impulse control.

Since then Dr Puloka has seen the accused on numerous occasions, having seen him at different times in 2002, 2003 and 2004. "I know now the nature of his illness, to a degree", he said. He went on to say that he suffered from a condition known as intermittent explosive disorder. He said that this illness is known to be associated with previous organic problems, such as head injury or an episode of unconsciousness, or febrile convulsions. He said that the accused did not have any of those three factors but had suffered a similar trauma during childhood when at the age of nine or 10 months a bottle of boiling water was accidentally poured over his head – I imagine the child himself tipped over a thermos flask, or whatever it might be called here. The child was not given medical attention immediately and the burn became infected. He was taken to a surgery ward and given a general anaesthetic. Some skin had to be removed because it was infected and he was hospitalized for five days.

The doctor's account of his patient's history includes a history of "bad temper". He gave examples which included an instance where his brother rebuked him in front of some friends and he responded inappropriately by throwing something at the brother and then smashing his brother's car. The witness said that it was disproportion to what his brother had done. In another incident he was angry with his sister-in-law when she spoke to him about some domestic matter, and he threw a drawer at her. There was one incident of his parents reprimanding him and he was very angry and tried to commit suicide with an electric chord.

It was the opinion of Dr Puloka that these incidents of apparent bad temper and inappropriate conduct were indeed a manifestation of the condition known as intermittent explosive disorder. He stressed that the initial trauma had occurred when the accused's brain was still developing and was very vulnerable, and that that incident was the cause of this illness and had been there since early childhood.

He explained that one of the things known about the brain is the different levels of serotonin and that there is often a low level of serotonin associated with intermittent explosive disorder. Unfortunately levels of serotonin cannot be tested for in Tonga. He added that Prozac is used to raise or elevate the level of serotonin in the brain and the accused feels better when he takes Prozac. It also causes a reduction in the incidence of intermittent explosive disorder.

Dr Puloka's conclusion was that the accused has a psychiatric disorder of this type which has an organic basis due to the low level of serotonin. He explained that this is a recognized mental disorder and falls within the so-called "impulse-control disorders, not elsewhere classified" in DSM-IV (Diagnostic and Statistical Manual of Mental Disorders, 4th edition). My enquiries indicate that according to p609 of that manual, intermittent explosive disorder is characterized by "discreet episodes of failure to resist aggressive impulses resulting in serious assaults or destruction of

property". The degree of aggressiveness is "grossly out of proportion to any provocation or precipitating psychological stressor".

Intermittent explosive disorder and insanity

Turning then to the effect of that illness in terms of the definition of insanity, it was the opinion of Dr Puloka that the accused would have known what he was doing at the time, i.e. that he was slashing people with a machete, but he would not have known that what he was doing was wrong. In his opinion the accused was in a very emotional situation, and as a result of the illness such emotion "overwhelmed his judgment to know whether it was right or wrong". He added that therefore the accused was not in control of the situation whatever he did.

When asked what the accused would have been thinking during that time, he said he could not answer that question but repeated that the emotions would have overwhelmed the accused's judgment.

At the end of his evidence-in-chief the witness added that he knew "more than 50% of what had happened but he did not know all the facts". He said that the patient's history was incomplete, and he had not provided a report for the Court because he had not been subpoenaed by the defence as a witness. He therefore attended on a voluntary basis.

I suggested to the witness that before he was cross-examined he should at least read the accused's account of the matter as recorded by the police in his interview with the police shortly afterwards. He did that over the period of an adjournment and before cross-examination commenced. During cross-examination the witness appeared to change his opinion. He said previously he had considered it 70 to 80% likely that the accused was unable to know that what he was doing was wrong, but now he felt it was about "50/50" that the emotions overwhelmed the understanding.

In re-examination he was asked whether the very severe nature of the injuries inflicted and the repeated nature of them suggested that it was more likely than not the emotions had overwhelmed the accused's judgement or the ability to know right and wrong, but the witness did not appear to accept that proposition as following in that manner. He indicated, I think, that it all depended on the finer detail of the evidence. At one point he thought that the fact that the accused had reflected on the presence of the knife before he picked up - and was aware of it being there and that he picked it up consciously - was something that tended to suggest the exercising of a power of judgement at that moment.

Defence submissions

Mr Niu first submitted that the Court should accept that the accused had not taken the knife with him in order to attack his wife. I accept that submission and will proceed on the basis that the accused took the knife with him for the purpose which he stated in evidence (namely to break through the wire fence at the prison), even though he had given a different explanation at the time to the police.

There was a very helpful account of the facts of the matter from Mr Niu, leading him to the point where he emphasised the severity of the injuries inflicted on the two women, and submitted that a man in his "right mind" would not take this murderous action. I raised with counsel the question whether a man in a jealous rage might not have exactly the same problem (of his emotions overwhelming his knowledge of right

and wrong) without being insane, and whether there might be a floodgates problem if this defence was successful. Mr Niu submitted that the floodgate to hold back the flood waters is the requirement that there be a disease of a mind, and it is only in the relatively unusual case where expert evidence can establish a disease of the mind that such a defence can operate. I accept that for this reason there is no "floodgates" problem. There may still however be a problem in drawing the line.

Mr Niu went on to submit that although the psychiatrist in cross-examination felt it was a 50/50 question as to whether there was knowledge of right and wrong on the part of the accused, nevertheless there was evidence which would be sufficient for a jury to accept the defence of insanity.

Mr Niu helpfully referred me to passages out of two of the leading English texts, Archbold's Criminal Practice, and Smith and Hogan Criminal Law. Those passages are to the same effect and can be summarised by taking one passage out of Smith and Hogan 9th edition (1999) at page 205:

> *The law does not recognise irresistible impulse even as a symptom from which a jury might deduce insanity within the meaning of the Rules. If, however, medical evidence were tendered in a particular case that the uncontrollable impulse, to which the accused in that case had allegedly been subject, was a symptom that he did not know his act was wrong, it would be open to the jury to act on that evidence.*

Those propositions are taken from the decision in *Attorney General for South Australia v Brown* [1960] 1 All ER 734 (PC).

As to whether the accused was on Prozac at the time of this incident, Mr Niu persuaded me on the evidence that the prescription which had been given to his client on 14 February 2002 had been lost by the prison officers, so that when the doctor saw the accused next (which was after this incident) he had to provide a new prescription. I accept on balance that the accused was not on Prozac at the time of this incident.

Submissions for the Crown

Mr Kefu's submissions started with his accepting on behalf of the Crown that the accused had a disease of the mind. I believe that was a responsible concession, and in any event I do accept Dr Puloka's evidence to that effect. There was no evidence to contradict it, and Dr Puloka is a well respected psychiatrist.

Nevertheless Mr Kefu submitted that on the balance of probabilities the accused was aware of what he was doing and knew that it was wrong. The first part of that - being aware of what he was doing - is not disputed by Mr Niu, and indeed the psychiatrist was of that opinion. As to the second part - that the accused knew that what he was doing was wrong - Mr Kefu put forward three arguments in support.

First, he pointed out that the condition as described by Dr Puloka involved sudden outbursts of violence when irritated or wronged. But in this case (Mr Kefu said) the accused did not snap at the moment when he discovered he had been lied to about his wife having an affair. Instead of snapping - reacting in a violent way at that point - he "coolly walked out", as counsel put it, and was obviously in control of himself and his emotions. Even when he was called back to talk about it further, he managed to "keep his cool" until his mother-in-law started to run away when he called her back.

Secondly, the accused had enough clarity of mind to know that there was a knife on the ground and to pick it up before pursuing the first victim, and also to take it with him when he kicked in the door to confront the second victim.

Thirdly, as to the severity of the wounds, Mr Kefu submitted that this was an issue for sentencing rather than itself showing an overwhelming of judgement. He added that the issues must be decided at the time of the commencement of the attack. He accepted that the accused may well have lost control and lost the ability to judge once blood started to flow, and that his emotions may have risen to take over his capacity to know right and wrong; but he submitted that the judgement of the Court must be addressed to the moment of the first blow and not to those that followed. I accept that proposition.

Finally, counsel on both sides agreed that the onus of proof is on the accused to establish a defence of insanity on the balance of probabilities. This means that unless the Court can say it is more likely than not that the accused was insane, the defence must fail. This requires something more than 50% in terms of the balance between the two sides of the argument.

Previous legal cases of intermittent explosive disorder

Against all that background I can now refer to the few cases I have been able to discover where intermittent explosive disorder has been discussed in the context of criminal offending. I have not so far found any case where this disorder has been accepted as the basis for a finding of insanity. However, there are two cases which Research Counsel in New Zealand has supplied where this disorder has been accepted as relevant in mitigation of sentence; in neither case does it seem to have been relied upon as a defence. These are *Murcott v Police* (High Court, Wellington, AP102/03, 18 June 2003, Goddard J) and *Graham v R* (Court of Appeal, CA 391/96, 27 February 1997, judgment of the Court delivered by Heron J).

I have also been supplied with the records of some American cases but although in some cases the disorder was raised as a defence, it has not (so far as I can see) been accepted as a defence on the facts of those cases. Nor have I found any case where it has been held that the disorder could not give rise to insanity. Indeed, in view of the general position concerning loss of control, as dealt with in Smith and Hogan, I would not expect to find such cases. It must always depend on the facts of the particular case.

Conclusions on the evidence

I accept (as does the Crown) that the accused suffered from a disease of the mind, namely intermittent explosive disorder. I am not however satisfied that at the time of these attacks he was insane. My reasons for this conclusion are as follows.

1. Even Dr Puloka was not able to go above a 50% likelihood of the emotions overwhelming the understanding of right and wrong in this case - once the witness had read the accused's statements to the police. It may in future cases be wise if, before being called to give evidence, a psychiatrist is provided by counsel with the depositions from the preliminary hearing. (The ideal of course would be for the witness to sit in court and hear the prosecution evidence given at trial, but where resources are very limited that may not be a practical suggestion.)

2. I am not satisfied on the evidence that the accused's emotions did in fact overwhelm his understanding. I may be in a better position than Dr Puloka to make that judgement, having heard all the evidence given here. In particular I stress the evidence of the wife that during the time she was being attacked with the machete the accused was demanding answers from her to his questions. That indicates to me that his mind was engaged in a rational process and that his powers of judgement had not entirely left him.

3. Mr Kefu's submission about the delayed response from the accused - his initial response being to walk away - also points to the same result. This was not a sudden or immediate response at the moment he discovered he had been lied to about his wife's affair, but something that occurred after he had had time (and the good sense) to walk away from the discussion.

Even if there had not been this problem of a delay, I would still have had difficulty with the defence case. It must happen often that enraged people act violently when their emotions overwhelm their judgement, without their having any disease of the mind. If those people are found Guilty of a serious crime, while others whose judgement is overwhelmed because of a disease of the mind are to be held Not Guilty, it is hard to see why there should be different outcomes when in both cases the defendant is not able to know at the time that what he is doing is wrong. Further, there is a problem of diagnosis. If the mentally ill one is in a rage induced in a perfectly logical way, how would you know if the violence was due to the illness or not?

This issue does not however need to be decided in the present case; but it may partly explain why I have not so far been able to find a case where the defence of insanity has succeeded on the basis of intermittent explosive disorder.

Result

For those various reasons, then, I find that the defence of insanity must fail. I find further that the constituent elements of the charges as defined in the Criminal Offences Act have been proved beyond reasonable doubt, and the accused is accordingly now found Guilty on the two counts of causing grievous harm and one count of causing bodily harm.

I should add, though, that the evidence which has been called concerning the accused's mental state will be very relevant at the time of sentencing, so that evidence has certainly not been a wasted effort.

R v Taufa

Supreme Court, Nuku'alofa
McElrea J
CR 276/03

19 October 2004

Sentencing – mental illness – mitigating factor

The facts are set out in the Supreme Court decision reported at [2004] Tonga LR 336.

Held:

1. The maximum term of imprisonment for grievous bodily harm was one of 10 years. Without mitigating factors a sentence in the order of 7½ or 8 years imprisonment would be required.
2. The medical condition was a mitigating factor and led to a substantially reduced level of self-control, even though he was not insane. That justified a considerable reduction and taken together with the other matters put forward the conclusion of the Court was that a term of imprisonment of 4½ years was appropriate.
3. On the grievous bodily harm charges the Court ordered that the prisoner would serve a term of three years (cumulative on the existing sentence of six years). The balance of 18 months would be suspended for a period of three years on five conditions. On the charge of bodily harm, where the damage was much less severe, the sentence was one of two years imprisonment (concurrent with the 4½ years sentence).

Counsel for prosecution : Mr Kefu
Counsel for the prisoner : Mr Niu

Sentencing Remarks

This is a difficult sentencing that arises out of an incident which occurred at Malapo on 23 February 2002.

The prisoner attacked three people with a machete - his wife, his mother-in-law and a young man who was a complete stranger to him. He inflicted very serious wounds on the two women, and I will come to the fuller facts in a moment.

He was originally charged with attempted murder of the two women and in the alternative grievous bodily harm in respect of those victims, as well as bodily harm relating to the young man.

The Crown accepted that the prisoner did not intend to kill the two women and therefore it offered no evidence on the charges of attempted murder. The trial proceeded in respect of the two charges of grievous bodily harm and one of bodily harm, and I found the prisoner guilty of those charges.

The essence of the defence was one of insanity but I found that that defence had not been proved on the balance of probabilities. In essence the defence was the prisoner was legally insane because, although he knew the nature of what he was doing, he did not know that it was wrong. It was said that this was because his ability to understand or comprehend things was overwhelmed by his emotions as a result of a mental illness described by Dr Puloka as Intermittent Explosive Disorder.

The prisoner at the time was serving a sentence of six years imprisonment on a conviction for robbery. He seemed to be able to leave the prison reasonably regularly and I have already expressed surprise at the lack of security at the prison. Sometimes he seems to have left with the permission of prison staff and at other times he simply walked out.

On this day he went to see his wife and mother-in-law, being upset about rumours he had heard of his wife having an affair with another man, which she had persistently denied. He confronted her in the early hours of the morning in the presence of the mother-in-law and an argument ensued which I have described in my verdict already. In the course of that it appears to have been admitted that in essence he had been deceived by both women.

Shortly after that when he saw the mother-in-law leaving the house he told her to come back, and when she failed to return he chased her, picking up the machete that he had brought from the prison and attacking her about the head area. He stopped only when a neighbour to whose house the mother-in-law had run shouted out at him. He went back to the house and then struck the young man when he failed to open the door to let him in, and once he kicked his way in through the door and into the house he attacked his wife mercilessly with the machete about the head and shoulders and at the back of her neck, inflicting numerous and serious wounds. How she survived that, I do not know. She was taken by others immediately to the hospital, as was the mother-in-law, and fortunately the medical assistance given was sufficient to save their lives. They still show the scars of that attack.

The medical evidence did establish that the prisoner suffered from this mental illness referred to as Intermittent Explosive disorder. Dr Puloka traced its origin back to traumatic injury suffered by the prisoner as a young child, when boiling water fell on his head. It has resulted in his having explosive times when he gets frustrated by other people and he responds in a way that is quite out of proportion to what is involved.

Dr Puloka's advice was that this mental illness can be controlled although not cured with the drug Prozac, which he had prescribed to the prisoner only a matter of two weeks or so before this incident. It appears that the prison officers responsible for obtaining the medication failed to do so and as a result it appears that he was not on the medication at the time. If that medication had been obtained and supplied these events may not have occurred.

My finding against the submission of insanity amounted to saying it was not proved on the balance of probabilities that he did not know that this was wrong. However I accept that as a result of the mental illness he had a reduced level of self-

control. That is not a legal defence but it is certainly a mitigating factor and I will give considerable credit for that in imposing sentence.

The maximum term of imprisonment for this offence is one of 10 years - that is, for grievous bodily harm.

Mr. Niu for the defence points out his client's mitigating factors in terms of the loss of control; the absence of medication after it had been prescribed; the fact that he has not repeated such acts of violence since he has been on medication over a period of 2½ years; the fact that his wife wishes to resume their marriage when he leaves prison and that she visits him regularly still.

Mr Niu makes the submission that the prisoner could be dealt with by way of a suspended sentence of imprisonment with terms which included taking part in an anger management course, and non association with the mother-in-law, who seems to fear for her life if he is released from prison.

Mr. Niu also pointed out that the prisoner still is relatively young man, being 25 years of age, so his rehabilitation is important, and he submitted that he might not be able to cope with the continued term of incarceration.

The Probation Report helpfully provided in this case ranks the prisoner as a high-risk prisoner, but that is based on the number of previous convictions and the seriousness of the offence and other such matters.

The Probation Officer records that the mother-in-law Kalatiola feels that she would have to leave Tonga for her own safety if the prisoner was released. The Probation Officer says that despite wanting to join his family and his wife's desire to reunite with the prisoner, the Officer believes that "if something happens again, if the accused is released then I am of the opinion that something very outrageous will happen". In other words the Probation Officer is concerned on questions of safety of other persons, and given the background to this matter that is understandable.

If somebody attacks somebody else with a machete and slashes them about the head and the neck they are very lucky that they are not on a murder charge or at least on attempted murder charge. In my view the starting point for sentencing in this case has got to be towards the upper end of the maximum sentence for grievous bodily harm, because it is about as serious as one can get without being on an attempted murder or murder charge. There were multiple wounds inflicted with a dangerous instrument on two people, not one.

The prisoner has a previous conviction on a serious matter; therefore he cannot be treated as being somebody with a blameless record acting for the first time in breach of the law.

I would have thought that without mitigating factors a sentence in the order of 7½ or 8 years imprisonment would be required.

I take into account the medical condition of the prisoner as a mitigating factor and I accept that he had a substantially reduced level of self-control, even though he was not insane. In my view that justifies a considerable reduction and taken together with the other matters put forward by Counsel my conclusion is that a term of imprisonment of 4½ years is appropriate even having regard to the medical condition.

I believe that part of that can be suspended on conditions, but I also believe that for reasons of public safety the prisoner needs to be kept in prison until there is a sustained period of a lack of any violence on his part. It is too early in my view to be able to say that the public could be safe if he was released now simply on conditions.

Therefore the seriousness of the offending and the questions of public safety lead me to say that he will serve a term of three years and this will be cumulative on the existing sentence of six years. The balance of 18 months will be suspended for a period of three years on conditions:

1. He will be under the supervision of a Probation Officer.
2. He will live and work where directed by his Probation Officer.
3. He is not to associate in any way with the victim Kalatiola.
4. He is to attend an anger management course as arranged by his Probation Officer.
5. He is to follow all directions of Dr Puloka or such other Medical Officer as Dr Puloka directs.

The effect of that sentence which I am imposing in respect of the two charges of grievous bodily harm is that if the prisoner re-offends during that three year period, which starts after he has served three years, then he will go back to prison and serve the remaining 18 months of the sentence. He will also serve the remaining months of this sentence if he breaches any of the five conditions that I have set out.

On the charge of bodily harm, where the damage was much less severe, the sentence is one of two years imprisonment, which is concurrent with the 4½ years sentence.

R v Fatani

Supreme Court, Nuku'alofa
McElrea J
CR 300/2003

17 September 2004; 15 October 2004

Sentencing – guilty of bodily harm on wife – sentence of imprisonment as deterrent

On 29 November 2001 the accused and his wife had been to a dance. When they returned home the wife fell asleep and woke to the accused kicking her. The medical evidence showed that the complainant suffered two black eyes (eyes closed but vision intact), cuts to her right cheek and right upper lip, a tooth broken through the enamel, a bony fracture of the right jaw, and a problem with closing her jaws. The doctor summed up her that injuries by saying that they were serious but not life-threatening, and were consistent with force from a heavy blunt object being exerted on her face many times. The accused was charged with causing grievous bodily harm contrary to section 106 of the Criminal Offences Act but was found guilty after trial of causing bodily harm under section 107 of the same Act.

Held:

1. It was important that the sentence imposed sent the right message to other men, namely that those who beat their wives and cause serious injury can expect to go to prison. The deterrent aspect of sentencing was an important one and a sentence of imprisonment was also required to denounce strongly this type of conduct on behalf of all society, and to try and protect the community by making it a safer place for women and other vulnerable people.
2. A sentence of 10 months imprisonment was imposed. After the accused served five months, the remaining five were to be suspended for a period of two years. That suspension was on condition that the accused was under the supervision of a probation officer for that period, and that he attended any programme directed by the probation officer.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown : Mr Sisifa
Defendant in person

Sentencing Remarks

The accused was charged with causing grievous bodily harm contrary to section 106 of the Criminal Offences Act but was found guilty after trial of causing bodily harm under section 107 of the same Act. The allegation was that the accused on 29 November 2001 caused (grievous) bodily harm to his wife, Siangahu Fatani, by repeatedly punching her about the eyes and mouth.

In finding the accused Guilty I accepted the evidence of his wife in preference to that of the accused. I can summarise the events in question for sentencing purposes in this way. The accused and his wife had been to a dance. They are Mormons and so I assume no alcohol was consumed. When they got home his wife got changed to go to bed while the accused set about playing cards by himself. His wife came back in the living room to try and sleep because she said it was too hot in the bedroom and then she was four months pregnant at the time. She did go to sleep but she was woken by her husband kicking her thigh. He told her to go back into the bedroom and when she didn't do so he started slapping her in the face while she was in a sitting up position. He was shouting at her about some amplifier or stereo which had been lent to a relative, and he was obviously upset about that.

Although the accused was hitting his wife with an open hand and not with a closed fist, he used considerable violence and caused a lot of pain and suffering. The complainant gave evidence that her mouth was bleeding and her face was swollen so that she could not talk and could hardly see. In addition her golden tooth was broken and her jaw was fractured. Her eyes were swollen as well. She estimated that this assault went on for about eight minutes but I accept that even a short duration of time would have seemed very much longer and I cannot put too much weight on that estimate.

The complainant managed to crawl out of the house and call for help. The accused's uncle lived nearby and his wife came first to her aid. They took her to the hospital where she remained for five or six days before she was discharged. In itself that indicates the seriousness of her injuries. The medical evidence showed that the complainant suffered two black eyes (eyes closed but vision intact), cuts to her right cheek and right upper lip, a tooth broken through the enamel, a bony fracture of the right jaw, and a problem with closing her jaws. The doctor summed up her that injuries by saying that they were serious but not life-threatening, and were consistent with force from a heavy blunt object being exerted on her face many times.

I found that these injuries constituted bodily harm but not grievous harm as defined in section 106. They were nevertheless serious injuries.

The complainant accepted that she had scratched her husband's chest and thrown a lamp at him, but I am satisfied that this was done only in self defence after the attack had started.

The aggravating factors in this case are as follows:

1. The attack was entirely unprovoked.
2. It occurred in the complainant's own home where she was entitled to feel safe, especially at the hands of her husband.
3. The complainant was a vulnerable person, being a woman four months pregnant.

4. The attack was a sustained one over a period of several minutes.
5. The injuries inflicted were serious and resulted in his wife being hospitalised for several days.

It is significant that the accused said by way of defence at trial that they had a fight which she started. He seemed to think that was all right for him to respond in this manner although he alleged it was only three or four slaps. The accused needs to be told in no uncertain terms that no man is entitled to strike his wife unless this is really necessary as self defence - which will not often apply, because the first obligation is to end the argument by walking away from it.

A probation report prepared for sentencing purposes lists certain factors that can be treated as mitigation in this case:

1. The accused has no previous convictions in Tonga although he is aged 41 years. (He does however have a conviction for murder in the United States from where he was deported after serving a nine months sentence of imprisonment; he must have been very young at that time.)
2. He is a hard-working man and attends his church.
3. He has apologised to his wife, is remorseful and promises to change his ways.

In Court today the accused repeated his apology and his expression of remorse. He said that nothing like this would happen again. He confirmed that he is now engaged in church activities and a youth programme.

When Mr Kefu opened the case for the Crown at trial he commenced by saying that this was "a rare case of domestic violence brought to court for criminal sanction". Such cases are so rare that there appears to be no case law providing guidance for sentencing judges dealing with cases of domestic violence. It is most unlikely that this situation is due to the absence of domestic violence in the Kingdom of Tonga. There are other, more probable, explanations - such as the unwillingness of most wives or female partners in many countries to lay charges with the police, or (even where that is done) to see the matter through as far as Court.

In these circumstances it is important that the sentence imposed in this case sends the right message to other men, namely that those who beat their wives and cause serious injury can expect to go to prison. In this case the deterrent aspect of sentencing is an important one - but I believe that a sentence of imprisonment is also required to denounce strongly this type of conduct on behalf of all society, and to try and protect the community by making it a safer place for women and other vulnerable people.

Bringing all of those matters together I consider that a sentence of imprisonment is required here and I impose a sentence of 10 months imprisonment. After the accused has served half of that, i.e. five months, the remaining half is suspended for a period of two years. That suspension is on condition that the accused is under the supervision of a probation officer for that period, and that he attends any programme directed by the probation officer.

I impose that sentence having regard to the importance of sending the right message to this defendant and to others, and having regard especially to the five serious matters listed as aggravating factors above.

R v Savieti

Supreme Court, Nuku'alofa
McElrea J
CR 104/2004

4-8 October 2004; 21 October 2004

Sentencing – indecent assault on child – imprisonment imposed for public safety and as deterrent

At the end of a defended trial by Judge and Jury the accused was found guilty on the count of indecent assault on a child contrary to s 125(1) of the Criminal Offences Act. The particulars of the offence set out in the indictment were that the accused in the year 1997 at Mataika did indecently assault a (named) girl under the age of 12 years by poking one of his fingers in her vagina. The maximum sentence for such an offence was seven years imprisonment.

Held:

1. The Court was not prepared to accept any expression of remorse whatsoever from the accused. He denied the allegation and gave evidence at the trial, in effect saying that the girl was liar. He could not say he was sorry for what happened, because if he admitted that this indecent assault did happen then he perjured himself at trial. At the most it was an expression of embarrassment at the shame brought upon him by the conviction.
2. Although at the time of the offending he was a first offender, he had a previous conviction at the time of trial and came before the court for the second time on a similar matter. He could not get the usual reduction available to first offenders as he got that previously when he appeared before the Court for the first conviction.
3. The maximum term of imprisonment was seven years. The Court imposed a sentence of five years. That was calculated having regard to the aggravating factors and the absence of any mitigating factor. The sentence imposed was for protection of the public and was intended to strongly denounce the abhorrent behaviour by an adult man, as well as to deter him and others from similar offending.

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for prosecution : Mr Kefu
Counsel for the accused : Mr Tu'utafaiva

Sentencing Remarks

The offence

At the end of a defended trial by Judge and Jury the accused was found guilty on the count of indecent assault on a child contrary to s 125(1) of the Criminal Offences Act. The particulars of the offence set out in the indictment are that the accused in the year 1997 at Mataika did indecently assault a (named) girl under the age of 12 years by poking one of his fingers in her vagina. I do not propose to identify the girl or her brother (also a witness) in this judgment.

The maximum sentence for such an offence is seven years imprisonment.

Facts surrounding the offence

The facts of the matter are that on the day of a funeral in their village when other adults would have been distracted by funeral activities, the accused enticed the victim (then aged seven or eight) and her younger brother into the bush with promises of lollies. He was known to them both as a very close family friend and indeed he was more like an uncle than a friend. At times when the children's father was sick he lived in the house and helped with household duties. He had from time to time bought lollies for the young boy then aged five.

On this day he found them sitting on a step and suggested that they go and get some lollies, and he organized a taxi for that purpose. He took them from his own village of Ngele'ia to Mataika along the By-pass Road to a place where there was a small shop open.

He bought lollies for the children and then he suggested that they go into the bush to collect coconuts. They went with him down a side road from the shop and crossed through an area of bush to a mango tree. They sat on a log under the tree and he had one child on each side of him. He told the young boy to look the other way while he ate his lollies. He pulled the young girl towards him and with his other hand inserted his finger under her clothing into her vagina. He pushed it in and out several times and it really hurt her. She was sobbing quietly and this caused her brother to turn around. He glanced quickly at her and he saw her apparently sitting on the accused's lap.

The accused had a knife with him and he held the knife in a way that the children could see him and threatened them not to tell anyone - or may be that the threat was directed only at the girl but her brother overheard it.

They then left the bush area and returned to the road where they made their way back home.

No doubt partly as a result of embarrassment but also because of the threat regarding the knife, neither child spoke about this until many years later.

Probation report

The Probation report provides helpful information in this case. It shows that the accused is a man aged 52 now and he would have been about 45 at the time of this offending. He is a single man and I believe he has never been married. Prior for his

remand in prison for sentencing he was living with his sister and her children and was as an operator for a taxi company in his village, Ngele'ia. He has been closely involved in church activities, being a member of the Church of Tonga. Indeed the evidence at trial established that he was a music leader or director at his Church.

The report notes that the accused is not a first offender as in 2002 he was convicted of a similar offence. The report also notes that the accused "seems to be astounded and [finds it] difficult for him to puzzle out why this imprudent idea approached his mind". It also says that "he is in deep remorse and regret what he did that darkened his image in the community".

Alleged remorse

Ms Mangisi appears as counsel for sentencing today in the absence of Mr Tu'utafaiva who was defence counsel at trial. She too emphasized the defendants' extreme remorse and said that he realized the seriousness of the offence and that it had brought shame and humiliation on himself, his family and acquaintances and also on the victim and her family.

I am not prepared to accept any expression of remorse whatsoever from the accused. He denied this matter and himself gave evidence at the trial, in effect saying that the girl was liar. He cannot turn around now and say he is sorry for what happened, because if he admits that this indecent assault did happen then he has perjured himself at trial. At the most it is an expression of embarrassment at the shame that this conviction has brought upon him.

The Probation Report recommends a rehabilitation program available from the Center for Women & Children's Counselling, and this would be possible within a Probation sentence with conditions. Community work also is mentioned as a possible sentence.

I have also received a letter from defendant's Pastor, the Rev Talia'uli. He speaks highly of the defendant and makes it clear that he is very surprised at this conviction. He asks for mercy on behalf of the defendant.

The Probation Officer refers to the accused as not a first offender but in fact this offence was the first in time of the two indecent assault cases of which he is now convicted.

Submissions in mitigation

In her submissions Ms Mangisi covered the personal circumstances of the accused as I have already outlined them, and his (alleged) expression of remorse and shame. She asked the court to consider a suspended sentence with Community Service.

The previous conviction

In my view that type of sentence would be quite inappropriate in this case. The accused may regard himself fortunate to have received a suspended prison sentence from Chief Justice Ward in a similar case on 10 June 2002. In that case he was sentenced to 12 months imprisonment suspended for 3 years. Somewhat surprisingly, there does not appear to have been any alternative by way of conditions of suspension, such as community service or supervision. However at that time the accused was understood to have one previous conviction and that was for an

unrelated matter concerning homebrew. That was true but in fact he was not a first offender at the time of the sentencing.

I am going to read from the summary of facts of that earlier case because in my view it shows a disturbing pattern of offending.

About 12 midday on 29 March 2002, the victim, a named girl who was in class 3 at her school, was asked by her mother to go to the store and do her shopping. The child went with a friend who turns out to be the younger brother of the present victim who went into the bush with the accused.

On their way back, they were called by the accused from his house near the road, informing them to come to his house to get the key. The girl and her friend went to the accused. They were told that the girl should walk in to get the key and the boy wait outside the house.

While inside, the girl was grabbed by the accused, who pulled out his penis and inserted it into her mouth. A moment later, an old lady noticed the boy standing outside the accused's house and she called out to him to go home. At that instant, the accused let the girl go. She walked out and told her friend what the accused had done to him. They went home and told her mother who went and complained to the police.

Comparison of the two cases

In my view the sentence in the present case should be much higher than that imposed on the first case for a number of reasons:

1. In the 2002 case the accused pleaded Guilty and would have got a reduction in sentence because of that. No such reduction is possible in this case.
2. At that time he was not known by the Court to have committed any previous sexual offences, but it is now known that he has done this twice.
3. In this case he abused a position of trust - that is, he relied on the fact that the children knew him almost as a family member and would have trusted him to behave properly. There was no suggestion in the earlier case that he occupied any position of trust in relation to the victim.
4. In this case he used a knife to threaten and terrify the young children.
5. In this case he caused very considerable pain to the young girl, to the point where she was crying.

For all those reasons I repeat that this is a much more serious case.

I said that I thought that the two cases showed something of a pattern and I return to that question now.

On both occasions Savieti picked on young children in the local area. In both cases he appears to have known that the young boy would do what he was told by the defendant, that is that he would stay outside the door or he would look away while eating lollies. He was therefore able to use Sani like a chaperone but also to know that he would be obedient and do what he was told.

In each case the girl might not have gone with the defendant but for the presence of the boy as a companion.

In each case he isolated the girl in a place where adults would not be able to see her. He then did thing to them which they may have been too young to know were even wrong.

In my view this man is a danger to the community and if at large is likely to be reoffending as a paedophile against other children.

Conclusions as to sentence

I am going to be imposing a lengthy term of imprisonment and it will not be suspended.

Although on this occasion he was a first offender he has a previous conviction and now comes before the court for the second time on a similar matter. He cannot get the usual reduction available to first offenders as he got that previously when he appeared before the previous Chief Justice.

He is also in my view to be regarded as a danger to the community and the sentence that I will impose is calculated in part to protect the community.

As already noted, the maximum term of imprisonment in this case is seven years. I impose a sentence of 5 years. That is calculated having regard to the aggravating factors that I have already mentioned and the absence of any mitigating factor. It is about as bad a case as one could get. The girl was very young, she was vulnerable, she trusted him, he hurt her, he threatened her, and he did not care about the result.

Counsel has suggested that he could receive some counselling and he clearly needs that, if there is any counselling available in Tonga for a paedophile, but as far as I am concerned he will have to get that while he is prison or after his release.

Finally I say that I have completely disregarded the fact that he was also charged with having carnal knowledge of this same girl some years later but was found Not Guilty of that crime by the jury. All I can say that I am sure myself that the jury's verdict on this present charge was absolutely right.

It is fortunate that these two children who gave evidence have the support of loving foster parents to give them the courage to come to court. They in turn may have saved other children from a similar fate.

I am not in a position to activate the suspended sentence imposed by Chief Justice Ward, even though the three years is still running. That is because this current offence was committed prior to the other one and not during the term of suspension. However I can say that the sentence of one year imposed in that case is in effect reflected in the current sentence because I have regarded the fact that there are two such crimes as a matter of calling for a longer sentence to protect the public.

In addition to public protection the sentence I have imposed is intended to strongly denounce this abhorrent behaviour by an adult man, as well as to deter him and others from similar offending.

The accused is now formally sentenced to five years' imprisonment.

R v Tongia

Supreme Court, Nuku'alofa
Ford J
CR 32/2004

6-8, and 28 October 2004 (at Neiafu) and 5, 8 November 2004 (at Tongatapu); 8 November 2004

Criminal law – alibi evidence brought – not sufficient – accused convicted

During the early morning hours of Saturday 27 September 2003, someone entered the dwellinghouse of Tauakipulu 'Ikimaka ("Pulu") at Pangaimotu, Vavau, and attacked Pulu's 22-year-old daughter, Mele, (the complainant) while she was sleeping. The complainant was punched on the head three times, had two of the fingers on her right hand bitten, and was indecently assaulted. The accused, a neighbour, was charged with one count, respectively, of housebreaking, common assault, bodily harm and indecent assault. He denied the charges and contended that the police apprehended the wrong man. He called evidence in support of his alibi defence.

Held:

1. Evidence of an alibi defence was inadmissible without the leave of the judge unless the accused gave written notice of such defence to the prosecution within seven days of the accused's committal for trial. The notice was to contain details of the place in which the accused stated he was at during the relevant time and the addresses of the various witnesses he intended to call. Such notice was not given and counsel for the accused did not seek leave from the Court to call his alibi witnesses until the trial had commenced. The Court granted the accused leave to call his alibi witnesses and at the same time gave leave to the Crown, if necessary, to seek an adjournment of the trial. An adjournment was not sought.
2. The Court found that none of the alibi witnesses were able to speak about what the accused had done after he walked up to his pigsty.
3. The complainant's evidence was corroborated by a statement the accused made to the police on the Monday morning following the incident. There was a lengthy hearing on the voir dire as to the admissibility of the statement in question and the Court ruled that, as it did not infringe section 21 of the Evidence Act (Cap 15), it was admissible.
4. The Crown proved the necessary elements of each charge against the accused beyond reasonable doubt. He was convicted accordingly on each count.

Statute considered:
Evidence Act (Cap 15)

Counsel for Crown	:	Miss Simiki
Counsel for accused	:	Mr Vaipulu

Judgment

The accused is charged with one count, respectively, of housebreaking, common assault, bodily harm and indecent assault. It is alleged that during the early morning hours of Saturday 27 September 2003, he entered the dwellinghouse of Tauakipulu 'Ikimaka ("Pulu") at Pangaimotu, Vavau, and attacked Pulu's 22-year-old daughter, Mele, (the complainant) while she was sleeping.

The particulars in the indictment state that the offending occurred on or about 26 September 2003. The evidence clearly established, however, that that incident occurred in the early morning hours of Saturday 27 September.

In her closing submissions this morning, Miss Simiki sought leave to amend the particulars to show the date as 27 September. Crown counsel submitted that up until then she had assumed that the words "on or about" would has been sufficient to cover the situation.

Mr Vaipulu opposed the amendment but he was unable to point to any prejudice or injustice to the accused and, in the circumstances, I allowed the amendment the Crown sought.

The particulars in the indictment state that the accused assaulted Mele by punching her on the head three times; that he caused bodily harm by biting two of the fingers on her right hand and that he also indecently assaulted her. The accused denies the charges and contends that the police apprehended the wrong man. He called evidence in support of his alibi defence.

The first witness for the Crown was the complainant's father, Pulu. He told the Court that his house at Pangaimotu is known as the "hurricane house" because it was built from Cyclone relief funding following the destruction of his previous home by Cyclone Isaac in 1983. The house is very basic. A police diagram produced in evidence shows that it measures 7.3 metres x 4.8 metres. It comprises of two rooms -- the living room and a bedroom. Pulu said that on the night of Friday 26 September 2003, he had gone to a kava party. His wife was away in Tongatapu at the time and, of his eight children, only two were staying in the hurricane house that night -- Mele and her 11 -year-old sister, Fiaola. A 27-year-old son, Nesiasi, was sleeping in a boys hut on Latu Lahi's property next door.

52-year-old Latu Lahi figured prominently in the case. She, obviously, has a particular fondness for the complainant's family and she appears to have assumed a protective role for the two girls whenever their mother was away. She said in evidence, for example, that the father would go to kava clubs every night of the week and on those nights she would stay with the girls and sleep with them. She has one adult daughter herself who was living in Neiafu at the time.

It was clear from Latu's evidence that she felt considerable remorse and responsibility for what had happened because on the particular night in question she had gone to a church concert and was sleeping at her own home when the incident occurred.

Returning to Pulu's evidence, he said that while he was at the kava party, a neighbour came and told him to go home because someone had entered their house. When he came out of the kava hall, the neighbour told him to get a car. He asked why and the neighbour told him that his daughter Mele had been injured and she needed to go to hospital.

Pulu said that when he arrived home, Mele was crying and he could see that her hand was covered in blood. He asked her what had happened and she told him that a man had come inside the house. Pulu said that he then asked his daughter whether she knew the man and she had answered, "no". He asked if the man was drunk and again she replied, "no". She then asked her father to take her to hospital.

The neighbour, who had called Pulu out of the kava party arranged for another member of the kava group, Uili, to provide a vehicle and they all then set out for the hospital in Neiafu. Travelling in the vehicle were the driver, Uili, the complainant Mele, her 11 -year-old sister Fiaola, Latu Lahi, Pulu and the neighbour who had called him out of the kava party.

Latu accompanied Mele when she entered the hospital to have her injured fingers treated. On the way home from the hospital, Mele asked the driver to stop at the police station because she wanted to lodge a complaint. They arrived at the police station at approximately 3 a.m.. Latu again accompanied Mele and Mele began making her complaint to police officer Hungalu.

Pulu had also entered the police station. He could overhear his daughter making the complaint. He told the court that he was curious because he was aware that his daughter knew who her attacker was but, for some reason, she did not want to tell him the name. Pulu was not asked to expand on this statement.

As the interview progressed, officer Hungalu asked Mele if she knew who had entered her home and she told him directly that it was Sateki Tongia, the accused. At that point her father stopped her. Pulu told the court that he stopped her because he did not think for a moment that it could have been Sateki and he believed that Mele must have been mistaken. Pulu explained that Sateki was his neighbour. He had been the person who had called him out from the kava hall and arranged the transport they were travelling in. At that point in time, Sateki was still sitting with the others in the car outside the police station.

Pulu told the court that he asked Mele three times to stop making her complaint because she might be mistaken. The police officer then asked Pulu to leave her alone so that she could complete the complaint. Pulu did so.

The police took no action against the accused on that particular night. The vehicle and its occupants returned to Pangaimotu. Nothing was said to the accused on the way home to arouse his suspicions.

Pulu said that when he arrived home he asked Mele why she was so sure that her assailant had been Sateki. Mele told him that after the attack she had turned on the outside light and had seen the man running away from house and she could tell from his clothing and the way he ran that it was their neighbour, Sateki.

In her evidence in chief, Mele told the court that she had been watching videos in her home on the Friday night and she had fallen asleep around 10 p.m.. She explained that she and Fiaola slept under the same blanket on the floor in the living room close by the door leading into the bedroom. They had separate pillows. Her parents slept in the bedroom and her brother slept in the hut on Latu's property.

Mele said that she was later awoken by the attacker who punched her three times towards the back of her head. She said that she could tell immediately from the punches that it was a man. At that point, she explained, the attacker was standing or sitting around her head area. The room was completely dark. Mele could not see the man but she stood up and began to struggle with him. She said that he kept punching her on the shoulders and upper arms. She was crying and struggling with him. Mele described how the man then tried to open her thighs and do something to her. She demonstrated to the court the movements of the attacker, which form the basis of the indecent assault charge.

Although Mele did not explain the precise movements that saw her end up on the floor again, that somehow happened because her next description to the court was of the man sitting on her stomach. Mele said that she then tried to feel his face in the dark but he bit two of the fingers on her right hand. She explained that the biting gave her extra strength and she was able to throw the man onto the floor and while still crying she began to yell out for her father. By this time the younger sister, Fiaola, had awoken and had ran into the bedroom.

Mele said that as she called out for her father, the man jumped up and ran outside the house. At the same time, she ran to the door after him and turned on the switch to both the living room and the outside light. She saw the man running away with his back to her. She estimated that he was about four to six metres away when she first saw him and she immediately recognised him as the accused, Sateki.

Earlier in her evidence Mele had explained that because the accused was an immediate neighbour she saw him virtually every day and sometimes several times in the course of a day. He would often visit their home to watch videos with her father. Mele was asked in evidence in chief why she was sure that her attacker was Sateki and she replied because of his hair and his body. She also described his clothing. The complainant's description of her attacker and her evidence in general was convincing.

When the complainant was asked in evidence why she had not immediately told her father that it was the accused who had attacked her she explained that she was aware of her brother's volatile temperament and she was sure that if she had told her family before telling the Police that it was the accused then her brother would have fought with the accused.

As in any criminal case, the onus rests upon the Crown throughout to prove all the essential elements of each charge beyond reasonable doubt. There is no onus on an accused person to give or call evidence.

In this case, the accused did not give evidence himself but evidence was given on his behalf. His defence essentially was one of alibi. His case, through those witnesses, was that on the Friday night in question he had been at a kava club at 'Utungake and after he had been dropped off back at Pangaimotu in the early hours of the Saturday morning he had walked straight home.

Under section 108 (2) of the Evidence (Cap 15), evidence of an alibi defence is inadmissible without the leave of the judge unless the accused has given written notice of such defence to the prosecution within seven days of the accused's committal for trial. The notice is to contain details of the place in which the accused states he was at during the relevant time and the addresses of the various witnesses he intends to call. Such notice was not given in the present case and counsel for the accused did not seek leave from the Court to call his alibi witnesses until after the trial had commenced.

Defence counsel need to be mindful of the notice provision relating to a defence of alibi. The purpose of the requirement is to prevent prejudice to the prosecution by ensuring that the Crown has adequate opportunity to investigate the alibi story and make any necessary inquiries in relation to the alibi witnesses.

When notice under section 108 (2) has not been given the justice of the case can often be met by granting leave subject to allowing the prosecution additional time to investigate the circumstances alleged in the alibi defence. Leave, however, will not be granted as of right and the Court will want to be satisfied that there will be no resulting prejudice.

In the present case, I granted Mr Vaipulu leave to call his alibi witnesses but at the same time I gave leave to the Crown, if necessary, to seek an adjournment of the trial. In the event, an adjournment was not sought and, given the fact that time was at a premium during the recent Court Session in Vava'u, that was a fortunate outcome.

The first alibi witness called for the defence was Sateki Afu. Sateki told the Court that he had been with the accused at the kava party and they had both been dropped off at the four corner intersection at Pangaimotu at approximately 1:20 a.m. or 1:25 a.m.. He said that they had each then walked to their respective homes. The witness admitted in crossexamination, however, that as they had had to walk in opposite directions to their homes, he could not be certain that the accused might have gone elsewhere.

The accused's wife, Velonika, told the court that she had been awake when the accused arrived home. She did not wear a watch herself but she had asked him the time and he had replied 1:15 a.m.. She said that her husband then took some food out of the cooler to eat and while he was eating she heard a dog barking up around their pigsty. She said that her husband asked her to give him a torch and he then walked off to see why the dogs were barking. The witness said that when her husband left the house she stood up to close the door and as she did so she looked over towards the complainant's house and she could see that the living room light was on. Velonika then went to bed and stayed there.

The next witness subpoenaed on behalf of the accused was the complainant's brother, Nesiasi. He confirmed that on the night in question he had been sleeping in the boy's hut on Latu's property and Latu had woken him and told him that Mele was crying because a man had beaten her up. He said that he then ran over to their home and on the way he met the accused outside the house. The accused had asked him what had happened and he told him that a man had entered their home. Both Nesiasi and the accused then walked inside the house together and they saw Mele crying.

That evidence was consistent with the evidence that had been given earlier by Latu and Mele. They had both told the court that the accused and Nesiasi had entered the house about the same time and the accused had then walked over to inspect Mele's injured fingers. Mele told the court that she had immediately pulled her hand away from him. Latu said that she had noticed Mele very deliberately pulling her hand away when the accused endeavoured to examine her injured fingers.

Nesiasi gave his evidence on 28 October 2004. Mr Vaipulu applied to have him declared a hostile witness upon the grounds that approximately two weeks previously, i.e. after the trial had commenced, he had told the accused's wife that he had met the accused on the night in question at the pigsty. I allowed Mr Vaipulu to cross-examine the witness and Velonika was then recalled by consent to give her version of the conversation.

I need not detail the evidence given but it was conflicting and I am not satisfied that Nesiasi had, in fact, mentioned to the accused's wife that he had met the accused by the pigsty. All he had confirmed to Velonika was that he had met the accused on the night in question but the meeting was outside Pulu's house -- not at the pigsty.

The trial was then adjourned so as to have the evidence of another defence witness, Mateo Taufa, taken at Nuku'alofa. Mr Taufa's evidence was taken on 5 November 2004. Mateo told the court that he had been at the kava club with the accused and they had been driven home together. After being dropped off on the main road at Pangaimotu, Mateo had walked home with the accused. He lived only a short distance further along the same road as the accused.

Mateo told the court that when he arrived home he obtained some food to eat and when he looked across at the accused's house he could see the accused sitting in his doorway also eating food. Mateo said that he finished his meal approximately 10 minutes after arriving home and he then went to bed. He said that at that point, the accused was still eating his meal in the doorway.

Even accepting the evidence of this witness and the accused's wife, however, it still does not account for the movements of the accused after he walked up to the pigsty. A diagram drawn by Mateo showed the pigsty to be on a side road or track between the accused's house and the complainant's home. The accused's wife said that after her husband walked up to the pigsty, she went to bed and stayed there. She was not asked and gave no other evidence about her husband's movements during the rest of the night. It was clear, however, that he had gone to the kava hall to fetch Pulu and he had then driven into Neiafu with the others when the complainant was taken to hospital. Velonika did not say whether she was aware of these matters or not.

My conclusion on the evidence is that the accused's wife must have been mistaken when she told the Court that she had seen the living room light on in the complainant's home while her husband was walking up to the pigsty area. If she was not mistaken then I simply do not believe that aspect of her evidence. None of the alibi witnesses were able to speak about what the accused had done after he walked up to his pigsty. I have no doubt that it was at that point in time that he made the impulsive decision to enter Puiu's home.

As indicated earlier in this judgment, I found the complainant an impressive and reliable witness. In fact, I was impressed with all of the Crown witnesses with the exception perhaps of Fiaola who, perhaps understandably because of her young age, seemed a little confused at times.

As it happens, the complainant's evidence was corroborated by a statement the accused made to the police on the Monday morning following the incident. There was a lengthy hearing on the voir dire as to the admissibility of the statement in question but in the end I ruled that, as it did not infringe section 21 of the Evidence Act (Cap 15), it was admissible.

In his police interview, the accused admitted going to Pulu's house after returning to Pangaimotu from the kava party. He said that he was very drunk from drinking Tongan kava and it was a sudden idea he had to enter Pulu's house and have sex with Mele. He knew that Pulu was at a kava club and that Mele's mother was down in Tongatapu. He admitted struggling with the complainant and biting her fingers but he denied punching her; trying to take off her pants or touching her between the thighs. It is significant, however, that the complainant was not cross-

examined on her evidence about the indecent assault and what she told the court was convincing.

I am satisfied, therefore, that the Crown has proved the necessary elements of each charge against the accused beyond reasonable doubt. He is convicted accordingly on each count.

Sefo anor v R

Supreme Court, Nuku'alofa
Ford J
CR 171/04 and CR 172/04

12 and 22 November 2004; 24 November 2004

Criminal procedure – application for bail pending hearing of appeal – had to have reasonable prospect of success

The two applicants were former employees of the ANZ Bank in Neiafu, Vava'u. Following a three week jury trial in October 2004 they were convicted on dishonesty type charges and sentenced to six years and five years imprisonment, respectively. The last 12 months of the sentence in each case was suspended for two years from the date of their release from prison. The applicants appealed against both conviction and sentence and they made application to be released on bail pending the hearing of their appeals by the Court of Appeal in July 2005. The first application for bail was filed on 3 November 2004 on behalf of Sefo. At the same time, she filed a notice of appeal. Her appeal to the Court of Appeal was comprehensive. The appeal was against the finding that the Crown had established a case to be answered and the summing up to the jury. It was also alleged that the jury's verdict was against the weight of evidence and that the sentence imposed was excessive. Counsel was heard in Chambers in connection with that application on 12 November and the Judge's decision was reserved. Later on 12 November a notice of appeal and application for bail was filed on behalf of Tu'ipulotu. The grounds of appeal, with two exceptions, were identical to Sefo's application. Counsel was heard at another Chamber's hearing on 22 November.

Held:

1. The granting of bail after conviction was a totally different proposition from the granting of bail pending trial, at which point the presumption of innocence still prevailed. A convicted person's right of appeal did not revive the pre-conviction presumption of innocence.
2. Under 4B(1)(a) of the Bail Act 1990 the Court could grant bail to a person who had appealed or applied for leave to appeal against conviction or sentence if the Court was satisfied that there were reasonable prospects of the appeal succeeding. That required a consideration of the grounds of each appeal.
3. The applicants had an onus to establish at least a prima facie basis for the Court being able to hold that the appeals had a reasonable, as distinct from a meagre or fanciful, prospect of success. In the absence of such

authorities, the Court did not see that the first ground of appeal had a reasonable prospect of success.

4. The Court made an assessment of the merits of the appeals based upon the material before it. The applicants failed to persuade the Court that there were reasonable prospects of their appeals succeeding and their applications were, accordingly, refused.

Cases considered:

Giordano, Application by 6 A.Crim. R 397
Kafoa v R (App No 347,348,743/1996, 20 June 1997, Court of Appeal)
Mahera, ex parte [1986] 1 Qd R 303
Moananui v R (1984) 1 CRNZ 231
R v Roads [1967] 2 All ER 84

Statutes considered:

Bail Act 1990
Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)
Supreme Court Act (Cap 10)

Counsel for the Crown	:	Miss Simiki and Ms Raasch
Counsel for the first applicant	:	Mr Tu'utafaiva
Counsel for the second applicant	:	Mr Fakahua

Judgment

The two applicants are former employees of the ANZ Bank in Neiafu, Vava'u. Following a three weeks jury trial in October 2004 they were convicted on dishonesty type charges and sentenced to six years and five years imprisonment, respectively. The last 12 months of the sentence in each case was suspended for two years from the date of their release from prison.

The applicants have now appealed against both conviction and sentence and they have made application to be released on bail pending the hearing of their appeals by the Court of Appeal in July 2005. Not surprisingly, perhaps, there appears to have been very few occasions in the past when this Court has been called upon to consider the provisions of section 4B of the Bail Act 1990 which provides for the granting of bail pending an appeal.

The first applicant, Sefo, was the Manager of the Vava'u branch of the ANZ Bank and during the relevant period, the second applicant, Tu'ipulotu, was the bank's Reconciliation Officer. Originally, there were four accused in total, the two present applicants along with 'Alilia Guttenbeil and Siniola Leleifi. The jury heard how, over a period of many months, a large amount of money had been misappropriated from the bank. Approximately $170,000 had been misappropriated from the ATM machine funds alone, $20,000 from the creation of a false mortgage by Sefo and there were obviously other defalcations as well. The total loss suffered by the bank is unlikely to ever be known.

The evidence was that around the second half of 2003 suspicions began to be aroused in the Vava'u community. One witness referred to a story circulating around town to the effect that, "the ANZ girls were rich with money."

The manager and a senior staff member from the local "Look Sharp" store that sells T-shirts and CDs gave evidence about large purchases made by Tu'ipulotu and Leleifi. One of the young women drew attention to herself by buying in one order more CDs from the shop than anyone else had ever purchased. Large purchases of T-shirts were also described by the witnesses. They told how the girls paid for the goods in cash and how one unravelled a bundle of notes, which had been wrapped up like a bundle of notes one sees in a bank. The witnesses from Look Sharp became so concerned about what was happening that one of them decided to go and see the manager of the bank, Sefo, and alert her to the fact that her employees seemed to be spending significant amounts of money around the place. Sefo told her that she would look into it but little did the lady from Look Sharp realise that the bank manager she was making her complaint to was the worst offender of them all.

All that was circumstantial evidence, of course, but, coupled with the other direct evidence, the case against the two applicants and Leleifi was a strong one and I am satisfied that the jury's findings were correct. I said that at the time of sentencing.

The position in relation to Guttenbeil appeared to be different. She gave an explanation to the police, which would tend to exculpate herself from blame. Her explanation related to the false mortgage document which Sefo created in the name of her (Guttenbeil's) parents without the parents' knowledge. I need not go into the transaction but, suffice it to say, Guttenbeil's explanation appeared to have the ring of truth about it. Guttenbeil was not one of the staff identified as a big spender around Vava'u.

In all events, as it turned out, the jury never heard from Guttenbeil. Following a voir dire hearing I upheld her counsel's submissions and, for what might be described as legal, but important, technicalities, I struck out all of the counts against her. Guttenbeil was accordingly discharged. I only mention her involvement because an aspect of her discharge has been made one of the grounds of appeal.

The other accused, Leleifi, was a relatively new ANZ employee. She appeared on the scene only a month or two before the offending was detected but she soon became caught up in the dishonest machinations of the bank's more senior officers. In the end, she was charged and convicted of one offence of embezzlement and sentenced to two years imprisonment with the final 12 months being suspended for two years from the date of her release. She has not appealed.

Originally, Sefo faced eleven counts, Tu'ipulotu and Guttenbeil ten counts each and Leleifi two counts. During the trial there were two hearings on the voir dire upon which I gave rulings and then at the end of the Crown case, all defence counsel made a submission that the evidence did not disclose a case to answer against their respective clients. The submission involved a number of legal issues.

Following on from the no case to answer submission, I discharged Guttenbeil completely and struck out other counts against the remaining accused. Sefo ended up facing four counts of falsification of accounts and one of forgery; Tu'ipulotu five counts of falsification of accounts and Leleifi one count of embezzlement. On 28 October 2004, after a short retirement of less than half an hour, the jury brought in verdicts of guilty against all three accused on each count. They were sentenced the following morning.

The first application for bail was filed on 3 November 2004 on behalf of Sefo. In a supporting affidavit she explained that she was studying towards a law degree and she had two examinations coming up the following week. At the same time, she filed a notice of appeal. Her appeal to the Court of Appeal is comprehensive. The appeal is against my finding that the Crown had established a case to be answered and my summing up to the jury. It is also alleged that the jury's verdict was against the weight of evidence and that the sentence imposed was excessive.

I heard counsel in Chambers in connection with that application on 12 November and reserved my decision. Later that same day a notice of appeal and application for bail was filed by Mr Fakahua behalf of Tu'ipulotu. The grounds of appeal, with two exceptions, were identical to Sefo's application. I heard counsel again at another Chamber's hearing on 22 November.

The granting of bail after conviction is a totally different proposition from the granting of bail pending trial, at which point the presumption of innocence still prevails. A convicted person's right of appeal does not revive the pre-conviction presumption of innocence.

In most other jurisdictions, admission to bail pending appeal is unusual and exceptional circumstances must be shown to exist before bail will be granted. In those jurisdictions, as is noted in **Halsbury** Vol 11(2), para 904, it is a power "rarely exercised."

The common-law principle has been considered in a number of cases and is probably best summed up in the following extract from **Hall's Sentencing**, LexisNexis NZ Ltd, 2004, para VI.14.3:

> "The inveterate practice in the Court of Criminal Appeal in England has been to refuse bail unless there are exceptional circumstances . . . The true question is, are there exceptional circumstances, which would drive the Court to the conclusion that justice can only be done by the granting of bail. The High Court of Australia has adopted a similar approach . . . In this country the Court of Appeal observed in *R v Hartstone* (CA 261/87, 6 January 1988) 11 TCL 2/5 that different considerations apply to the granting of bail to a person who has been found guilty of an offence than those that apply where it is sought pending trial. In the first case, a determination of guilt has been reached; in the second, the presumption of innocence still applies. For these reasons, the Court said (per McMullin J.) that, while the issue of whether bail is granted will depend on the circumstances of the particular case, "the grant of bail to convicted persons should be regarded as very much the exception rather than the rule. Moreover, if bail is granted pending the outcome of an appeal which proves to be unsuccessful . . . the appellant has to be recalled from the community, possibly months after his conviction, to serve the sentence imposed".

In the *Application by Giordano* 6 A.Crim. R 397 at 398, the Court of Criminal Appeal of South Australia speculated on what the situation might be if a more relaxed approach was taken to applications for bail pending appeal:

> "There is the serious risk of availability of bail pending appeal leading to a proliferation of unmeritorious appeals thereby adding to the strains on the system of justice. Persons undergoing punishment in custody are prone to seize any opportunity to secure release, perhaps leave the future to take care of itself. Appeals would be launched irrespective of the prospects of success simply in order to secure release, or perhaps with a view to creating situations which would tend to frustrate justice by making it difficult to return the appellant to prison."

In *ex parte Mahera* [1986] 1 Qd R 303, 310, Thomas J. observed:

> "The spectacle of a recently sentenced man walking free may be seen by the public as equivocation by the courts, and does not tend to foster respect for the system."

In Tonga, the position is governed by section 4B of the Bail Act 1990 which reads as follows:

> "4B(1) A person who has been convicted of and sentenced to imprisonment for a criminal offence and who has appealed or applied for leave to appeal against that conviction or sentence may be granted bail if the Court is satisfied that -
>
> (a) there is a reasonable prospect of the appeal succeeding; or
>
> (b) the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; and
>
> (c) there are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will surrender to custody without committing any offence while on bail.
>
> (2) In taking the decision required by subsection (1), the Court shall have regard to all the relevant circumstances and in particular -
>
> (a) the nature of the offence and length of the sentence;
>
> (b) the grounds of appeal;
>
> (c) the character, antecedents, associations and community ties of the person; and
>
> (d) his record in surrendering to custody at the trial and on other occasions."

Although, with reservation, some guidance can no doubt be obtained from decisions in other jurisdictions, section 4B really contains a comprehensive code for dealing with applications for bail pending appeal. Neither application comes within the category of case envisaged in subsection (1)(b) where the appeal is unlikely to be heard before a substantial part of the sentence has been served. The present applications, therefore, are made pursuant to subsection 1(a) which requires the Court to have regard to the prospects of the appeal succeeding. The Court needs to be satisfied that there are reasonable prospects of the appeal succeeding and that element in turn requires a consideration of the grounds of each appeal.

I say at once that such a task puts me, as the trial judge, in a rather invidious position. For obvious reasons, I would prefer not to have to deal with grounds of appeal involving my own trial rulings or directions to the jury. A similar situation faced Eichaelbaum J. (as he then was) in *Moananui v R* (1984) 1 CRNZ 231. His Honour, in dealing with a bail application pending appeal, had to consider the force of a ground of appeal, which alleged that he had misdirected the jury on evidentiary matters. The learned Judge opined:

> "Although I have to respond to Mr Mills' submission, it would be presumptuous of me to endeavour to deal in any depth with any of these issues."

The Court's obligation under the Bail Act is less equivocal. As I see it, I am obliged by the statutory provisions to give proper consideration to the grounds of appeal and the prospects of the appeal succeeding.

With some diffidence, therefore, I now turn to consider the grounds and merits of the appeals.

On an application for bail pending appeal there is a reversal of the usual onus of proof obligation in criminal cases. The onus is on the applicant to show cause, by reference to the relevant statutory criteria, why bail should be granted.

At the Chambers hearings, counsel were given the opportunity to present any additional submissions they wished to make over and above the information that was already before the Court but both Mr Tu'utafaiva and Mr Fakahua indicated that they were content to rest their applications on the contents of the written grounds of appeal already filed.

The first ground of appeal relates to my finding on the no case submission. It is alleged that I erred in finding that the remaining counts in the indictment were not defective and in ruling that there was sufficient evidence to go to the jury.

As indicated, the legal arguments raised on the no case submission involved issues of some complexity. I recall, for example, in relation to the theft charges that were included in the original indictments that an issue arose as to whether computer generated false computerised credit entries in a bank account could be held to come within the definition of theft. In the end, I struck out all the theft charges. I also recall making the observation at the time that some of the legal issues raised were difficult for the Court to have to deal with at short notice given the paucity of research facilities available at the Vava'u Court house. I accept, of course, that counsel no doubt found themselves in similar difficulties.

I mention these matters because, against that background, I would have thought that it behoved counsel, upon their return to Tongatapu, to carry out whatever research was needed so that in support of the bail applications they could refer the Court to some authority whether it be from reported cases or legal textbooks in support of their bald assertion that my ruling on the no case submission was wrong. They have not done so. I would not expect to hear argument on any such authorities, that would be encroaching into the Court of Appeal's territory but it seems to me that the applicants do have an onus to establish at least a prima facie basis for me being able to hold that the appeals have a reasonable, as distinct from a meagre or fanciful, prospect of success. In the absence of such authorities, I cannot see that the first ground of appeal has a reasonable prospect of success.

The second ground of appeal is more complex to deal with in this ruling. It is against six issues arising out of my summing up. The first two grounds relate to remarks made to the jury by the prosecutor in the course of her address to the jury. The first remark was her comment that there were other charges that could have been brought against the accused apart from those before the Court. This was a reference to a pre-trial ruling, which I had given as to the number of counts that the Crown was able to include in the various indictments. As I understood it at the time, originally, when the case was before the Magistrates' Court, the prosecution was contemplating some 400 or 500 charges against all the accused.

In this court, I gave a ruling, based on section 150 of the Criminal Offences Act (Cap 18) and other authorities, restricting the number of counts that could be laid on the indictment to no more than five in respect of any one particular type of offence. That was no doubt the point Crown counsel was alluding to.

The other remark to which exception is taken in the grounds of appeal was the comment by Crown counsel to the effect that in Tongatapu the general public perception is that the prosecution never wins a jury trial in Vava'u. The ground of appeal in both cases is that I failed to firmly and sufficiently direct the jury to disregard the comments.

In my summing up I directed the attention of the jury to both comments. I told them that, unfortunately, because I had to wait for the remarks to be translated into English, there was nothing I could have done at the time to prevent the jury from hearing them. No objection was raised at the time by defence counsel. I went on to tell the jury that the comments should not have been made and that Crown counsel should have known better. I then directed the jury to ignore them and put them out of their minds.

I cannot see any force in this ground of appeal. If I had ignored the remarks and said nothing to the jury about them then the position would have been different but I gave the jury a clear direction in relation to them.

The next two grounds of appeal relate to the reduction in the counts in the indictment, which I ordered at the end of the no case submission and the discharge of Alilia Guttenbeil. It is alleged that I did not explain the reason adequately in each case and the jury could draw the inference, therefore, that they should convict on the remaining counts and, likewise, convict the remaining accused.

Again, no authority has been cited to the Court in support of this ground of appeal. Because of the nature of the charges and the complexity of the legal issues involved, I deemed it appropriate to say as little to the jury as possible about the reduction in the counts and the discharge of Guttenbeil. I concluded that to explain the situation adequately with reference to the legal issues involved could well simply confuse the jury in relation to what they had to know about the law in respect of the remaining counts in the indictment which was a difficult enough matter for them to have to deal with anyway.

Archbold 2001 ed. para 4.292 states:

> "If the submission of no case is rejected, there should be no comment of the jury . . . However, it being generally desirable, and especially so in long cases, that the judge keeps a jury informed as to what is happening, it is proper for him to give a brief explanation for upholding one or more

> submissions of no case, so long as he says nothing which might be construed as indicating a belief on his part that any remaining counts are well-founded".

That passage sets out the converse argument to the point raised in this particular ground of appeal. I do not see it as stipulating a requirement that reasons for upholding part of a no case submission must be explained to the jury. Instead, the learned authors simply seem to be saying that the trial judge is at liberty to give a brief explanation to the jury if he so desires provided that he does nothing to convey suspicion of a belief on his part that the remaining counts are well founded or that the remaining accused should be found guilty.

In the absence of any reference by counsel for the applicants to any authority to the contrary, I do not see any substance in these two grounds of appeal.

The next ground of appeal is that I failed to direct the jury that they contents of documents certain witnesses referred to, that did not produce a court, must be proved by primary evidence. No other details are provided of this ground of appeal.

There were a great number of documents before the jury. Of the 46 documents produced by the Crown as exhibits, many run into numerous pages. The contents of some of the documentation was extremely complicated and, in this regard, I refer in particular to documentation relating to the workings of the ATM machine.

The specific documents referred to in this ground of appeal, which apparently were not produced, have not been identified nor has the evidence attributable to the named witnesses. Moreover, I cannot recall any objection having been raised by defence counsel at the time to the admissibility of the evidence in question.

In these circumstances, I cannot attribute any weight to this ground of appeal.

The final ground of appeal in relation to my summing up is that I failed to direct the jury that two of the witnesses, Tangitau Puloka and Leilani Uhi Va'enuku, "in certain aspects of their respective evidence were not expert witnesses."

The evidence in question is not identified but I perceive that it was evidence relating to the forgery charge against Sefo. The evidence was that she, through the use of a photocopier, transposed the Villa's signature of the bank's loan manager in Nuku'alofa, Mr Tim Valente, from a genuine loan approval document onto the fictitious loan documents, which she had drawn up in the name of Guttenbeil's parents. The fraud was detected when another bank official realised that Mr Valente had left Tonga and return to Australia at the time he was supposed to have signed his approval to the false loan documents.

Puloka and Va'enuku worked in the ANZ Bank in the Nuku'alofa and they were very familiar with Mr Valente's writing and signature. They identified his signature to the jury.

In his address, Mr Tu'utafaiva reminded the jury that neither witness was a handwriting expert nor were they are able to give expert evidence about the supposed use of a photocopier to transpose Mr Valente's signature.

Under section 26(1) of the Evidence Act (Cap 15) any person acquainted with the handwriting of another person is able to express an opinion as to whether or not the writing or signature is genuine. He or she does not have to be a handwriting expert.

The Crown's case in relation to the photocopier was that because the original document containing the loan approval notation signed by Mr Valente had been

produced and it contained a unique line running through it and because that same unique line also appeared running through the approval notation signed by Mr Valente which appeared on the false loan documents, one did not need expert evidence to detect the fraud.

That seemed a common sense proposition and that is how I left it with the jury. I see no substance in this ground of appeal.

There then further grounds of appeal in Sefo's application, which were not duplicated in Tu'ipulotu's application. First, but I failed to tell the jury that the Crown prosecutor was wrong when she said that the evidence of Inspector Tu'ihalagingie about an alleged statement made by the accused Leleifi in the absence of Sefo, could be used as evidence against Sefo.

In my summing up, I reminded the jury, and I stressed that it was "important" for them to understand that a statement made by one accused to the police could not be used against another accused mentioned in it and it must be totally disregarded when considering the evidence against that other accused.

In other words, there is no substance to this ground of appeal.

The other ground of appeal relied upon by Sefo is that I told the jury that the verdict had to be unanimous and I, therefore, let them to believe that they had no choice in the matter other then to return a unanimous verdict. In the same paragraph, the additional allegation is made that on the day after the jury's verdict had been given, two of the juryman went to see another lawyer in Neiafu and indicated to him that one of their number (not one of the two men who attended the lawyer) did not agree with the jury's decision.

I do not see any substance in this ground of appeal. Under section 14(8) of the Supreme Court Act the verdict is required to be unanimous. The authorities are also clear that if a verdict is rightly delivered in court by the former in the presence of all the jurors, then their assent will be resumed. A juror cannot later give evidence of a lack of unanimity with the verdict was returned in his presence and hearing -- see *R v Roads* [1967] 2 All ER 84.

In other words, again, I see no substance in this ground of appeal.

I do not see any need to refer to the grounds of appeal against sentence. Even if the Court of Appeal would vary the terms of imprisonment, I do not consider it likely that they would reduce the terms to such an extent as to bring section 4B(1)(b) into play. In other words, so that it could be claimed that a substantial portion of the sentence would have been served before they appeal hearing next July.

I stress that I do not wish to be seen in any way as appearing to pre-empt the ultimate decision the Court of Appeal will need to make after it has heard full argument on the matter. Under the Bail Act, however, I am clearly required to make an assessment of the merits of the appeals at this stage based upon the material I have before me. Having carried out that exercise and made my assessment all I can say is that, for the reasons stated, the appeals have only meagre prospects of success.

Having reached that conclusion, it would be quite inappropriate for me to grant bail. In this regard I am unmindful of the admonition of the Court of Appeal in *Kafoa v R* (App No 347,348,743/1996, 20 June 1997, Court of Appeal) where the Court was critical of the Judge's decision to grant bail to three appellants in a rape case pending appeal having regard, in particular, to the gravity of the offences and the appellants' meagre prospects of success. The court went on to make the following additional observation:

> "The fact that the appellants were admitted to bail and have lived in the community for nearly a year since they were convicted has complicated the task of deciding what orders should be made in disposing of the appeals."

The applicants have failed to persuade me that there are reasonable prospects of their appeals succeeding and their applications are, accordingly, refused.

R v Taufalele anor

Supreme Court, Nuku'alofa
Ford J
CR 395-6/2003

29 and 30 November 2004; 6 December 2004

Criminal law – housebreaking and assault – trespass not proved – acquitted on housebreaking charge

The two accused were brothers (Silifou aged 42 and Kolofoua aged 54) and lived in their own homes opposite the Fuaimamao Angilau's (the complainant's) house at Tatakamotonga. Up until the date of the incident the three families enjoyed a close relationship and both accused had an unwritten licence at all reasonable hours to come and go from the complainant's property at will. On 21 June 2003 at Tatakamotonga the complainant's 19-year-old nephew, Keni was in a drunken state and walked outside and was swearing in a particularly offensive manner at Silifou. Silifou ran inside and started punching Keni on the back of the head. Keni then ran out the back door with Silifou chasing after him. They ran around the house and just as Keni was about to re-enter the house through the front door the other accused, Kolofoua, arrived on the scene. They all entered the house and again Silifou threw more punches at the back of Keni's head. Both Silifou and Kolofoua were charged with assault and housebreaking. It was alleged they entered the house of the complainant as trespassers with the intention to commit a crime therein. The "crime" referred to was the assault charge. Silifou pleaded guilty to the assault charge but denied the count of housebreaking. Kolofoua denied both charges and was discharged on the assault charge.

Held:

1. The Court was satisfied that Kolofoua did not enter the house as a trespasser or with the intention of committing a crime. Although he was sympathetic to Silifou's situation, his main objective was to break up the fight. Kolofoua was, accordingly, discharged on the count of housebreaking.
2. The Court was satisfied that the complainant never at any stage regarded Silifou as a trespasser and, for his part, Silifou did not have the necessary mens rea to be a trespasser. This was consistent with the observations made earlier to the effect that prior to the incident, the accused and the complainant's families were good friends and good neighbours and the

accused had an unwritten licence at all reasonable hours to come and go from the complainant's property at will.

3. The Crown failed to establish to the required standard of proof in criminal cases that Silifou entered the complainant's house as a trespasser and he was acquitted and discharged, accordingly, on that count.

Cases considered:

R v Collins [1972] 2 All ER 1105
R v Jones [1976] 3All ER 54

Statutes considered:

Criminal Offences Act (Cap 18)
Theft Act 1968 (UK)

Counsel for Crown	:	Ms Guttenbeil
Counsel for both accused	:	Mr Tu'utafaiva

Judgment

The two accused are brothers. Silifou is 42 years of age and Kolofoua is 54. They are both married with families. Each has been charged with one count of housebreaking and one count of assault. It is alleged that on 21 June 2003 at Tatakamotonga they entered the house of the complainant, Fuaimamao Angilau, as trespassers with the intention to commit a crime therein. The "crime" referred to is the subject of count two in the indictment, namely the assault charge. It is alleged that they assaulted the victim, Keni Tu'akalau, "by punching his body". Keni is the complainant's 19-year-old nephew.

Silifou pleaded guilty to the charge of assault but not guilty to the housebreaking count. Kolofoua pleaded not guilty to both charges. At the end of the Crown case I upheld a no case submission made on behalf of Kolofoua in respect of the assault count and he was acquitted accordingly.

The defence did not call evidence but Mr Tu'utafaiva challenged the Crown's assertion that the two accused were housebreakers. His submissions were primarily directed at the wording of section 173 of the Criminal Offences Act (Cap 18) which creates the offence of housebreaking and, in particular, the phrase "enters any building ... as a trespasser". The section reads:

> "173. (1) A person is guilty of housebreaking if
>
> (a) he enters any building or part of a building as a trespasser and with intent to commit any crime."

The two accused live in their own homes opposite the complainant's house at Tatakamotonga. The evidence established that up until the date of the incident giving rise to the present charges the three families enjoyed a close relationship. The two accused were particularly well acquainted with the complainant's husband who was actually overseas at the relevant time. They would call into the complainant's house from time to time to, watch television and videos. The families would also exchange food supplies such as vegetables and fish. I am satisfied that both accused would have

been more than welcome to enter the complainant's home at any reasonable hour of the day. In no way would they have been regarded as trespassers.

The evidence leading up to the incident at the complainant's home was complicated by another event earlier in the day involving the same victim, Keni. I need not go into the details of that first incident but suffice it to say that Keni was involved in a fight. I must say that I did not find Keni a very impressive witness and his evidence about the fight was self-serving and vague. He did say that three men had attacked him and one was the accused, Silifou. Keni made out that he was an entirely innocent party but I do not believe him.

The day in question was a Saturday and Keni had been drinking beer since the early morning hours. I am satisfied that by the afternoon he was very drunk. The complainant told the court that the incident happened about 3 pm.

As I have mentioned, Keni is the complainant's nephew. He had apparently walked to her house after the earlier fight which had taken place on the outskirts of the village of Tatakamotonga down by the lagoon. The complainant's 18-year-old daughter, Salote, was at home when Keni arrived on the scene. She said in evidence that he had swollen eyes and blood running from his mouth and nose.

Keni sat down inside the livingroom of his aunty's house and Salote ran over to the tap to fetch some water and a towel to wipe the blood from his face. Apparently Keni's half-sister Ngalu was also present. She had been with Salote but she was not called as a witness and it was difficult from the evidence to pinpoint her exact movements and involvement, if any.

In terms of what happened next in the narrative, however, it is significant that Keni was at that point in the company of three women relatives: his aunty (the complainant), his first cousin Salote and his half-sister Ngalu. It is common knowledge, and evidence was given to this effect, that in Tongan society the use of swear words in the presence of any female company is unacceptable. Swearing by a male person in the presence of close relatives such as an aunty, sister or first cousin is particularly offensive and strictly taboo.

It appears from the evidence that after Salote had wiped the blood from Keni's face he looked out the front door and spotted the accused Silifou who was standing over the road outside his own home. Keni proceeded to walk outside swearing at Silifou. I need not repeat the language used but I accept, as the witnesses indicated, that it was particularly offensive.

Silifou then jumped over the fence on his property and came running after Keni. Keni ran back inside his aunty's house. Silifou entered the house and the aunty immediately moved over to him and tried to hold him off and calm him down. She apologised to Silifou over Keni's swearing but Silifou broke free and started punching Keni on the back of the head. Keni then ran out the back door with Silifou chasing after him. They ran around the house and just as Keni was about to re-enter the house through the front door the other accused, Kolofoua, arrived on the scene.

They all entered the house and again Silifou threw more punches at the back of Keni's head. Salote, who appeared to be a reasonably credible witness, told the court that the reason Silifou attacked Keni was because Keni had been swearing at him. She said that she had found Keni's swearing offensive.

In a statement made to the police, Kolofoua said that he had gone across and entered the complainant's house to stop Silifou from beating Keni. There was evidence that Kolofoua held on to Keni at one stage around the upper part of his body

but, while technically that amounts to an assault, the assault that he has been charged with is punching Keni, not holding on to him. There was no evidence from either the victim or any other witness that Kolofoua had punched Keni and that was the basis of the no case submission which I upheld.

Neither accused gave evidence. They did not have to of course because, as in any criminal case, the onus is on the Crown to prove all the necessary elements of each offence.

As I have indicated, Silifou pleaded guilty to the assault charge but denied the count of housebreaking. Kolofoua denied both charges and he has been discharged on the assault charge. I am only concerned, therefore, with the two housebreaking counts.

I do not have any difficulty in deciding the case against Kolofoua. I am satisfied that he did not enter the house as a trespasser or with the intention of committing a crime. Although he was sympathetic to Silifou's situation, I accept that his main objective was to break up the fight. Kolofoua is, accordingly, discharged on the count of housebreaking.

With Silifou the situation is different. Crown counsel submitted that while he had the right to enter the complainant's home to watch television and videos, he did not have permission to enter the house to commit a crime. He became a trespasser, Crown counsel submitted, when he entered the house with intent to commit a crime. Counsel referred to a passage from Adams on Criminal Law, para CA 241.02 which states:

> "The best evidence of intent to commit a crime will be proof that a crime was committed inside the premises entered . ."

In this case, the crime the Crown relies upon is the admitted act of assault.

For his part, Mr Tu'utafaiva submitted that there are two elements to the offence of housebreaking, namely, (1) that the accused entered the building as a trespasser and (2) with intent to commit a crime. Responding to the prosecutor's submissions, he argued that if every person who enters the building with intent to commit a crime is thereby a trespasser then there would be no need for the section to make any specific reference to entering "as a trespasser". Those words, on that approach, would be mere surplusage whereas the court should endeavour to give significance and meaning to all the words used in a section creating an offence.

Both counsel referred to helpful and relevant legal authorities and I am obliged to them for their succinct submissions. Reference was made also to section 9(1)(a) of the (UK) Theft Act 1968 which creates the offence of burglary. The wording is virtually identical to section 173(1)(a). It reads:

> "9.(1) A person is guilty of burglary if
>
> (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below."

The offences mentioned are theft, inflicting grievous bodily harm, rape and causing unlawful damage to the building.

Reference was also made by counsel to cases decided under the English legislation, in particular, *R v Collins* [1972] 2 All ER 1105 and *R v Jones* [1976] 3All

ER 54. In *Jones*'s case, which is perhaps the most relevant to the facts are the present case, two accused were charged with burglary. It was alleged that they had broken into a house belonging to the father of one of the accused and stolen two television sets. The father had not been in the house at the time. When he later discovered that the television sets were missing he made a complaint to the police and the two accused were subsequently arrested and charged.

The defence raised was essentially that the complainant's son had unreserved permission to use his father's house at any time and the question the court, had to consider was whether, in these circumstances, the son could be said to have entered the house as a trespasser. The court held that a person is a trespasser if he enters the premises of another knowing that he is entering in excess of the permission that had been given to him, or if he is reckless as to whether his entry was in excess of the permission. The court added a proviso that facts had to be known to the accused which enabled him to realise that he was acting in excess of the permission given.

Crown counsel invited the court to follow that reasoning in the present case and find Silifou a trespasser because when he entered the complainant's house with the intention of assaulting Keni, he was entering in excess of the otherwise effective unreserved permission he had to enter the house.

Jones's case can immediately be distinguished, however, from the facts of the case before me because in that case the premises were unoccupied at the time of entry. The court, in other words, was dealing with a hypothetical situation in that it had to consider whether the accused had entered the house with the knowledge that entry was being effected in excess of the permission he had been given by his father. For his part, the father obviously had second thoughts about the matter after his son had been charged with the offence. He changed his story and in the end was declared a hostile and unreliable witness. So the court had to have recourse to legal principles to determine whether or not the son was a trespasser.

In the present case, the situation is quite different because the house was occupied at the time of entry and I am able, therefore, to make a clear finding on the facts as to whether or not Silifou was a trespasser. I do not need to revert to legal principles to resolve this element of the offence.

As a starting point, I am satisfied that the complainant would have realised that her nephew, Keni, was inviting trouble as soon as he went outside in his drunken state and began shouting abusive words to Silifou. When Silifou then chased Keni back into the complainant's house, it is significant that the complainant did not try to prevent Silifou from entering her home nor at any time did she tell him to leave. What she did was apologise to him over her nephew's abusive behaviour and she tried to prevent Silifou from attacking Keni. In other words, the complainant's concern was not over Silifou having entered her house but over what was going to happen once he caught up with Keni.

Even though the complainant feared what was going to happen to her nephew, I am satisfied that she never at any stage regarded Silifou as a trespasser and, for his part, Silifou did not have the necessary mens rea to be a trespasser. My finding in this regard is, of course, consistent with the observations I made earlier in this judgment to the effect that prior to the incident, the accused and the complainant's families were good friends and good neighbours and the accused had an unwritten licence at all reasonable hours to come and go from the complainant's property at will.

The Crown, in other words, has failed to establish to the required standard of proof in criminal cases that Silifou entered the complainant's house as a trespasser and he is acquitted and discharged, accordingly, on that count.