TONGA
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Editor: Ms Janine Ford LLB

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Hon Justice James Burchett
Justice Sir David Tompkins
Hon Justice Bryan Beaumont

Supreme Court

Chief Justice:
Hon Justice Gordon Ward

Hon Justice Anthony Ford

Land Court

Hon Justice Gordon Ward, Chief Justice
Hon Justice Anthony Ford

Magistrates' Court

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Principal Magistrates:
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Mr Peauafi Pifileti
Mr Samiu Palu

Senior Magistrates:
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Mr Folau Lokotui

Magistrates:
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Mr Paula Tatafu

Attorney General

Hon Tevita Tupou

Solicitor General

Mr Aisea Taumoepeau

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R v Mo'unga

Supreme Court, Nuku'alofa
Ford J
Cr 67/2000

15 – 18 January 2001; 19 January 2001

Criminal law – incest – no corroboration or credible witnesses – not guilty

The accused faced four counts of incest. The indictment alleged that at their home at Lapaha the accused had sexual intercourse with the complainant "on or about December 1998" and then "on or about" January, July and September 1999. At the time of trial the complainant was 16 years of age. She had three elder brothers and a younger intellectually handicapped sister. The Crown called the complainant, the complainant's brother, Okusi, and the complainant's mother, Vaimoana. The only other Crown witness was Soane Naufahu, the police officer in charge of the case. The prosecutor sought orders to have his first three witnesses (including the complainant) declared hostile. His applications were granted. The case for the accused was that the complainant was lying about the incest allegations and that, in effect, she made them up as a way of getting back at him because he had stopped her from "going out and sleeping with friends and boys".

Held:

1. To establish a charge of incest, the Crown must prove three elements beyond reasonable doubt: first, that there was an act of sexual intercourse. Any penetration, no matter how brief or how slight was enough. There did not have to be ejaculation. Second, that one of the parties to that act of intercourse was the accused and that he was (in this case) the father of the female. Third, that he knew of that relationship at the time. No question of consent arose.
2. Although it was not necessary for the Crown to establish corroboration in a case of this nature, it was always comforting to a Court if corroboration could be found in the supporting evidence. There was no corroboration. Furthermore, the Crown witnesses lacked credibility.
3. The Crown did not make out its case to the required standard and the accused was found not guilty on all counts and was discharged.

Case considered:

R v Teisina (Supreme Court, Cr No 230/97, Ward CJ)

Counsel for Crown : Mr Cauchi
Counsel for accused : Mr Tu'utafaiva

Judgment

It is not often that a Crown prosecutor finds it necessary to have the complainant in a case declared a hostile witness. In this case, the prosecutor found it necessary to go further. He sought orders to have his first three witnesses (including the complainant) declared hostile. His applications were granted. Those applications, as it were, epitomised some of the difficult aspects of the prosecution case.

The accused faces four counts of incest. The indictment alleges that at their home at Lapaha the accused had sexual intercourse with the complainant "on or about December 1998" and then "on or about" January, July and September 1999. The complainant is now 16 years of age. She has three elder brothers and a younger intellectually handicapped sister.

The Crown called the complainant, the complainant's brother, Okusi, and the complainant's mother, Vaimoana. The only other Crown witness was Soane Naufahu, the police officer in charge of the case.

The evidence given by the family members in relation to dates in particular was vague in the extreme and had to be repeated and corrected on a number of occasions. It appears, however, that at some stage the accused went on a rugby football trip to the United States and he remained there working for six years returning in 1997. Then in September 1998, the complainant's mother went to the States to attend a funeral and she did not return until May 1999.

The complainant first started to tell the Court that the offending took place in February 1986 or 1987. The prosecutor pointed out that she had only been born in 1985. In answer to the Court the complainant then said that it happened in 1998. She said that she could not remember the day or the month but one evening she was sleeping with her younger sister and at about twelve o'clock midnight her father, the accused, (who she referred to throughout as "Peni") entered the room. She said she asked him why he entered the room because he didn't have anything in the room and he told her to move over because he wanted to sleep. She said she pushed him and he then attacked her and held her and told her not touch him any more because he will beat her. She said that he touched her again and she stabbed him with a screwdriver in the left shoulder. She said that he then attacked her and took off her clothes and he inserted his penis into her vagina. She said she cried and the accused told her not tell anyone what had happened and what happened would just be between the two of them because if anyone found out there would be a big penalty imposed on the two of them.

The evidence that I have just narrated was punctuated with lengthy pauses. Questions had to be repeated and the Court had to intervene more than once to encourage the complainant to answer the question that had been put to her.

The Court was very mindful, however, that the complainant was young, that she was in a totally unfamiliar environment and that she was being asked to speak about an acutely embarrassing topic before an audience unknown to her, made up of males (apart from the Court interpreter) and, of course, the audience included her father, the accused.

The complainant went on to say that the following morning she told her elder brother, Okusi, what had happened, although in cross-examination she qualified that statement by saying that she had told Okusi the story in such a way as to make it sound as though Peni had only "punched her". She said that she was afraid of being punished if her father found out that she had told Okusi what really happened. In all events, her evidence was that at Okusi's suggestion they then went down to Cable and Wireless where she made a phone call to her mother in America and she explained to her mother the things that Peni had done to her the night before. She said that her mother told her to wait for her and she would be on the next available flight home. She said that after her conversation, Okusi also talked to the mother on the telephone.

The complainant was then asked whether there was any other occasion when something happened between her and her father and she told about an unrelated matter when she received a beating. She was then asked more than once whether there was any other occasion when her father had come into her bedroom and she ended up answering this question with a categorical "No".

At that point, Crown counsel applied to have the complainant declared hostile. He explained that her evidence was inconsistent with evidence she had given at the preliminary hearing in the Magistrates' Court.

I allowed the application and then took a short adjournment to give the complainant the opportunity to refresh her memory from the deposition. After the break, Crown counsel proceeded to cross-examine the complainant on her earlier evidence. She agreed that what she had told the Court before the break was not true and that the evidence she had given in the Magistrates' Court, where she said that her father had had sexual intercourse with her on four occasions, had been the true story.

The Crown then sought to produce the complainant's deposition as her evidence. In my discretion, I declined this request. I indicated to counsel that, having allowed the complainant the opportunity to refresh her memory from the written deposition, I now wanted to hear her give the rest of her evidence. The complainant then proceeded to give evidence under cross-examination from Crown counsel. Even though the complainant had been given the opportunity to read through her written deposition, the evidence she gave continued to be vague and disjointed. She said that the first incident she had described to the Court before she was declared hostile had occurred in February 1998 and she then, with some prompting from counsel, talked about two other incidents where her father had come into her bedroom and had sexual intercourse with her. She agreed that one of these incidents occurred on the date put to her by Crown counsel, namely January 1999. She could give the Court no indication whatsoever of the date of the other incident, save that it took place on a Sunday. She was then asked if there was any other occasion when Peni had come into her room and she answered "No".

To establish a charge of incest, the Crown must prove three elements beyond reasonable doubt:

1. First, that there was an act of sexual intercourse. That is the penetration of the female genitalia by the male penis. Any penetration, no matter how brief or how slight is enough. There does not have to be ejaculation.

2. Second, that one of the parties to that act of intercourse was the accused and that he is (in this case) the father of the female.
3. Third, that he knew of that relationship at the time.

In considering an allegation of incest, no question of consent arises. It makes no difference whether the complainant consented to the intercourse or not.

The burden of proof, of course, is on the Crown and it remains on the Crown throughout. There is no onus of proof on the accused and he has the right to remain silent. In this case, however, the accused elected to give evidence.

The accused denied the charges. He said that whilst he was in America his wife telephoned him periodically and told him that she could not control the complainant; that she was going out smoking and getting drunk and mixing with boys. The accused said that when he came home from the States, this same pattern of "misbehaviour" continued and he freely admitted to having beaten the complainant on a number of occasions in an effort to discipline her. He told how on one occasion she had gone away from home and he had found her in a hut with boys. He told how on other occasions she had come home with love bites on her neck and chest. This evidence was consistent with evidence given by the complainant's mother and I accept it even though it was denied by the complainant. The complainant struck me as being a fairly mature young woman for her age and she knows how to look after herself. She has lived away from home now for over a year and she presently resides at a girlfriend's house at an undisclosed address.

Apart from the beatings of the complainant, the accused in his evidence freely admitted beating his other children, although not to the same extent, and he freely admitted frequent beatings of his wife throughout their marriage. The Court found that evidence deeply disturbing. In his closing address, Mr Cauchi observed that, putting aside the six years the accused spent in the States, the wife seemed to accept that it was part of her life since the marriage in 1970 to accept beatings. That is a fair assessment of the evidence. The beatings, I suspect, continue. The accused is fortunate that he has not before now faced other charges in relation to his systematic acts of domestic violence.

In all events, the case for the accused is that the complainant was lying about the incest allegations and that, in effect, she made them up as a way of getting back at him because he had stopped her from, as he put it, "going out and sleeping with friends and boys".

Although it is not necessary for the Crown to establish corroboration in a case of this nature, it is always comforting to a Court if corroboration can be found in the supporting evidence. As Ward CJ observed in *R v Teisina* (Supreme Court, Cr No 230/97, Ward CJ) at p 5:

> *"Of course, the court will always look for evidence that confirms the evidence of the complainant in a criminal case particularly in cases such as rape where, because of the nature of the act, there are frequently only the opposing accounts of the complainant and of the accused."*

One area in this case where the Court did look for corroboration was in relation to the complainant's evidence that on the morning after the first incident when her father

had entered her room and had sexual intercourse with her against her will, she had told her brother Okusi something about the matter and then, at her brother's suggestion, they had gone along to Cable & Wireless and telephoned their mother in the States. The complainant said she told her mother what had happened and her mother said that she would be home on the next available flight back to Tonga.

This evidence was important in my judgment in trying to determine where the truth of the matter lay because it was evidence which the complainant gave before she had been declared hostile and she gave it with some conviction. In cross-examination the complainant agreed that the telephone call from Cable & Wireless took place the morning after the first incident.

I was unable to find any evidence whatsoever supporting the complainant's story about the Cable & Wireless phone call. The brother, for example, denied being told anything by the complainant in this context and he denied ever going with the complainant to Cable & Wireless and making the call to the mother in the States. The mother, for her part, denied receiving any such call. I believed this aspect of their evidence.

It seemed to me that if the phone call had in fact taken place then it was perfectly reasonable to expect the mother to have reacted as the complainant had said and caught the first available flight back to Tonga. The complainant's evidence before me, however, was that the first incident of sexual intercourse took place in February 1998 and the mother was not even in the States at that time. She did not travel to the States until September 1998. Even if I were to accept that the first incident occurred on the date stated in the Indictment, namely December 1998, the evidence is that the mother did not return from the States until May 1999 and I cannot accept that, if the complainant had made the Cable & Wireless call as claimed, it I would have taken the mother another five months to return to Tonga.

So in the absence of corroboration, subject what I have to say further on, it becomes a question of credibility. Who does the Court believe? Mr Cauchi was able to demonstrate a number of inconsistencies in the accused's evidence and, as with the other members of the family, much of what he said in relation to dates, was hopelessly confusing. There were other aspects of his evidence, however, which I believed and in this regard it is not without significance that right from the outset when he was confronted with the allegations at family meetings called by the elder son, Okusi, the accused denied the allegations and told the family that if they did not believe him then they should report the matter to the Police. In my assessment, he is not the sort of person who would have thrown down that type of challenge, on more than one occasion, if he had had something to hide.

Mr Tu'utafaiva, in his closing address, highlighted unsatisfactory aspects in the complainant's evidence and in particular he said that it was simply unbelievable that the complainant could not recall the year or month, let alone the dates, of the alleged incident if they had really happened. I accept that submission. Mr Tu'utafaiva also pointed to other inconsistencies in the complainant's evidence.

But, at the end of the day, it is not simply a matter of the Court weighing up the evidence and deciding which of the opposing accounts, the complainant's or the accused, is most likely to be the true story. As I have noted, the burden is on the Crown to prove every element of each charge beyond reasonable doubt - the accused does not have to prove anything. That, in my view, is where the Crown's case falls down. Even making allowances for the complainant's age and the other matters I have

earlier mentioned, I found her evidence unbelievably vague and disjointed. It is certainly not evidence of a standard which I would require to support a criminal conviction. Moreover, I was able to observe for myself the complainant telling lies in court under oath without any apparent embarrassment when she was being questioned by the Crown prosecutor before being declared hostile. Once the lies start, the Crown's task becomes so much more difficult.

The mother said that sometime after her return from the States, the complainant told her that the accused had asked her to have sex but the mother was insistent that at no time had the complainant alleged that intercourse had actually taken place. Furthermore, and significantly in my judgment, the mother said that after the complainant told her that Peni had asked her to have sex with him the mother had told the complainant to go to the police and report the matter but the complainant had replied saying, no she wouldn't go to the police because she was lying - she had "only wanted to go out".

In summary, the Crown's evidence has not left me persuaded to the required standard as to the accused's guilt. In evidence in chief, it was put to the complainant's mother that she had raised the complainant to tell the truth and the mother agreed. Crown counsel then asked whether she did in fact tell the truth and he must have been somewhat taken aback when the mother responded, "No, she usually tells lies to me and she is not truthful…"

The Crown has not made out its case to the required standard. I find the accused not guilty on all counts and he is hereby discharged.

Ta'ufo'ou v Prisons Department

Supreme Court, Nuku'alofa
Ward CJ
C 296/00

15 January 2001; 22 January 2001

Tort – false imprisonment – calculation of release date from prison
Prisons – calculation of early release date – burden of proof for each element

On 9 April 1997, the plaintiff was sentenced to serve a total of 5 years and three months imprisonment and he was admitted to Hu'atolitoli prison. Under the Prison Rules he could earn a maximum remission of one quarter of that sentence by a marks system. In 1998, in celebration of His Majesty's 80th birthday, a number of prisoners were released or had their sentences reduced; it was ordered that the plaintiff was to have his sentence reduced by one quarter. Remission was earned under a marks system set out in the Prison Rules; the maximum remission that could be earned by a male prisoner was one quarter of his sentence and, in order to achieve that, he would need to earn a total of 8 marks a day. Thus the total marks needed to achieve maximum remission would be eight times the number of days in the served portion of his sentence. However, marks may not be awarded if the prisoner did not work properly or failed to behave. In such cases, the prisoner would only be awarded a basic 6 marks per day. The plaintiff's earliest release date was calculated to have been 9 November 1999. He, along with the other prisoners who were to benefit from the King's birthday, was told of that date in about July 1998. However, by the time the day for his release dawned, the plaintiff was 50 marks short of the required total and so he was required to serve an extra six days imprisonment. That would have resulted in his release on 14 November 1999 but, as that was a Sunday, he was released on the previous day, the 13th. He sought damages for false imprisonment in respect of those extra days. The defence submitted that, after the provisional release date had been calculated as 9 November 1999, the prisoner started avoiding prison duties by claiming to be sick. A prison officer produced the records from the prison in which were shown 25 days when the plaintiff was sick and did not work. Their case was that he was not genuinely sick but simply malingering to avoid his duties.

Held:

1. The plaintiff bore the burden of proving that he was released later than he should have been. There was no dispute that he was released after the date that would have applied had he received full remission. The burden of proving the correct reason for that delayed release shifted to the defendant.

The Court was satisfied that the defence proved on balance that the plaintiff failed to carry out his work on the days they stated. The burden then shifted to the plaintiff to prove that he came within the exception under rule 188 and was thus entitled to full marks on any of those days and he failed to do so. He admitted he was sick on some days in the period from July 1998 to November 1999 but produced no clear evidence to challenge the defence dates beyond a vague denial that he was sick on all of them.

2. The prison authorities were correct to require the plaintiff to serve the extra six days in custody and the plaintiff's claim failed.

Rules considered:
Prison Rules

Counsel for plaintiff : Mr Fifita
Counsel for defendants : Mr Kefu

Note: The case was taken on appeal and the appeal was dismissed. See [2001] Tonga LR 11.

Judgment

On 9 April 1997, the plaintiff was sentenced to serve a total of 5 years and three months imprisonment and he was admitted to Hu'atolitoli prison. Under the Prison Rules he could earn a maximum remission of one quarter of that sentence by a marks system.

In 1998, in celebration of His Majesty's 80th birthday, a number of prisoners were released or had their sentences reduced. No explanation was given as to the method of, or reason for, selection of the prisoners who were to be treated in this manner but it was ordered that the plaintiff was to have his sentence reduced by one quarter.

Remission is earned under a marks system set out in the Prison Rules. The maximum remission that can be earned by a male prisoner is one quarter of his sentence and, in order to achieve that, he will need to earn a total of 8 marks a day. Thus the total marks needed to achieve maximum remission will be eight times the number of days in the served portion of his sentence. However, marks may not be awarded if the prisoner does not work properly or fails to behave. In such cases, the prisoner will only be awarded a basic 6 marks per day.

In the present case, the prison authorities interpreted the order for reduction in honour of the King's birthday as a deduction of a quarter of the total sentence irrespective of the marks system and then calculated his remission on the remainder. As a result of such calculations the plaintiff's earliest release date would have been 9 November 1999. He, along with the other prisoners who were to benefit from the King's birthday, was told of that date in about July 1998.

However, by the time the day for his release dawned, the plaintiff was 50 marks short of the required total and so he was required to serve an extra six days imprisonment. That would have resulted in his release on 14 November 1999 but, as that was a Sunday, he was released on the previous day, the 13th.

He seeks damages for false imprisonment in respect of those extra days.

The defence case is that, after the provisional release date had been calculated as 9 November 1999, the prisoner started avoiding prison duties by claiming to be sick. A prison officer produced the records from the prison in which were shown 25 days when the plaintiff was sick and did not work. Their case was that he was not genuinely sick but simply malingering to avoid his duties.

The plaintiff denies being sick on most of those days but says that he was at the hospital on two occasions for bronchitis. He called Dr Latu who saw the plaintiff at Vaiola Hospital on 3 February 1999. That date is not recorded as one upon which the prisoner lost marks but Dr Latu said the record showed that a colleague had also seen the plaintiff five days before. The prison records show that he did not earn marks on 28, 29 and 30 January which would have included that previous visit.

When a prisoner is unable to carry out his allotted work because of sickness, he only receives the basic 6 marks. The only exception is under rule 188 which provides that any prisoners in hospital or the infirmary "if injured on the public works or in the performance of their duty (without any fault of their own)" shall be awarded the full 8 marks per day. That is the only exception and if they are unfit for work for any other reason, even if they are in hospital, they will only receive 6 points unless there is a special recommendation for more. Thus it does not matter whether the plaintiff was genuinely sick or malingering on the days he is recorded as having failed to do his work because of sickness.

The record shows the plaintiff was sick on the 50 days identified and so he only received 6 points for each of those days. The plaintiff denies being sick on more than a few days. On those few days and on the days he was at hospital, he was there for bronchitis which had been caused by having to work in the fields in wet weather without adequate, or any, wet weather clothing. If that had been the case he would have been entitled to 8 points for those days but his own witness, Dr Latu, told the court that bronchitis would not have been caused by such conditions. I accept his expert opinion on this and so the exception in Rule 188 does not apply to the plaintiff. Quite why his visit to the hospital on 3 February did not lose him points is not clear on the evidence but the other visit five days before clearly resulted in him receiving only 6 marks and, on the basis of Dr Latu's evidence, that was correct.

The plaintiff brought this action and bears the burden of proving that he was released later than he should have been. There is no dispute that he was released after the date that would have applied had he received full remission. I consider that the burden of proving the correct reason for that delayed release shifts to the defendant. I have considered the evidence of the prison officer called and the prison record and I am satisfied the defence has proved on balance that the plaintiff failed to carry out his work on the days they have stated. The burden is on the plaintiff to prove that he came within the exception under rule 188 and was thus entitled to full marks on any of those days and he has failed to do so. He admitted he was sick on some days in the period from July 1998 to November 1999 but produced no clear evidence to challenge the defence dates beyond a vague denial that he was sick on all of them.

In the circumstances, I am satisfied that the prison authorities were correct to require him to serve the extra six days in custody and the plaintiff's claim fails.

Before I leave the case, I should state that the plaintiff raised a complaint that he was never properly advised of the marks system when he was first admitted and neither was he told he had lost marks nor that he could challenge or appeal that

decision. He also told the court that he was assured he would be released on 9 November and was never told subsequently that he would not until he was told in a
130 casual conversation shortly before the 9th.

I do not consider these matters alter his claim but I state that, as far as the first is concerned, he had served two previous sentences and I have no doubt at all that he knew about the marks system. As far as the second is concerned I believed the evidence of the prison officer who said he had mentioned the delayed release date to the prisoner more than once. I did not believe the plaintiff's account.

The claim is dismissed with costs to the defendants.

Ta'ufo'ou v Prisons Department

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 2/2001

24 July 2001; 27 July 2001

Tort – false imprisonment – release date calculation

The facts are fully set out in the headnote of the Supreme Court decision at *Ta'ufo'ou v Prisons Department* [2001] Tonga LR 7.

Held:

1. The appellant claimed the prison officer's evidence was hearsay, however he conceded in argument that he had taken no objection to it, and there was no basis on which the Court could conclude that the witness was without personal knowledge of the details he had himself noted in the prison records.
2. It was unnecessary to discuss a further contention that the Appellant had a legitimate expectation of earlier release. Legitimate expectation was germane to the application of the principle of natural justice; but not to any cause of action in tort.
3. The appeal was dismissed with costs.

Statute considered:
Prisons Act (Cap 36)

Regulations considered:
Prison Rules

Counsel for appellant : Mr Fifita
Counsel for respondent : Mr Bloomfield

Judgment

[1] The Appellant brought an action against the Respondents for damages, alleging that he was falsely imprisoned from 9 November 1999 (when he claimed he should have been released from gaol after serving consecutive sentences for housebreaking, theft and other offences) until 14 November 1999, a period covering six days. In fact,

he was released on 13 November 1999. His action having been dismissed, he appeals to this Court.

[2] Briefly, the circumstances are the following. The Appellant, who had had some experience as an inmate of a prison by virtue of having served two prior sentences of imprisonment, totalling two years, for offences of dishonesty, was admitted to Hu'atolitoli prison on 9 April 1997 to serve consecutive sentences of 3 months, 1 year and 4 years, that is to say, a total period of 5 years and 3 months. While he was in the prison, the eightieth birthday of the King was celebrated, among other things, by three royal pardons, and by a decision of the Privy Council, approved by His Majesty, that twenty-eight prisoners, among whom was the Appellant, should have their terms of imprisonment reduced by one quarter. It is not in dispute that, after having his term of imprisonment so reduced, the Appellant was entitled, as well, to receive the benefit of the Mark System provided for by the Prisons Regulations made under The Prisons Act, as applied to the reduced term. Under the Mark System, regulations 184 et seq allowed to a male prisoner, in the words of reg 185, a "maximum remission obtainable" of "one fourth of the sentence". This meant that the Appellant's release date, if he did earn all available marks, suffering no deductions, would be 9 November 1999.

[3] What is in dispute, leaving aside some peripheral questions, is the determination of the officers of the Prisons Department that the Appellant did not earn all the marks required for the maximum remission obtainable, but only sufficient to enable him to be released on 14 November 1999, or as that was a Sunday, the day before, 13 November 1999, when he was, in fact, released. The reason for the shortfall in marks was the Appellant's alleged illness on a number of occasions when he was required to do work. Under the system, a prisoner obtained six marks for each day served, but in order to obtain the daily maximum of eight marks, he would need to do, under reg 186, "a fair day's labour" and "steady hard work and full performance of the task allotted for the day", or alternatively, the case would have to come within reg 188 or 189. Those last regulations provide, in some circumstances, for a discretion in the Gaoler where a prisoner is in hospital, and for special treatment of a prisoner where "the medical officer" certifies him "to be only capable of light labour". But they were not utilised in the Appellant's case, except, perhaps, on the occasion of one hospital visit when he did receive full marks for the day, although he did no work. The prison records showed that the Appellant failed to work, claiming to be sick, on fifty days in respect of which he received only six marks per day. It was the calculation of the reduced marks for these fifty days that put back the Appellant's date of release.

[4] The Appellant denied the evidence of the prison officer who gave detailed evidence of the days of alleged sickness. But the learned Chief Justice, who heard the matter, did not believe his denials, accepting, on the contrary, that he had failed to work on the days alleged by the Respondents. Although the Appellant's counsel claimed the prison officer's evidence was hearsay, he conceded in argument that he had taken no objection to it, and there is really no basis on which the Court could conclude that the witness was without personal knowledge of the details he had himself noted in the prison records.

[5] It is unnecessary to discuss a further contention that the Appellant had a legitimate expectation of earlier release. Legitimate expectation is germane to the application of the principle of natural justice; but not to any cause of action in tort.

[6] Finally, counsel attacked a collateral conclusion of the Chief Justice that the Appellant was well aware, despite his denials, of the Marks System. It was said the
80 Chief Justice was not entitled to infer knowledge from the Appellant's considerable experience of prison. We disagree; but, in any case, there was ample evidence on the point.

[7] For these reasons, the appeal must be dismissed with costs.

Paea v R

Supreme Court, Nuku'alofa
Ford J
Cr 207/2000

19 January 2001; 23 January 2001

Bail - application to be released until appeal determined – could not use jurors' affidavits as evidence – new application needed

After a jury trial in Vava'u the appellant was found guilty of murder and on 20 October 2000 he was sentenced to life imprisonment. The appellant filed a notice of appeal on the last day for appealing although the notice was inaccurately date stamped by the Court staff as having been filed on "31/11/00". The grounds of appeal were stated to be that the finding of the jury was wrong in fact and law and there followed 11 particulars in support of the stated ground. Some of the particulars related to matters of fact. Others did not relate to the jury's findings. On 19 December 2000, the Court made a file note that under section 16 of the Court of Appeal Act (Cap 9) the appellant needed leave if he sought to appeal on any ground other than a question of law alone, and further, that his counsel needed to clarify the position. Counsel for the appellant said that he did not receive any notification from the Court. The file was referred back to the Court because, on 10 January 2001, the appellant filed an application for orders (1) quashing the jury's verdict, or (2) quashing the sentence of life imprisonment or, alternatively, (3) releasing the appellant on bail until determination of his appeal. The first two matters were not matters that were within the jurisdiction of the Court so were put to one side. The relevant ground advanced in support of the bail application consisted of affidavits from two members of the jury in which the deponents stated that they disagreed with the jury's verdict announced in Court. The Crown opposed the bail application.

Held:

1. The Court has power to grant bail to 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, if the Court was satisfied that there was a reasonable prospect of the appeal succeeding.
2. The appellant's application for bail based on the affidavits from two members of the jury could not be entertained. The affidavit evidence from the two jurors was inadmissible. The principle of the finality of jury verdicts was well-established.

3. If the appellant wished to make any fresh application under the Bail (Amendment) Act he would first need to seek appropriate leave and finalise the grounds of his appeal and he would then need to be able to satisfy this Court that there was a reasonable prospect of the appeal succeeding.

Cases considered:

Nanan v The State [1986] 1 AC 860 (PC)
R v Papadopoulos [1979] 1 NZLR 621
Vaise v Delavel (1785) 1 TR 11

Statutes considered:

Bail (Amendment) Act 1991
Court of Appeal Act (Cap 9)

Counsel for Crown : Ms Simiki
Counsel for accused : Mr Paasi

Judgment

After a jury trial in Vava'u last year the appellant was found guilty of murder and on 20 October 2000 he was sentenced to life imprisonment.

It appears that the appellant filed a notice of appeal on the last day for appealing although the notice has been inaccurately date stamped by the Court staff as having been filed on "31/11/00".

The grounds of appeal are stated to be that the finding of the jury was wrong in fact and law and there follows some 11 particulars in support of the stated ground. Some of the particulars relate to matters of fact. Others do not relate to the jury's findings.

On 19 December 2000, I made a file note as follows:-

> *"Under section 16 of the Court of Appeal Act the appellant needs leave if he seeks to appeal on any ground other than a question of law alone. His counsel needs to clarify the position. The limitation period has now expired."*

It is unclear from the Court file whether my file note was ever passed on to counsel. Mr Paasi says he did not receive any notification from the Court. The file has now been referred back to me because on 10 January 2001 the appellant filed an application for orders, (1) quashing the jury's verdict or (2) quashing the sentence of life imprisonment or, alternatively, (3) releasing the appellant on bail until determination of his appeal. The first two matters are not matters coming within the jurisdiction of this Court and for present purposes I put them to one side.

The Court of Appeal has special powers relating to bail which are set out in Section 26 of the Court of Appeal Act (Cap 9) but under section 4B(1)(a) of the Bail (Amendment) Act 1991 this Court has power to grant bail to 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, if this Court is satisfied (in the context of this case) that there is a reasonable prospect of the appeal succeeding.

The relevant ground advanced in the present case in support of the bail application consists of affidavits from two members of the jury in which the deponents state that they disagreed with the jury's verdict announced in Court.

The Crown opposes the bail application. Miss Simiki has referred to the decision of the Privy Council in *Nanan v The State* [1986] 1 AC 860 (PC) which was an appeal from the Court of Appeal of Trinidad and Tobago. Under the law of Trinidad and Tobago a person can only be convicted of the crime of murder by a unanimous jury verdict. The Judge did not direct the jury that the verdict had to be unanimous but the court clerk did ask the foreman whether the jury had agreed upon a unanimous verdict and he said that they had. The foreman and three jurors subsequently swore affidavits stating that they had not been aware that they all had to be agreed upon the verdict and that eight had been in favour of one decision and four of another. The defendant appealed on the basis that his constitutional right not to be deprived of life except by due process of law (in this case a unanimous jury verdict) had or was likely to be infringed. The Privy Council dismissed the appeal holding (as stated in the head note to the report) that:

> *"To admit the affidavit evidence of the four jurors in order to establish that they did not agree with the verdict, or that they were acting under the misapprehension that a majority verdict could be returned, would be contrary to the general principle that evidence was not admissible to rebut the presumption that a verdict given in the sight and hearing of all the members of a jury without protest was one to which they had all assented…"*

In the present case, there is no suggestion that, as Trial Judge, I failed to direct the jury that a unanimous verdict was required nor is it suggested that there was protest by any member of the jury to the guilty verdict announced in open Court in the sight and hearing of all jury members.

The New Zealand Court of Appeal in *R v Papadopoulos* [1979] 1 NZLR 621 at 626 set out at some length the principles covering the finality of jury verdicts and the reasons for them and stated at page 626:

> *"As to the contents of the juror's affidavit, for centuries the Courts have declined to receive affidavits from jurors purporting to disclose what took place during their deliberations in the jury room or the jury box … The rule is essential in the public interest for a number of reasons."*

That principle, which has been described as the finality of jury verdicts, has been re-stated, emphasised and explained by courts in other jurisdictions on numerous occasions down through the years.

One of the other authorities Miss Simiki referred to was "The Jury Under Attack", a 1988 publication, where the learned authors noted that the foundation of the rule that evidence will not be admitted from jurors for the purpose of attacking the verdict is the decision of *Vaise v Delavel* (1785) 1 TR 11, where the court refused to

hear evidence that the jury had decided the case by the toss of a coin when they had
120 been unable to agree on a verdict.

Against this powerful line of authority, the appellant's application for bail based on the affidavits from two members of the jury cannot be entertained. The affidavit evidence from the two jurors is inadmissible.

If the appellant wishes to make any fresh application under the Bail (Amendment) Act he will first need to seek appropriate leave and finalise the grounds of his appeal and he will then need to be able to satisfy this Court that there is a reasonable prospect of the appeal succeeding.

Fifita and Naitoko v Minister of Police

Supreme Court, Nuku'alofa
Ward CJ
C 739/00 and C 743/00

11 January 2001; 25 January 2001

Prisons and enforcement of sentences – calculation of release date – started on the day after commitment order
Prisons and enforcement of sentences – place of detention – police cells not ultra vires detention order

These two separate actions arose out of similar circumstances. In each case, the plaintiff was arrested by the police and charged with being drunk in a public place. Each appeared before a magistrate in the morning of 11 July 2000, pleaded guilty and was fined $25 in the case of Fifita and $20 in the case of Naitoko. In both cases the magistrate ordered payment immediately and, in default of payment, ordered imprisonment for 4 days in the case of Fifita and for 3 days in the case of Naitoko. The men were taken to the Central Police Station in Nuku'alofa and despite their requests to be taken to prison were detained at the police station until the following day, 12 July, when they were transferred to the Prison at Hu'atolitoli. Naitoko was released on 14 July and Fifita a day later on 15 July. They claimed, first, that their detention by the police at the police station was ultra vires the order of the committing magistrate and, second, that the total term served in each case was one day too long.

Held:

1. The officer's duty was to convey the prisoner and to deliver him to the gaoler to serve his sentence but that did not mean that the police could not take him to the police station on the way. There may be many practical difficulties about conveying the prisoner direct to prison. It would be unreasonable and unrealistic to expect the police to have to convey each and every prisoner directly to the prison as soon as he had been sentenced. The duties of the admitting officer in the case of every newly admitted prisoner would take some time and, after a certain point in the afternoon, it would be reasonable to detain the prisoner in the police station until the following morning rather than deliver him to the prison late in the day and that would not be a breach of the terms of the warrant of commitment.
2. The proper calculation of any sentence of imprisonment should be made by excluding the day of the order. That would mean in the present case

that the first day of the sentence was the calendar day following the making of the order, namely 12 July. In the case of Naitoko the last day of his imprisonment would be the 14th. That therefore is the day upon which his sentence expired and so, according to Prison Rules, he should have been discharged at 1pm on that day. Fifita should have been released at 1pm on the following day, the 15th. That was the time each man was released.

3. No method of reckoning was totally fair and there were clear injustices that could arise from the adoption of the basis of calculation in section 1 of the Interpretation Act but that was the correct method under the law.

Statutes considered:
Criminal Offences Act (Cap 18)
Interpretation Act (Cap 1)
Magistrates' Courts Act (Cap 11)
Prisons Act (Cap 36)

Rules considered:
Prisons Rules

Counsel for plaintiff : Mr Fifita
Counsel for defendants : Miss Tupou

Judgment

These two separate actions arise out of similar circumstances and depend on the interpretation of the same parts of the Prisons Act (Cap 36) and the Prison Rules. That interpretation could decide the whole action and I have directed it should be determined as a preliminary point. Counsel have filed written submissions and I have given them the opportunity to make any further oral submissions they wished.

In each of these cases, the plaintiff was arrested by the police and charged with being drunk in a public place. Each appeared before a magistrate in the morning of 11 July 2000, pleaded guilty and was fined $25.00 in the case of Fifita and $20.00 in the case of Naitoko. In both cases, the magistrate ordered payment forthwith and, in default of payment, ordered imprisonment for 4 days in the case of Fifita and for 3 days in the case of Naitoko. There is no evidence to link the two cases.

The men were taken to the Central Police Station in Nuku'alofa and despite their requests to be taken to prison were detained at the police station until the following day, 12 July, when they were transferred to the Prison at Hu'atolitoli.

Naitoko was released on 14 July and Fifita a day later on 15 July.

They claim, first, that their detention by the police at the police station was ultra vires the order of the committing magistrate and, second, that the total term served in each case was one day too long.

1. The warrant of commitment used in such cases is Form 10 of the Schedule to the Magistrates' Courts Act (Cap 11). It is addressed to each and all constables and the gaoler of the relevant prison and sets out the terms of the fine and the default of payment. It continues:

"You the said constables are hereby commanded to convey the defendant to the said prison and there to deliver him to the gaoler together with this warrant and you the gaoler of the said prison to keep the said defendant imprisoned for the space of ..... unless the said sum of ..... be sooner paid."

The plaintiffs' case is that the terms of that warrant clearly only authorise the police officers to detain the prisoner for the purpose of conveying him to the prison. They had no right, Mr Fifita suggests, to hold him in the police station.

I agree that the officer's duty is to convey the prisoner and to deliver him to the gaoler to serve his sentence but I cannot accept that means the police may not take him to the police station on the way. There may be many practical difficulties about conveying the prisoner and there may be other people committed to prison during the course of the court sitting that same day. It would be unreasonable and unrealistic to expect the police to have to convey each and every prisoner directly to the prison as soon as he has been sentenced. As most criminal cases are the result of earlier police action, there will also be police documentation that needs to be carried out at the police station. The magistrate may have a number of cases during the same sitting and it is not practical to prepare and sign a warrant for each person as he is sentenced. As a result, the warrant may not be signed until later in the day and it would be wrong of the police to deliver a prisoner to the gaoler without a warrant.

Rule 105 of the Prison Rules sets out the duties of the admitting officer in the case of every newly admitted prisoner. They will inevitably take some time and I accept Miss Tupou's suggestion that, after a certain point in the afternoon, it may be reasonable to detain the prisoner in the police station until the following morning rather than deliver him to the prison late in the day and that will not be a breach of the terms of the warrant of commitment.

2. Mr Fifita told the court that the plaintiffs had attended court on the 11 July at 10 am in obedience to a summons. They had, he said, arrived well before that and were sentenced the same morning. He suggests that the first day of detention is that day. That would mean the second day was the 12th and the third day on which Naitoko should have been released was 13th. Fifita, similarly, should have been released on the fourth day which, on those calculations, would have been the 14th. His submission relies on the term "day" meaning a calendar day and on the period served including the day the order was made.

Miss Tupou points out that there is no definition of "day" in the Prisons Act. She explains that, as a result, the prison authorities have taken a day as being 24 hours. She points out that, with some exceptions with which we are not concerned here, by Rule 112 every prisoner shall be discharged at 1 pm "on the day when his sentence expires or otherwise terminates".

On that basis, the plaintiffs were sentenced at about 10 am on the 11th and Naitoko's sentence of three days would expire at 10 am on the 14th. By rule 112 he would then be released at 1pm of that day as he was. Similar reckoning would result in the release of Fifita at 1pm on the 15th as occurred.

I cannot agree with either proposition.

In the absence of any specific provision in the Act, it is necessary to take the provisions of the Interpretation Act (Cap 1) into account. Section 19 provides:

"In every case in which an Act prescribes a particular number of days from a particular day or date for the doing of any act or for any other purpose, then in reckoning such number of days the specified day or date shall be excluded therefrom."

The Magistrates' Courts Act (Cap 11) and the Criminal Offences Act (Cap 18) give the courts the power to impose a sentence of imprisonment in default of payment of a fine.

I am satisfied that the proper calculation of any sentence of imprisonment should be made by excluding the day of the order. I also consider that the reference to day or date in section 19 means a calendar day and the wording of Rule 112 in my opinion clearly refers to calendar days also. In the present cases, it would mean that the first day of the sentence is the calendar day following the making of the order, namely 12 July. In the case of Naitoko the last day of his imprisonment would be the 14th. That therefore is the day upon which his sentence expires and so rule 112 requires that he should have been discharged at 1pm on that day. Fifita, on the same reckoning should have been released at 1 pm on the following day, the 15th. That is the time each man was released.

I consider the suggestion that the day should be a 24 hour day from the time of detention, whilst no doubt adopted to be as accurate and fair as possible, could, as a result of Rule 112, produce an unjustified difference in the period of time served for identical sentences passed on the same day. On that calculation, a man sentenced, for example, to three days imprisonment at midday on the 1st would be released at 1pm on the 4th whilst another man sentenced to the same penalty at 2pm on the same day would not be released until 1pm on the 5th. That would only be avoided by reading Rule 112 as meaning a calendar day which would be inconsistent with the basis of the original calculation.

Equally it means that any man sentenced, for example at 10am, will wait for his release until 1pm on the day his sentence expires with the result that he will remain in custody for three hours more than his sentence. I cannot accept that is the intention of the law.

No method of reckoning is totally fair and there are clear injustices that can arise from the adoption of the basis of calculation in section 1 of the Interpretation Act but I am satisfied that is the correct method under the law and I so rule.

R v Tukia

Supreme Court, Nuku'alofa
Ward CJ
Cr 132-135/00

29, 30 January 2001; 1 February 2001

Criminal law – abetment of armed robbery – knew offence was being committed - guilty

On 28 February 2000 there was an armed robbery in which Zhu Ai Yu, a Chinese man who runs a delivery business, was attacked whilst he drove along a narrow rough road. During the course of the robbery, he was struck on the head and the hand apparently with a baseball bat and sustained nasty injuries. His attackers then drove off in his van taking all its contents. There was no suggestion that the accused was involved at that stage. The van was recovered, damaged, the next day near the sea where there had apparently been an attempt to dispose of it. The contents, apart from a few slippers, were missing as was the vehicle's radio. The accused was seen by the police on 21 April 2000 and interviewed under caution. During the evidence he admitted that he knew the van was the stolen van of a Chinese man and he helped to consume or use the stolen items. He was charged with a single count of Abetment of Armed Robbery. Counsel for the accused submitted that he should have been charged with receiving stolen goods.

Held:

1. The other three men actually committed the offence of armed robbery. That offence included the attack on the victim, the taking of the van and the final disposal of the goods and the van. Until all those events had been carried out, the offence of armed robbery was still being committed.
2. The court was satisfied beyond any doubt that the accused knew full well that he was helping to commit the offence albeit in the last stages only of that offence. The assistance with the final removal of the goods that had been in the van and the fruitless journey to burn the van were all steps taken knowingly by the accused to facilitate the commission of the other men's crime.
3. The definition of abetment requires knowledge that the act was done to facilitate an offence. The prosecution must prove that the accused knew that an offence was being committed and did some act to assist knowing that act would facilitate the commission of the offence. The fact he did not know the actual details of the offence gave him no defence. However, the

Court was satisfied that the accused knew enough of the details to be aware that the crime he was going to assist was one of armed robbery.

4. The accused was convicted as charged.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for prosecution	:	Mr Kefu
Counsel for accused	:	Mr Veikoso

Judgment

The accused has pleaded not guilty to a single count of Abetment of Armed Robbery. The indictment wrongly charges the offence under sections 15 and 154(1) of the Criminal Offences Act (Cap 18) when it should have been under sections 8 and 154(3). However, the actual offence charged is clearly stated and understood by the defence so I proceed on the basis of the charges under the correct sections.

The evidence is short. There is no dispute that there was an armed robbery on 28 February 2000 in which Zhu Ai Yu, a Chinese man who runs a delivery business, was attacked whilst he drove along a narrow rough road. During the course of the robbery, he was struck on the head and the hand apparently with a baseball bat and sustained nasty injuries. His attackers then drove off in his van taking all its contents. The prosecution case is that there were three men involved at the scene of the attack, Mataiasi Taufa, Peni Malafu and Tevita Lavaki. There is no suggestion that this accused was involved at that stage.

The van was recovered, damaged, the next day near the sea where there had apparently been an attempt to dispose of it. The contents, apart from a few slippers, were missing as was the vehicle's radio.

This accused was seen by the police on 21 April 2000 and interviewed under caution. The answers given and the statements he made are not challenged.

He was first asked if he knew why he was there and replied that it related to a Chinaman's delivery. The interview continued:

> "Q - Can you tell me about it in detail?
> A - Yes, it was a delivery van of a Chinaman who was beaten up by Tevita and the man ran away while there were goods in the van.
> Q - Did you actually see what happened?
> A - No.
> Q - How did you know about it?
> A - I knew about it when Peni Malafu came to Mataiasi Taufa's home and asked me to go with him to the Mormon church at Ha'atieho because Mataiasi and Tevita were waiting there in the delivery van."

The accused explained that the four of them lived in Mataiasi's house and recalled that Peni came for him at about 9 pm. He was then asked, "When Peni called you what did you understand then?" and he replied, "Nothing but between Mataiasi's

house and where the other two were waiting, Peni explained to me and then I understood it was a stolen van of the Chinaman."

He said they then drove the van to an allotment on the Liku road and took the goods that had been in the van by foot to the kitchen adjacent to Mataiasi's home. The accused made three such journeys. They then consumed or used the stolen items.

He then told the police that Mataiasi and Tevita had taken the van and parked it near the sea and was asked, "Did you plan anything about the van?"

A - "After we took the goods we went back to burn the van but the police were already there and they chased us and we went back to Ha'ateiho."

In court the accused gave evidence and explained that Peni had come and asked him to go with him to see the other two. As they went along the road "he explained what occurred earlier". Later in his evidence he said, however, that he was only told it was a delivery van. He knew it did not belong to them and belonged to someone else so he knew he was involved with stolen goods.

Later in his evidence he agreed that the other three told him as they drove the van that they had "forced the van from the Chinaman". It was after that he was involved in the carrying of the goods and the journey to burn the van.

Mr Veikoso for the accused asks the court to consider that the evidence reveals a case of receiving stolen goods and that is the offence with which he should have been charged. The accused, he suggests, did not take any part in the robbery and was simply dealing with the goods the others had already stolen.

I cannot agree. Abetment under section 8 of the Criminal Offences Act makes "every person who knowingly does any act for the purpose of facilitating the commission of an offence by any other person" an abettor.

In the present case, the other three men actually committed the offence of armed robbery. That offence included the attack on the victim, the taking of the van and the final disposal of the goods and the van. Until all those events had been carried out, the offence of armed robbery was still being committed.

On the evidence before the court, I am satisfied beyond any doubt that the accused knew full well that he was helping Peni and the others to commit the offence albeit in the last stages only of that offence. The assistance with the final removal of the goods that had been in the van and the fruitless journey to burn the van were all steps taken knowingly by the accused to facilitate the commission of the other men's crime.

I am equally satisfied that his answers to the police show that he was told the full nature of the crime he was abetting by Peni as they went along the road to Mataiasi's house the first time. Having described, in his interview, how Tevita had beaten the Chinaman, he was asked if he had seen it and said that he had not but had heard about it when Peni came and asked him to go to join the other two. I am satisfied that, at that point, he knew enough of the details to be aware that the crime he was going to assist was one of armed robbery.

I should add that, had I not been satisfied that he knew it was armed robbery, I would still have convicted him of the offence charged. The definition of abetment requires knowledge that the act is done to facilitate an offence. The prosecution must prove that the accused knew that an offence was being committed and did some act to assist knowing that act would facilitate the commission of the offence. The fact he does not know the actual details of the offence gives him no defence.

The accused is convicted as charged.

Tonga Development Bank v Howard

Supreme Court, Nuku'alofa
Ford J
C 89/00

1, 2 February 2001; 5 February 2001

Contract law – common mistake involving house - remedied

In about 1988 Penisimani Muti took out a loan of approximately $27,000 with the plaintiff, the Tonga Development Bank, to purchase computer hardware and software for the operation of a magazine called "Tonga Today". The loan was secured over various assets including his four acre tax allotment (the "four acres") and various personal assets including a "concrete block residential house plus contents". The magazine failed. In about 1995 Penisimani was seriously in arrears with his loan account. He heard that the plaintiff was about to foreclose and so went to live in Salt Lake City, Utah. When Penisimani left for the USA the plaintiff, as mortgagee, moved into possession and on 11 July 1996 it advertised in the Tonga Chronicle inviting tenders to "sub-mortgage the following tax allotment. Penisimani L. Muti - Ha'ateiho, four acres tax allotment to sub-mortgage for 28 years." After protracted negotiations an agreement was reached between the plaintiff and Jimmy and Meleane Matthews (the second defendants). The deed of possession that resulted provided that the Matthews could have possession of the tax allotment for 28 years and they were to pay $20,500 lump sum and $600 a year as annual rental. The issue to be determined was, when the plaintiff sold off the four acres to the second defendants, Mr and Mrs Matthews, whether the sale included the concrete block dwelling house.

Held:

1. The plaintiff established that, at the time the deed of possession was signed, both parties were acting under the perfectly innocent misapprehension that the dwelling house was not on the four acres and consequently the term "improvements" where used in the deed was intended to refer to the shop building at the front of the four acres, fencing etc and not to the dwelling house which everyone firmly believed was on the town allotment.
2. That situation was called "common mistake". The agreement was not void and the mistake could be remedied because in Tonga it was well established that, unlike in some jurisdictions, houses were regarded as items of personal property rather than accretions to the land.

3. The Court made the declarations requested in the statement of claim that the deed of possession dated 19 May 1997 did not include the dwelling house and the dwelling house was not owned by the second defendants. There was no award of costs.

Case considered:

Kolo v Tonga (Supreme Court, C 20/1997, 7 August 1998)

Counsel for plaintiff	:	Mrs Vaihu
Counsel for first defendant	:	Mr Foliaki
Counsel for second defendants	:	Mr 'Etika

Judgment

In about 1988 Penisimani Muti took out a loan of approximately $27,000 with the plaintiff, the Tonga Development Bank, to purchase computer hardware and software for the operation of a magazine called "Tonga Today". The loan was secured over various assets including his four acre tax allotment (the "four acres") and various personal assets including a "concrete block residential house plus contents".

The magazine failed. In about 1995 Penisimani was seriously in arrears with his loan account. He apparently heard that the plaintiff was about to foreclose and so he packed up and went to live in Salt Lake City, Utah, where he remains to this day, leaving others to sort out the mess. That is the background to this litigation. The issue to be determined is, when the plaintiff later sold off the four acres to the second defendants, Mr and Mrs Matthews, did the sale include the concrete block dwelling house?

The land in question is situated on Taufa'ahau Road about a quarter of a mile or so on the southern or airport side of the Royal Tongan Golf Club. The four acre tax allotment is a rectangular section running back from the road. It is not perfectly rectangular because in the southern corner of the property fronting on to Taufa'ahau Road there is a square section of land which is not included in the four acres. That corner block was referred to as Penisimani's town allotment but apparently it has never been officially registered as a town allotment, hence, the plaintiff did not have security over the "town allotment" as such but, as I have noted, the loan was secured over the dwelling house which the plaintiff believed was situated on Penisimani's town allotment. For present purposes, I will refer to that section as the "town allotment".

When Penisimani left for the USA the plaintiff, as mortgagee, moved into possession and on 11 July 1996 it advertised in the Tonga Chronicle inviting tenders to "sub-mortgage the following tax allotment. Penisimani L. Muti - Ha'ateiho, four acres tax allotment to sub-mortgage for 28 years."

The plaintiff only received one reply to the advertisement. It was a tender from the second defendants, Jimmy and Meleane Matthews. In his tender letter dated 25 July 1996, Mr Matthews said:

> *"RE: PENISIMANI MUTI 4 ACRES OF LAND AT HA'ATEIHO. 28 YEAR LEASE.*

Dear Sir's,

With reference to advertisement in Tonga Chronicle on 11th of June 1996, concerning the above Land.

I would like to put an offer in for the above Land in the name of Meleane Matthews (Tongan) my wife and myself, Jimmy Matthews. I would like the lease to be put in Both name but with a condition that I can transfere (sic) the lease from my name into my wife, Meleane Matthews sole name at any time before my death or when I die. It is my intension(sic) that my wife as a Tongan should have this lease if you accept our offer.

The intention is to farm this Land and grow taro, by drip feed. We have been working with Haniteli Fa'anunu on this. Also we plan to grow Hybrid, Hawaiian Pawpaw. Also we plan export the produce.

If our offer is accepted I will deposit on acceptance the purchase price with the Tonga Development Bank. Also on acceptance, I would like to be able to clear the land at our cost.

I enclose a copy of my statements of account with the AIB Bank in London where I have a deposit of £41,619 which is over $80, 000.

Our offer is $10,500.

Waiting to hear from you.

Yours sincerely.

Jimmy Matthews."

Jimmy's offer was not accepted. He left for overseas and did not return to Tonga until 15 October 1996. The plaintiff wanted a higher price for the four acres. Further negotiations followed upon Jimmy's return but they were protracted. In January 1997 Mr Matthews increased the offer to $20,500 and on 25 February 1997 he wrote stating that he wanted the offer in the names of "Mrs & Mr Jimmy Matthews and Mrs & Mr Paul Karalus".

On 19 May 1997 agreement was finally concluded. That day the plaintiff wrote to Mr Matthews as follows:

"Dear Jimmy

I am pleased to inform you that after considering your tendered price for the tax allotment at 'Atele belonging to Mr Peni Muti, the Bank wishes to make an offer as follows:

1. That a lump sum payment of $20,500 be made upon the signing of the Sub Mortgage Document.

2. That an Annual Rental of $600 per year be paid at the commencement of every calendar year of every year.

3. The use of the Land for either private or commercial purposes shall include the premises of trade store which is located on the sub Mortgaged Land.

May I seek your approval, should the offer is acceptable, would you please submit your acceptance within seven days of this.

Yours faithfully

'Etuate Sakalia

MANAGER LEGAL/INSURANCE DIVISION."

Although Mr Matthews in his evidence could not specifically recall receiving that letter, I conclude that it was handed to him sometime on the day it was written and he then had a reply typed out (which unfortunately is undated) confirming the terms contained in the letter and a formal Deed which is headed "DEED OF MORTGAGED LAND POSSESSION BY MORTGAGEE" was signed between the plaintiff and Mr and Mrs Matthews. That document was variously referred to by witnesses, probably inaccurately, as the "Mortgage Deed" and the "Deed of Mortgage". For convenience, I will refer to it as the "deed of possession".

After the recitals, the relevant part in the deed goes on to state:

"The mortgagee (the Bank) lets for himself to the POSSESSOR (the Matthews) all the said piece of land. (hereinafter, together with improvements hereon called "the premises" from the 7th day of May, 1997 until the 19th day of April, 2018 ..."

The lump sum consideration of $20,500 was paid by payments of $2650 on 19 May 1997 and $17,850 on 23 May 1997.

The principal witness for the plaintiff bank, Mr 'Etuate Sakalia, said that the next development came in about November or early December 1997 when Jimmy Matthews approached the Bank and said that since the signing of the deed of possession he had discovered that part of the dwelling house which everyone thought was on the town allotment, was, in fact, located on his four acres and therefore he was the legal owner of the dwelling house. Mr Sakalia said that he advised Jimmy that if that was so then, because neither the Bank nor he was aware of the correct situation at the time the deed was signed, he should not benefit from something he was unaware of. Surprisingly, the plaintiff did not produce any file note or minute relating to that meeting. Mr Matthews disputes the account given by Mr Sakalia.

In all events, Mr Sakalia said that he took the matter up with management for the Bank and on 16 December 1997, after being instructed in the matter, he wrote to Mr Matthews giving him the opportunity to tender an offer for leasing the dwelling house on the four acres. Mr Matthews ignored the letter and it appears that there were no further discussions or correspondence between the parties until the writ was issued in January 2000.

The dwelling house was described to the Court as a "substantial improvement" containing five bedrooms and two very large reception areas. No one gave any estimate of the market value of the building. Mr Matthews, who is in the business of renting houses and selling land through his firm called "House Rental Agency" said that one cannot value houses in Tonga in the same way as valuations are carried out in Australia and New Zealand based on the prices of other properties sold in the neighbourhood. In Tonga, Mr Matthews said, the value of a property is the price that someone is prepared to pay for it on the day.

Before he left for the States, Penisimani Muti and his wife lived in the dwelling house. After his departure, he left a power of attorney with his brother Morton Muti and Morton, as it turned out, instructed Jimmy Matthews, House Rental Agency, to find a tenant. That was Jimmy's first involvement with the dwelling house and, of course, it was long before he tendered for the four acres. Jimmy eventually found a tenant in the form of Mr Alexander Howard who is the named first defendant. Mr Howard agreed to pay rental of $400 per month with a cash payment of $200 per month and the balance of $200 per month was to be applied by Mr Howard on required improvements and repairs to the property.

Mr Howard lived in the house from August 1995 until 5 December 1998 when he eventually vacated at the request of Mr Matthews who had told him that he then wanted the property for his own use. Mr Howard had been aware for sometime that Mr Matthews claimed ownership of the dwelling house.

Mr Howard said that initially after moving into the house in 1995 his rental payments were being paid to Peni Muti's brother, Morton, but after about a year he had a visit from Peni's wife, Alisi, who said that she had a power of attorney from Peni in Utah and she directed him to make his rental payments in future to the Tonga Development Bank.

Later that month Mrs Muti gave Mr Howard formal notice to vacate the property but he pointed out that he had entered into a written tenancy agreement with Morton under an earlier power of attorney and he was entitled, therefore, to remain in possession.

The records show that Mr Howard paid rent to the plaintiff Bank in August, September and October 1996 of $200 per month and again in August, September and October 1997. He was not asked why he had not paid rent on a regular basis and it appears that the plaintiff took no action to follow up on his missing payments apart from in the present proceeding where a claim is made for $5200 being unpaid rental between August 1996 and December 1998.

Mr Matthews said that in his capacity as "owner" of the dwelling house he never followed up the rental question with Mr Howard because at that stage he did not want possession of the house. He said that he knew Mr Howard was not paying any rent but he also knew that he didn't have the money and he had three very young children. Besides, as he put it, if he had got rid of Mr Howard he would have had to get a caretaker in to look after the property so it suited him to allow Mr Howard to remain

in possession rent free. This part of Mr Matthew's evidence was explored further in cross-examination and his answers were not totally convincing.

Arising out of all that, the plaintiff says the dwelling house was never part of the deal with Mr Matthews because both parties thought at the time the deed of possession was signed that the dwelling house was situated, not on the four acres but, on the adjacent town allotment. The plaintiff says the reference in the deed to "improvements" was a reference to a four-room shop at the front of the four acres which originally contained the newspaper office, a showroom and some other business.

Mr Matthews gave evidence and he said that there never had been any mistake on his part. He said that he was aware all along during the negotiations leading up to the signing of the deed of possession that the dwelling house was on the four acres and he took strong exception to Mr Sakalia's evidence that initially when he approached the Bank, he had said that only part of the house was on the four acres.

Mr Matthews said that at the time the deed was signed he knew that the Bank was under the mistaken impression that the dwelling house was on the town allotment but in a rather colourful way the 68 year old said that it was not his responsibility to tell the Bank, as vendor, what was on the land that they were supposed to be selling.

Mr Matthews said that at one stage Mr Sakalia admitted to him that he thought that he (Mr Matthews) owned the house but he pleaded with him not to pull it down and he asked him if he would put on hold any development of the property until after he had retired from the Bank when he turned 55 years of age. I record that evidence but I propose to ignore it in my deliberations because it was never put to Mr Sakalia in cross-examination and he was never given the opportunity to comment on the proposition.

Well, where does the truth of the matter lie?

Mr Matthews quoted various figures to the Court in support of his contention that he would never have agreed to pay the sort of money mentioned in the deed unless the dwelling house was included. He said that the old shop at the front of the land was "rubbish" made from off-cuts of coconut trunks and he said that three of the four offices had blown over in a hurricane about 15 months after he took possession.

Mr Sakalia, on the other hand, also quoted various figures to support his contention that the sums of money talked about in the deed were not as much as the Bank anticipated being able to receive on the transaction and hence its decision to reduce the term of the deed of possession from 28 years to 21 years. He said that if the intention had been to include the dwellinghouse then that would have been stated in the advertisement and the asking price would have been higher.

In the end, these two approaches cancelled themselves out and only went to demonstrate quite remarkably how similar figures can be used to demonstrate conflicting propositions. I do accept, however, that it would be unusual for the bank not to have specifically referred to the house in the advertisement if it was intended to be included in the sale.

When the plaintiff's witnesses gave evidence I was interested in trying to ascertain how it was that Mr Matthews had first learned or become aware of the fact that the dwelling house was on the four acres. The evidence was silent on that point. Similarly, when Mr Matthews gave evidence, nothing was said as to how he first found out that the house was not on the four acres allotment. He was content to say

simply that he knew that that was the situation before he signed the deed of possession.

It was not until Mr Howard gave evidence that the full picture emerged. Although Mr Howard is the named first defendant, through his counsel, he reached an agreed compromise with the plaintiff early on in the hearing and he was excused from further attendance. He was later called as a witness, however, by Mr Matthews.

Mr Howard said that he knew that Mr Matthews had bought the four acres although he could not be precise about dates. He also thought that Mr Paul Karalus was somehow involved in the transaction and he assumed that they had both bought it. He said that one day after he thought that they had bought the four acres he came home from work and saw that they had started to plough the land. That evening, the wife of the estate holder who lives nearby approached Mr Howard and made inquiries about the ploughing because she alleged that they had gone over the boundary of the four acres and that some of the land they were ploughing did not belong to them. Mr Howard then described how he came home from work on a later date and found people walking over his front lawn and when he inquired as to what they were doing, they told him they were checking for survey pegs. Upon inquiry, he was told by the men that the boundary line was 3 meters in front of his house meaning that the house was totally on the four acres. Mr Howard said that at that point he realised for the first time that the house, which everyone had assumed up till then was on the town allotment, was in fact on the four acres.

I found that convincing and helpful although it was vague as to dates. Nevertheless, it shows that Mr Matthews had taken possession and was having the land ploughed when the discovery was made about the boundary pegs. In. other words, the discovery was made after the deed of possession had been signed. All that is consistent with the statement Mr Matthews had made in his tender letter of 25 July 1996 where he said, "on acceptance, I would like to clear the land at our costs." Significantly, Mr Matthews said nothing at all in his evidence about the ploughing incident.

Mr Howard gave other evidence which, if accepted, would indicate that the Bank was aware that the dwelling house was on the four acres before the land was sold to Mr and Mrs Matthews. I did not find that evidence as convincing and I do not accept it.

I am satisfied, therefore, on the balance of probabilities that the plaintiff has established that, at the time the deed of possession was signed, both parties were acting under the perfectly innocent misapprehension that the dwelling house was not on the four acres and consequently the term "improvements" where used in the deed was intended to refer to the shop building at the front of the four acres, fencing etc and not to the dwelling house which everyone firmly believed was on the town allotment.

In law that situation is called "common mistake". The agreement is not void and the mistake can be remedied because in Tonga it has been well established that, unlike in some jurisdictions, houses are regarded as items of personal property rather than accretions to the land -- see *Kolo v Tonga* (Supreme Court, C 20/1997, 7 August 1998).

I, therefore, make the declarations requested in the statement of claim that the deed of possession dated 19 May 1997 did not include the dwelling house and the dwelling house is not owned by the second defendants.

The plaintiff, in addition, seeks from the second defendants rent up to the date of judgment totalling, on my calculations, $11,250 together with interest and costs. I am not prepared to award any of these additional matters. There was no evidence presented to the Court in support of the plaintiff's rent claim and, of course, that meant that Mr 'Etika was never given an opportunity to cross examine on the subject. In relation to any items of discretionary relief I am satisfied that there is substance in Mr 'Etika's submission that the delays on the plaintiff's part in seeking to establish its rights, after first having its attention drawn to the serious boundary challenge back in 1997, has been inordinate. The evidence shows that action was finally taken by the plaintiff to have the matter verified by survey in July 2000 at a cost of only $133.50.

In fairness, Mr Sakalia did acknowledge the delay and indicated that he accepted that it was unacceptable but he explained that one of the problems was that he had been moved to another division within the Bank at quite an important time in terms of the development of the case. I, nevertheless find the overall delay unacceptable and for that reason I decline to award costs. Quite apart from the delay factor, the just result in my opinion, in all the circumstances, is that there should be no award of costs.

Having made the declaratory orders sought by the plaintiff, that is still not the end of the matter. No further relief has been asked for and all that the declarations establish is that there is a house owned by the plaintiff Bank sitting, without any access, on the four acres belonging to the second defendants. The matter is now crying out for a speedy final resolution of all outstanding matters by negotiation between the parties.

I prefer the parties to attempt to negotiate a settlement of all outstanding issues without further involvement of the Court but I do not want the matter to drag on indefinitely. To this end, unless the Court receives earlier advice that the matter has been settled, I have scheduled a Directions Hearing which will take place on Friday 23 March 2001 at 9 am. If there has been no resolution by that date then I will proceed to deal with the matter. As an initial step in the negotiation process I direct that the plaintiff is to provide the second defendants with its suggested options for resolving outstanding issues, in writing, on or before Friday 23 February and the second defendants are to let the plaintiff have their considered response in writing on or before 9 March.

South Pac Builders Supplies Ltd v Naidu

Supreme Court, Nuku'alofa
Ford J
C 394/99

7 and 21 February 2001; 26 February 2001

Costs – solicitor and client basis claimed – have to be exceptional case to warrant that
Discovery - non-compliance – reflected in costs award

On what was anticipated to be the final afternoon of the hearing, counsel for the plaintiff advised the Court that her client had considered its position over the break and she had been instructed to seek leave to discontinue the action. Leave was granted and counsel for the third defendant, Mr Waalkens, immediately applied for costs to be awarded on a solicitor and client basis describing the case as a "hopeless and worthless action". Counsel then made submissions on the question of costs but because, at that stage, Mr Waalkens did not have any records with him to indicate the likely amounts involved, it was left on the basis that he would provide Miss Tonga with particulars of his claim and counsel would then endeavour to reach agreement in relation to costs. The Court specified that if agreement was not possible then the matter should be referred back to the Court for a ruling. The costs claims by the first and second defendants were settled. Counsel advised that they were unable to reach agreement as to the costs claim by the third defendant. Additional submissions were filed by Mr Waalkens in support of his claim for an award of costs on a solicitor and client basis and counsel for the plaintiff filed submissions in opposition.

Held:

1. The case did not fall within the *Fonua* type of case where it was held that the claim was "bogus" and that the plaintiff had persisted in a "thoroughly worthless action". The true facts unfolded only gradually as the hearing progressed. The real cracks in the plaintiff's case began to open up under skilful and exacting cross-examination capped off by a favourable impression created by the defendant's witnesses. It was not the sort of exceptional case referred to in the *Fonua* decision that would warrant an award of costs on a solicitor and client basis.
2. While the rules relating to discovery were primarily directed at the party to the action, there was also a heavy onus on the party's solicitor to ensure compliance. The Court showed its condemnation of the plaintiff's conduct in relation to disclosure and discovery in the strongest possible terms and

allowed the defendant costs on a solicitor and client basis in respect of all steps taken by its counsel (including his Tongan agent) in relation to disclosure and discovery subsequent to counsel's initial letter of 12 July 1999. In all other respects, costs were awarded to the defendant on a party/party basis.

3. The defendant then had to file pursuant to O 29 Rule 3 two separate bills of cost for taxation (one in respect of the solicitor and client costs, the other in respect of the party/party costs). The bills were to be filed within 28 days of the date of ruling.

Cases considered:

Compaq Computer Australia Pty Ltd v Merry (1998) 157 ALR 1
Fonua v MBf Bank [1999] Tonga LR 4
Jones v Petas [1948] VLR 331

Counsel for plaintiff	:	Miss Tonga
Counsel for first and second defendants	:	Mr 'Etika
Counsel for third defendant	:	Mr Waalkens

Ruling on Costs

On the afternoon of what was anticipated to be the final day of this hearing, counsel for the plaintiff advised the Court that her client had considered its position over the lunch break and she had been instructed to seek leave to discontinue the action. Leave was granted and counsel for the third defendant, Mr Waalkens, immediately applied for costs to be awarded on a solicitor and client basis describing the case as a "hopeless and worthless action".

I then heard some submissions from counsel on the question of costs but because, at that stage, Mr Waalkens did not have any records with him to indicate the likely amounts involved, I left it on the basis that he would provide Miss Tonga with particulars of his claim and counsel would then endeavour to reach agreement in relation to costs. I made it clear, however, that if agreement was not possible then the matter should be referred back to me for a ruling but I indicated that, in that event, the plaintiff could expect to be on the receiving end of some strong criticism from the Court because of the unsatisfactory way in which it had handled issues relating to discovery.

That is the situation we have now reached. Counsel have advised that they have been unable to reach agreement and additional submissions have been filed by Mr Waalkens in support of his claim for an award of costs on a solicitor and client basis and counsel for the plaintiff has filed submissions in opposition. I should record that although the first and second defendants were separately represented, counsel for the third defendant effectively acted as lead counsel for all the defendants and handled most of the cross-examination of the plaintiff's witnesses. The court has been informed that the costs claims by the first and second defendants have been settled but a ruling now needs to be made in relation to the third defendant's (the "defendant") application.

In support of his application for an order seeking an award of costs on a solicitor and client basis, Mr Waalkens submits that the "hopelessness" of the plaintiff's case

was apparent from an early stage of the trial and he produced a handwritten letter which he had handed to the plaintiff's counsel during the second morning of the hearing putting on record his assessment that the plaintiff's claim lacked any credibility and giving notice that if the plaintiff continued then he would be seeking solicitor and client costs. In his letter Mr Waalkens referred to the decision of Ward CJ in *Fonua v MBf Bank* [1999] Tonga LR 4 which was approved by the Court of Appeal ([2000] Tonga LR 319 (CA)), where the Chief Justice had awarded costs on a solicitor and client basis and Mr Waalkens drew attention to the strong message the Court had given in that case to plaintiffs pursuing what the learned Chief Justice had referred to as "thoroughly worthless actions". Mr Waalkens also apparently repeated his advice to plaintiff's counsel on the second last day of the hearing.

Counsel for the plaintiff submitted that the nature of the case was not the same as the *Fonua* case. She said that in the present case the Court did not allow the third defendant's "no case" application at the end of the plaintiff's case and she submits that it was not up until the lunch break on the final day that it became clear that "the plaintiff's evidence was not strong enough against that of the defendants".

There is a rather complicated background to the case which I need not go into except to say that as a result of other proceedings which had come before me last year, I was aware that there had been a falling out between the chairman and the managing director of the plaintiff company. The managing director was the first defendant, Mr Naidu. The second defendant was the company secretary and financial manager.

Events had developed to the point where the chairman considered that the first and second defendants were no longer working in the best interests of the company and so he said that on 27 February 1998 he personally delivered a letter to a Mr Choo, manager of the defendant bank, withdrawing the second defendant's cheque signing authority. The company's case was that Mr Choo had failed to act on this instruction and over the course of the following five or six weeks, the Bank continued to honour cheques signed by the second defendant. The company claimed that three of those cheques were not for legitimate company debts but for the personal benefit of the first defendant.

The defendant's primary defence was that no such instruction had ever been given to Mr Choo. Given the fact that Mr Choo was no longer in the Kingdom and, therefore, not available as a witness, that particular defence could well have been a difficult proposition for the Bank to establish had it not been represented by particularly able counsel.

At the end of the plaintiff's case, Mr Waalkens made a submission on behalf of all the defendants that there was no case to answer. It is not correct to say, as counsel for the plaintiff has put it in her submissions, that the Court did not allow that motion. What the Court did, in fact, was to require the defendants to make an election as to whether or not they were going to give evidence and having received confirmation from Mr Waalkens that evidence would be called, I then declined, in the exercise of my discretion, to rule on the application but said that I would do so at the conclusion of all the evidence.

Counsel for the defendant pressed strongly for a ruling on his application and he referred to a recent decision of this Court in which Ward CJ had given judgment immediately in response to a "no case" submission without putting the defendant to an election. From counsel's description of that particular decision, however, it

appeared that the situation was one in which His Honour was able to determine the submission on a question of law without the need to examine the evidence.

In the present case, as I indicated to counsel at the time, I considered that it would not be possible for me to make a determination on the "no case" submission without reviewing much of the evidence which at that point in time was very much in contention. The approach I followed in this regard has been the practice in other jurisdictions for many years. The relevant authorities were reviewed relatively recently in *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1, where Finkelstein J said:

> *"There is a settled rule of practice that when counsel for the plaintiff closes his case and counsel for the defendant wishes to submit that there should then and there be judgment for the defendant, counsel for the defendant must elect to call no evidence. This is the practice laid down for judges in the United Kingdom by the authorities ... Further, as Herring CJ observed in* Jones v Petas *[1948] VLR 331 at 333:*
>
> *"In the ordinary case it is most undesirable that the plaintiff's evidence should have to be reviewed twice during the course of the trial, first by itself at the close of the plaintiff's case, and then later along with any evidence called for the defendant."*
>
> *But like most rules, the practice is not inflexible. The judge always retains a discretion whether there should be adherence to it. For example, if the case can be decided on a question of law without the need to examine the evidence, departure from the rule will usually best serve the interests of justice."*

Because of the way the present case developed, it was simply not necessary for me to rule on the "no case" submission and I say no more about it.

Returning to the defendant's costs claim, I do not accept that the present proceeding falls within the *Fonua* type of case where His Honour held that the claim was "bogus" and that the plaintiff had persisted in a "thoroughly worthless action". I am inclined to agree with the brief analysis of the case outlined in the plaintiff's submissions in response to the defendant's application. The true facts, as it were, unfolded only gradually as the hearing progressed. The real cracks in the plaintiff's case began to open up under skilful and exacting cross-examination capped off by a favourable impression created by the defendant's witnesses. It is not the sort of exceptional case referred to in the *Fonua* decision that would warrant an award of costs on a solicitor and client basis.

There is one exception to the point I have just made. It relates to the question of discovery. Mr Waalkens referred to the plaintiff's appalling performance regarding disclosure and discovery despite warnings. In his submissions he said:

> *"Considering the poor performance by the plaintiff with respect to discovery of documents given the number of applications and requests made for proper discovery, the present case is a compelling one to*

*emphasise the point that litigants in Tonga **must** give proper discovery in cases which go to trial and that in default, an approved cost order will result."*

In earlier submissions, Mr Waalkens enumerated the following chronology of steps he had taken to obtain discovery:

"(a) 12/7/99 Letter to Mr Tonga seeking discovery - detail and categories of documents
(b) 24/8/99 Further letter of reminder
(c) 20/10/99 Further reminder letter
(d) 25/11/99 Mr Tonga replies
(e) 7/4/00 Finnigan J. orders disclosure/discovery
(f) 18/4/00 Letter to Mr Tonga advising of categories of documents
(g) 3/5/00 Plaintiff's first "list" of documents
(h) 24/5/00 Letter to Mr Tonga as to lists inadequacies
(i) 26/5/00 Mr Tonga replies -- rejects
(j) Aug 00 Bank seeks order from the court as to discovery. See Yeoh affidavit
(k) 25/10/00 List and affidavit as to documents by plaintiff
(l) 30/10/00 Local agents letter to court (Mr Niu) as to Bank alarm at lack of discovery
(m) 6/11/00 Supplementary list of documents -- and copies of all documents provided for first-time
(n) 9/11/00 Hearing."

Inexplicably, despite these efforts, some 5 documents which Mr Waalkens fairly described as "critical documents" were still not disclosed by the defendant. Counsel submitted:

"In its most neutral gloss the plaintiff has provided an incomplete picture. The third defendant contends the plaintiff has conducted a deliberately misleading case, with selective evidence, by omission of proper discovery and reference to the full evidential picture."

Mr Waalkens endeavoured through cross-examination to elicit an explanation from the plaintiff's witnesses for the company's inadequate discovery but the answers given were vague and totally uninformative.

While the rules relating to discovery are primarily directed at the party to the action, there is also a heavy onus on the party's solicitor to ensure compliance. Thus **Halsbury**, 4th edition, vol 13 para 45, states:

"The client cannot be expected to realise the whole scope of his obligation regarding discovery without the aid and advice of his solicitor and the latter has a peculiar duty, as an officer of the court, carefully to investigate the position and, as far as possible, to see that full and proper disclosure of all relevant documents is made. The solicitor cannot simply allow the client to make whatever list of documents the client thinks fit,

> *nor can the solicitor escape the responsibility of careful investigation or supervision ... indeed, the solicitor owes a duty to the court carefully to go through the documents disclosed by his client to make sure, as far as possible, that no relevant document has been withheld from disclosure. If the client will not give him the information he is entitled to require, or if the client insists on making a list of documents or swearing an affidavit verifying the list which the solicitor knows to be imperfect, it is the solicitor's duty to withdraw from the case. If the solicitor is guilty of misconduct in this respect, he may be ordered personally to pay or to contribute to the costs of the action. In this matter a solicitor must search his own conscience."*

The criticism Mr Waalkens makes of the plaintiff's totally inadequate disclosure and discovery in this case is, in my view, justified. Whether it is proper to attribute all the blame to the plaintiff as distinct from it's solicitor is something that has not been explored before me but, in fairness, I acknowledge that counsel for the plaintiff was not the solicitor on the record. Indeed, as I understand it, she was not instructed in the matter until the eve of the trial.

In all events, I consider that it is entirely appropriate for the Court in the present case to show its condemnation of the plaintiff's conduct in relation to disclosure and discovery in the strongest possible terms and, in the context of the application before me, I propose, in the exercise of my discretion, to allow the defendant costs on a solicitor and client basis in respect of all steps taken by its counsel (including his Tongan agent) in relation to disclosure and discovery subsequent to counsel's initial letter of 12 July 1999.

I appreciate that this exercise may create some difficulties for counsel particularly when the attendances in relation to discovery overlap with other matters. If there is a grey area, however, my instruction to the Registrar upon taxation is to err in favour of the attendance being a discovery matter. In all other respects, costs are awarded to the defendant on a party/party basis.

The defendant is now to file pursuant to O 29 Rule 3 two separate bills of cost for taxation (one in respect of the solicitor and client costs, the other in respect of the party/party costs). The bills are to be filed within 28 days of today's date.

Uaisele v Police

Supreme Court, Nuku'alofa
Ford J
Cr App 25/00

1 March 2001; 7 March 2001

Sentencing – possession of marijuana – quantity a factor in sentencing

The appellant, Vili Uaisele, was from Ha'apai and was 21 years old. On the night of Saturday 6 October 2000, Vili, "went out on the town and got drunk". He was apprehended on the street by the police and taken back to the police station. The police found on him a small transparent plastic bag containing leaves of Indian hemp, also known as cannabis or marijuana. The quantity of the substance could not be weighed on the scales. The appellant freely admitted his offending in a statement he gave to the police. He was charged with being found drunk in a public place and with possession of Indian hemp. He pleaded guilty to both charges and was dealt with summarily in the Magistrates' Court. On the drunkenness charge he was convicted and fined $20; on the possession charge he was convicted and sentenced to six months imprisonment. He appealed against the sentence of six months imprisonment imposed.

Held:

1. Even though the legislation does not distinguish between different quantities of a drug when it came to sentencing, that does not mean that the Court itself cannot make such a distinction and, in reality, when it came to sentencing, the quantity of drug involved in a case was one of the fundamental factors a Court was bound to have regard to.
2. The sentencing guidelines in New Zealand and English Court of Appeal cases appear to be consistent with "the norm" applied in the Magistrates' Court in the Kingdom. The reality was that most jurisdictions recognise that the type of offending was at the very lowest end of the scale. The situation was entirely different when commercialism or large scale growing or possession was involved. In such cases a strong deterrent message was certainly called for.
3. The sentence imposed of six months imprisonment was wrong in principle and it was set aside. In its place a fine of $300 was imposed which was to be paid within three months, failing which the accused would be imprisoned for a period of three months.

Cases considered:

Anders v Police (1974-1980) TLR 60
R v Aramah (1983) 76 Cr App R 190
R v De Havilland (1983) 5 Cr App R 109
R v Dutch [1981] 1 NZLR 304 (CA)
Tuita v R [1999] Tonga LR 152 (CA)

Statute considered:

Drugs and Poisons Act (Cap 79)

Counsel for appellant : Mr Tu'utafaiva
Counsel for Crown : Mr Fusitu'a

Note: In June 2001 the Chief Justice issued a Press Release relating to sentencing in drug cases which appears at p 333 of this volume.

Judgment

The appellant, Vili Uaisele, is from Ha'apai. He is 21 years of age and single. He came to Tongatapu to obtain work. He was fortunate in that he was able to obtain employment as a construction worker. From his modest wages, he sends money back to his elderly mother and family in Ha'apai. His employer thinks highly of him and was instrumental in instructing counsel in connection with the present appeal.

On the night of Sat 6 October 2000, Vili, as his counsel put it, "went out on the town and got drunk". He was apprehended on the street by the police and taken back to the police station. The police found on him a small transparent plastic bag measuring 7 X 4 centimetres containing leaves of Indian hemp, also known as cannabis or marijuana. The quantity of the substance could not be weighed on the scales.

The appellant freely admitted his offending in a statement he gave to the police. He was charged with being found drunk in a public place and with possession of Indian hemp. He pleaded guilty to both charges and was dealt with summarily in the Magistrates' Court. On the drunkenness charge he was convicted and fined $20; on the possession charge he was convicted and sentenced to six months imprisonment. He now appeals to this Court against the sentence of six months imprisonment imposed on him in respect of the possession charge.

Counsel for the appellant did not dispute that the Magistrate had power to impose an imprisonment sentence for possession of Indian hemp but he told the Court that the usual punishment imposed in the Magistrates' Courts in the Kingdom for possession of Indian hemp was a fine averaging $500 and so his main ground of appeal was disparity of sentencing between this case and others. Counsel submitted that there were no extraordinary features associated with this case which would warrant a penalty outside the "norm". He noted the evidence that the appellant had purchased the plastic bag of cannabis for $10.00 from a person who he had named to the police. Counsel submitted that there was only a very small amount of product involved. He said that in his drunken state, the appellant had bought the cannabis to try the taste. He had used some of it and counsel submitted that it was clear from the

small amount involved that the appellant had the product for his personal use and not for commercial purposes. The appellant had no previous convictions.

Crown counsel filed helpful written submissions. He noted that under the Drugs and Poisons Act (Cap 79) the Court could, upon conviction, have imposed a fine up to a maximum of $2000 or a term of imprisonment of up to 10 years or both. Counsel also noted that, unlike in some jurisdictions, the legislation imposes no graduated scale of sentencing depending upon the quantity of the prohibited drug involved and hence the fact that only a small amount of Indian hemp was involved in this case should not, as he put it, "be a determinate of the appropriateness or otherwise of a sentence of imprisonment".

Counsel also referred to the sentencing guidelines suggested by Hill J in *Anders v Police* (1974-1980) TLR 60 and to the decision of the Court of Appeal in *Tuita v R* [1999] Tonga LR 152 (CA) which adopted some of his observations. Counsel went on to say in his submissions:

> *"In* Anders v Police Department*, an appeal was made to the Supreme Court against a Magistrates' Court sentence of six months imprisonment for a conviction for possession of marijuana ... Hill J considered this sentence as extremely lenient. He noted that his recommended sentence for the possession of such drugs as cannabis (namely, Indian hemp), without supply, would be in the region of three to six years imprisonment."*

Counsel submitted that, "*the guidelines and concerns of Hill J are rendered even more valid in the present climate of widespread Indian hemp availability and use in the Kingdom*".

The Crown also drew the Court's attention to the "grave concerns" expressed by the learned Magistrate in his sentencing remarks in the present case where he said:

> *"... it has become evident that this (Indian hemp possession) has become widespread in Tonga today. This includes the manner in which marijuana is procured. And this is an extremely dangerous thing. I comment on this subject from an informed position as I was one of the first people (in the country) to study drug use. And this is the nature of marijuana, when one smokes marijuana it immediately enters the blood stream and is then spread in this manner throughout one's body."*

The Magistrate spoke more about the effects of the drug and concluded:

> *"Perhaps my remarks have become rather drawn-out but this is in order that I might use this as a lesson or deterrent example to those who consume marijuana."*

As to the current practice in the Magistrates' Court, Crown counsel accepted the submission made on behalf of the accused that possession of Indian hemp cases were being dealt with by the imposition of a monetary fine but he submitted that such sentences should not be considered "par for the course" or grounds for leniency and they did not mean that the sentence imposed in this case was in any way inappropriate or excessive.

In relation to the principal submission advanced by the Crown, Crown counsel is quite correct when he says that the legislation does not distinguish between

different quantities of a drug when it comes to sentencing but that does not mean that the Court itself cannot make such a distinction and, in reality, when it comes to sentencing, the quantity of drug involved in a case is one of the fundamental factors a Court is bound to have regard to.

In relation to the Crown's submission about what Hill J had said in the *Anders* case, the relevant passage in the judgment reads as follows:

> *I want all the Magistrates in this country to take notice of this judgment because I expect them to follow my directions. And I want them to know that such sentence will certainly be upheld by me in the absence of very exceptional circumstances. If there is a case of trafficking or importing substantial quantities of cannabis, in my view the correct sentences,* ***and this is in line with other countries****, is between three and five years. If there is any attempt to supply or import hard drugs that is heroin, cocaine or LSD, the standard sentence will be around seven years up to the maximum which I can impose which is ten years. The sentence for possessing* ***such drugs*** *without supplying them will be in the region of three years to six. I want everybody to know that there are not going to be drugs in Tonga if the Courts can stop it."* (emphasis added)

Whether the reference to "such drugs" was intended to refer only to the hard drugs described in the previous sentence or to cannabis which was mentioned in the sentence prior to that is not free from doubt.

In any event, there are two points I make about the suggestion that three to six years imprisonment is an appropriate sentence for possession of cannabis. First, that passage was not specifically endorsed by the Court of Appeal in the recent *Tuita* case and, secondly, it is a statement made back in 1978. Hill J indicated that his observations on sentencing were "in line with other countries". I will now look at that proposition, but even if it is correct and the appropriate sentence for possession of Indian hemp in those days was three to six years, I need to consider whether that statement of principle holds true now in 2001. I also need to consider whether it has any application at all to the type of factual situation I have outlined in the present case where the quantity of drug involved is very small and obviously not intended for commercial use.

In *R v Dutch* [1981] 1 NZLR 304, the New Zealand Court of Appeal carried out a review of sentences in previous cases for cannabis cultivation. It concluded that examples of cultivation sentences showed three broad divisions of this class of offending. The second and third classes recognised were for large scale commercial growing. In relation to the first class, the Court of Appeal said:

> *"At the lowest level of culpability are cases where the offender has cultivated a few plants on his own property exclusively for his own use. Sentences for cultivation to that extent have not been considered by this Court, as obviously they will normally be dealt with by a fine or some other form of non-custodial penalty in the District Courts. But there will be offences of a more serious kind in relation to non-commercial cultivation where terms of imprisonment or heavy fines will be appropriate."*

It is difficult to reconcile the first part of that statement in relation to cannabis "cultivation" with the statement by Hill J only three years previously where His Honour observed that three to six years imprisonment for possession only was "in line with other countries."

In 1983 the Court of Appeal in England in *R v Aramah* (1983) 76 Cr App R 190, also issued guidelines for sentencing in drug offences and in the recent publication "**The Law on the Misuse of Drugs and Drug Trafficking Offences**" third edition, paragraph 14.42 the learned author described the *Aramah* guidelines as being still relevant today. In relation to possession of cannabis for personal use, the guideline is expressed as follows:

> *"Ordinarily, possession of a very small amount of cannabis for the defendant's personal use would not result in a custodial sentence but a continuous or persistent flouting of the law might justify a short custodial sentence."*

The Court of Appeal in the *Aramah* case drew a distinction between possession of class "B" drugs such as cannabis and possession of class "A" drugs such as heroin and morphine and said in relation to the latter category "there will be very many cases where deprivation of liberty is both proper and expedient". The fact that the Court of Appeal drew this distinction inclines me to the view that Hill J's reference to "such drugs" was intended to be a reference to the "hard drugs" of the type that he described rather than cannabis. In any event, if the reference was intended to include cannabis then I cannot accept, as being correct, his comment that three to six years imprisonment for simply possessing cannabis was in line with sentences in other countries.

Of course, these so-called guideline cases do not lay down rigid rules to be applied strictly in all cases. The appropriate sentence is always a matter for the discretion of the sentencing judge. As Dunn LJ said in *R v De Havilland* (1983) 5 Cr App R 109, 114:

> *"Occasionally this Court suggests guide-lines for sentences ... but the sentencer retains his discretion within the guide-lines, or even to depart from them if the particular circumstances of the case justify departure".*

I do not think it is purely a coincidence that the sentencing guidelines I have referred to in the New Zealand and English Court of Appeal cases appear to be consistent with what the Court was told is "the norm" applied in the Magistrates' Court in the Kingdom. The reality is that most jurisdictions in this day and age recognise that this type of offending is at the very lowest end of the scale. The situation is entirely different, of course, when commercialism or large scale growing or possession is involved. In such cases a strong deterrent message is certainly called for.

There is nothing in the present case, in my opinion, that would warrant any departure from the guidelines I have referred to. For this reason, I have concluded that the sentence imposed of six months imprisonment is wrong in principle and it is hereby set aside. In its place, I impose a fine of $300 which is to be paid within three months from today's date failing which the accused will be imprisoned for a period of three months.

R v Tangata'iloa

Supreme Court, Nuku'alofa
Ford J
Cr 99/00

12, 14 March 2001; 14 March 2001

Criminal procedure – indictment limited to five counts – onus on prosecutor to comply

The accused was arraigned on 1 June 2000 on a total of 14 counts - 7 counts of embezzlement and 7 counts of falsification of accounts. On the morning of the scheduled trial counsel for the accused raised a legal issue as to whether the Crown was able to proceed to trial upon an indictment containing 14 counts given the provisions of section 160 of the Criminal Offences Act (Cap 18) as amended by section 5 of the Criminal Offences (Amendment) Act 1997. The Court heard argument and gave an immediate oral informal ruling in favour of the counsel for the accused's interpretation of section 160 and directed that the Crown could proceed to trial on five only out of the 14 counts set out in the indictment. Crown counsel were advised that the Crown would have to make an election as to what five charges out of the 14 it was going to proceed with. Subsequently Crown counsel made application to the Court and said that he disagreed with the Court's interpretation of section 160. He maintained that the Crown should be able to proceed to trial on the 14 counts set out in the indictment without amendment. He requested a directions hearing and one was arranged. At the directions hearing counsel for the accused took the position that it was inappropriate for the Court to be asked to reconsider its Ruling which had been confirmed in open Court and the Crown's remedy, if it wished to challenge the Ruling was to appeal to the Court of Appeal. The Court agreed and indicated to counsel that it would not reconsider the previous Ruling but would take the opportunity to set out the reasons in writing.

Held:

1. Each count in an indictment, for the purposes of evidence and judgment, constituted a separate offence and the rationale behind the legislator's decision to restrict any one trial on the type of offences listed in section 160 to no more than 5 offences is to counter the difficulties which may arise from the jury having to deal with a number of issues or a great volume of evidence or both.
2. The onus was on the prosecutor to take the necessary compliance steps.

3. The original Orders made were to stand. The Crown, pursuant to its own request, was given leave to file a fresh indictment confined to five counts and the accused would then be re-arraigned.

Cases considered:

R v Hudson and Hagan (1952) 36 Cr App Rep 94
R v Novac (1977) 65 Cr App Rep 107

Statutes considered:

Criminal Offences Act (Cap 18)
Criminal Offences (Amendment) Act 1997

Counsel for Crown : Mr Sisifa
Counsel for accused : Mr Veikoso

Ruling

The accused was arraigned on 1 June 2000 on a total of 14 counts - 7 counts of embezzlement and 7 counts of falsification of accounts. He pleaded not guilty and elected trial by jury. The trial was set down to commence on Monday of this week. At the pre-trial conference held in February, Mr Veikoso had confirmed that the accused wished to change his election to trial by Judge alone.

On the morning of the scheduled hearing last Monday, Mr Veikoso raised a legal issue which should, in the proper course, have been dealt with at the pre-trial conference but it was a valid issue and it required an immediate decision. The point was whether the Crown was able to proceed to trial upon an indictment containing 14 counts given the provisions of section 160 of the Criminal Offences Act (Cap 18) as amended by section 5 of the Criminal Offences (Amendment) Act 1997.

I heard argument and I gave an immediate oral informal ruling in Chambers in favour of Mr Veikoso's interpretation of section 160 and I directed that the Crown could proceed to trial on five only out of the 14 counts set out in the indictment. I advised Crown counsel that the Crown would have to make an election as to what five charges out of the 14 it was going to proceed with. Crown counsel then sought an adjournment so that a fresh indictment could be laid containing only five counts and the accused could be re-arraigned. Whether that procedure was appropriate or necessary is something that I did not have to address because Mr Veikoso readily consented to the application. I, therefore, granted a one week adjournment until next Monday, 19 March. Mr Veikoso, for his part, indicated that on that basis, it was likely that his client would be pleading guilty when he was re-arraigned on the five charges.

All that happened last Monday. Subsequently Crown counsel made application to the Court and said in his submissions that he had reconsidered the point raised by Mr Veikoso and he disagreed with the Court's interpretation of section 160. He maintained that the Crown should be able to proceed to trial on the 14 counts set out in the indictment without amendment. He requested a directions hearing and I arranged one for this morning (Thursday 14 March).

At the directions hearing Mr Veikoso took the position, quite rightly in my view, that it was inappropriate for the Court to be asked to reconsider its Ruling which had been confirmed in open Court and the Crown's remedy, if it wished to

challenge the Ruling was to appeal to the Court of Appeal. I indicated to counsel that I was not prepared to reconsider my previous Ruling but I would take the opportunity of setting out of my reasons in writing and I now do so.

Section 160 of the Criminal Offences Act (as amended) reads as follows:

> *"160. In the case of any person intended to be tried in the Supreme Court for embezzlement, falsification of accounts or fraudulent conversion respectively unless there are special reasons, no order shall be made preventing the trial at the same time of any number of such offences not exceeding 5, whether alleged to have been committed within 6 months from the first to the last of such offences against the same person or not. Nothing in this section shall prevent an indictment containing more than five counts from being presented."*

Crown counsel submitted:

> *"That the true meaning of this section is that:*
>
> *1. The accused cannot be **charged** with 5 **different** offences against the same person.*
> *2. Nothing under section 160 of the Criminal Offences Act shall prevent an indictment containing more than 5 counts from being presented."* (emphasis added)

Whilst I have no problem with the second part of that suggested interpretation of section 160, I cannot accept point 1. The words which I have underlined do not appear in section 160. The first part of section 160 is directed, not at preventing more than 5 charges being laid against an accused, as counsel submits, but at preventing an accused person from being "tried" at the same time on more than 5 offences and the section does not speak about them having to be "different" offences as counsel submits. On the contrary, it states the very opposite. It uses the term "such offences" which means that an accused can be tried at the same time on up to 5 offences only if the offences are of the same generic class.

Each count in an indictment, for the purposes of evidence and judgment, constitutes a separate offence and the rationale behind the legislator's decision to restrict any one trial on the type of offences listed in section 160 to no more than 5 offences is explained by **Archbold, Criminal Pleading Evidence & Practice** (1993) vol 1, 1-175, as follows:

> *"The desirability of ... trying counts together which are properly joined in one indictment according to the rules, may often be outweighed by the difficulties which may arise from the jury having to deal with a number of issues or a great volume of evidence or both."*

In *R v Hudson and Hagan* (1952) 36 Cr App Rep 94, Lord Goddard CJ addressed the undesirability of unnecessarily long indictments and the desirability of the prosecution being put to its election if an unduly large number of counts is contained in the one indictment. In that case two appellants were indicted on an indictment that contained 38 counts; some were in the alternative. The Lord Chief Justice said:

> *"The court has on many occasions pointed out how undesirable it is that a large number of counts should be contained in one indictment. Where prisoners are on trial and have a variety of offences alleged against them, the prosecution ought to be put on their election and compelled to proceed on a certain number only. Quite a reasonable number of counts can be proceeded on, say, three, four, five or six, and then, if there is no conviction on any of those, counsel for the prosecution can consider whether he will proceed with any other counts in the indictment. If there is a conviction, the other counts can remain on the file and need not necessarily be dealt with unless this court should for any reason quash the conviction and order the others to be tried.*

Section 160 of the Criminal Offences Act and section 150, which contains an identical provision in relation to theft offences, are clearly designed to overcome the problem which Lord Goddard identified in the *Hudson and Hagan* case and the decision of the Court of Appeal in *R v Novac* (1977) 65 Cr App Rep 107, makes it very clear that the onus is on the prosecutor to take the necessary compliance steps. At page 118, Bridge LJ delivering the judgment of the Court said:

> *"It must always be the responsibility of those who have the conduct of a prosecution of any magnitude to consider those wider questions. It is quite wrong for prosecuting authorities to charge, in a single indictment, numerous offenders and offences, simply because some nexus may be discoverable between them, leaving it to the Court to determine any application to sever which may be made by the defence. If multiplicity of defendants and charges threatens undue length and complexity of trial then a heavy responsibility must rest on the prosecution in the first place to consider whether joinder is essential in the interests of justice or whether the case can reasonably be sub-divided or otherwise abbreviated and simplified. In jury trial brevity and simplicity are the hand-maidens of justice, length and complexity its enemies."*

The original Orders made on Monday will stand. The Crown, pursuant to its own request, is given leave to file a fresh indictment confined to five counts and the accused will then be re-arraigned.

Hoeller v Knab

Supreme Court, Nuku'alofa
Ford J
C 976/00

16 March 2001; 16 March 2001

Practice and procedure – non-compliance with 'unless' order – time extended

The defendants, Mr and Mrs Knab, and the plaintiff, Mr Hoeller, were all Austrian citizens. Some time in the first part of 2000, the parties reached an agreement back in Austria in relation to taking over the operation of the Polynesian (or Popao) Village Resort on Vaka'eitu Island, Vava'u. The nature of the agreement reached was the subject matter of a Court case and numerous contested allegations and claims were made by each party. The defendants filed an application for security for costs against the plaintiff in the sum of $20,000 and for an order varying some of the terms of the Consent Order. The plaintiff filed a "Notice of Default" in which he gave notice that the defendants had failed to comply with some of the terms of the Consent Order and because of the default he applied for an order striking out the defendants' defence. The Notice of Default was based on one of the Orders (commonly referred to as an "unless" order) which read: "If payment is not made … then the defendants' defence will be struck out". The defendant made an application for security for costs.

Held:

1. The Court did not believe that the defendants were deliberately disobeying the Court's "unless" Order but expected strict compliance from now on. The date by which the payment was to be made was extended.
2. In relation to security for costs the general rule was that such security may be ordered where it appeared to the Court that the plaintiff was ordinarily resident out of the jurisdiction or that the address in the writ was intentionally incorrectly stated. The justice of the case did not warrant the making of an order granting security for costs.
3. A further directions hearing date was fixed and costs were reserved.

Case considered:

Fonua v Yeoh [2000] Tonga LR 437

Counsel for plaintiff : Mr Niu
Counsel for defendants : Mr 'Etika

Ruling

At a Chambers hearing on 24 January last, I set this case down for hearing for three days commencing on Monday 26 February 2001. On the afternoon of Thursday 22 February the defendants sought an adjournment of the hearing until the Vava'u Circuit in May on the grounds that the first defendant, Mrs Knab, was in Austria collecting documentation relevant to the defence and she did not have a booking to return to Tonga until the first week in April. Counsel for the defendants said in his adjournment application that since the Chambers hearing on 24 January he had been endeavouring to ascertain the first defendant's availability for the trial from her husband in Vava'u but he had been unsuccessful up until that very day, i.e. 21 February.

The application for an adjournment was completely unsatisfactory in a number of respects, not least of all because of its lateness. I allocated an urgent Chambers hearing to consider the application the following day which was the Friday. The case was due to commence on the Monday morning. Quite apart from the general inconvenience to the Court resulting from the late notification, the plaintiff, his witnesses and counsel were all no doubt considerably inconvenienced by the lateness of the application and costs would have been incurred one way or another unnecessarily.

After hearing submissions from counsel I decided that it was appropriate in the interests of justice to grant the adjournment application, but on strict terms, and I proceeded to do so.

The case results from a falling out between the defendants, Mr and Mrs Knab, and the plaintiff, Mr Hoeller. They are all Austrian citizens. It appears that some time in the first part of 2000, the parties reached an agreement back in Austria in relation to taking over the operation of the Polynesian (or Popao) Village Resort on Vaka'eitu Island, Vava'u. The nature of the agreement reached is the subject matter of the Court case and numerous contested allegations and claims are made by each party which will not be resolved without a full scale hearing.

There is another civil case running in conjunction with the present proceeding where Mr Knab is claiming $20,000 damages against Mr Hoeller for a physical assault which is alleged to have taken place on Vaka'eitu Island in September 2000, some three months after the parties arrived in Tonga.

In November 2000, Mr Hoeller filed an injunction application seeking various interim orders from the Court. At that stage a container was due to arrive in Vava'u with goods from Austria for the Resort and the principal relief Mr Hoeller sought from the Court was an order that the defendants be restrained from touching or removing anything from the container. On 10 November 2000, the Chief Justice issued an injunction containing a restraining Order to this effect. The container is presently in the custody of the authorities on the wharf at Vava'u incurring unpaid storage charges. It remains unopened.

The terms I imposed when I granted the defendants' adjournment application were set out in a formal Order dated 23 February. On 28 February I made a Consent Order at the request of both counsel which contained a minor variation to the 23 February Order and included some other provisions designed to protect the status quo pending the trial in May.

On Tuesday of this week, the defendants filed an application for security for costs against the plaintiff in the sum of $20,000 and for an order varying some of the

terms of the Consent Order. Because of the urgent nature of the application I included this case, at a late stage, in the list of Chambers matters scheduled to be dealt with this morning. Yesterday the plaintiff filed a "Notice of Default" in which he gave notice that the defendants had failed to comply with some of the terms of the Consent Order of 28 February and because of the default he applied for an order striking out the defendants' defence. The Notice of Default was based on one of the Orders I made on 23 February (commonly referred to as an "unless" order which read:

"If payment is not made in accordance with paragraph (5) above then the defendants' defence will be struck out."

I heard oral argument on all of these applications this morning. Some reasonable concessions were made by Mr Niu which allowed agreement to be reached on certain matters and I now give my Ruling which incorporates the points agreed upon and sets out my decision on the other issues.

First, in relation to the "unless" order, the position is that the application by the defendants for an adjournment of the trial date came so late in the piece that it inevitably resulted in costs and expense to the plaintiff, his witnesses and his legal advisers. The plaintiff's father, for example, who was scheduled to appear as a witness, had flown out from Austria and he was already in Tonga when the application was made. The Order I made, therefore, on 23 February in relation to costs read as follows:

> "3. The defendants are to forthwith make the following payments on account of the costs awarded against them on the adjournment:
> (i) return air fare for Mr Hoeller (senior) from Germany/Austria.
> (ii) return air fare for two witnesses from Vava'u.
> (iii) $1000 to Mr Niu on account of costs "thrown away."
> (iv) $630 for 3 months storage charges on the container.
> 4. …
> 5. Payment in terms of (3) above is to be made to Mr Niu's office by 4:30 p.m. on 9/3/01.
> 6. If payment is not made in accordance with paragraph (5) above then the defendants' defence will be struck out."

The Court Order made by a consent on 28 February varied Order 3 above so that it then read:

> "4. In respect of order no. 3 of 23rd February 2001, the defendants are to pay a total sum of T $7,136.00, $4,652.00 of which to be paid on or before 9/3/01 and the balance of $2,484.00 to be paid on or before 16/3/01. Order no. 6 of 23rd February 2001 be read accordingly."

Another provision in the Consent Order required the defendants to properly insure the Resort and a boat that goes with the business against fire, hurricane and earthquake by 7 March 2001.

The plaintiff in its strike out application says that no payments have been made by the defendants pursuant to the costs Order and no insurance cover has been taken

out. He, therefore, makes application to strike out the statement of defence upon the grounds that they have failed to comply with the "unless" Order.

Non-compliance with an "unless" order was a matter which the Chief Justice had to consider recently in *Fonua v Yeoh* [2000] Tonga LR 437. I respectfully adopt the following passage from that judgment:

> *"Mr Fifita, for the plaintiff, points out that, even when there has been a failure to comply with an "unless" order, the Court always has a discretion to allow more time. That is plainly correct and I accept the principles on that stated in* Samuels v Linzi Dresses Ltd *(1981) QB 115. However, it must still be a matter of discretion. In that case, Roskill L. J. finally set the principle in* Whistler v Hancock *(1878) 3 QBD 83 to rest and continued:*
>
> > "In my judgment, therefore, the law is that a court has power to extend the time where an "unless" order has been made but not been complied with; but that it is a power that should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily it is question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not."
>
> *In* re Jokai Tea Holdings Ltd *(1992) 1 WLR 1196, 1202 Brown-Wilkinson VC confirmed the reasoning in the* Samuels *case and then passed on to consider the class of case described in* Birkett v James *(1978) AC 297, where the delay (as it was in that case) had been intentional and contumelious. He continued:*
>
> *"...*
>
> *In my judgment, in cases in which the Court has to decide what are the consequences of a failure to comply with an "unless" order, the relevant question is whether such failure is intentional or contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the Court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed." "*

In the present case the defendants seek a variation to the Order made for the various payments on account of costs. In his affidavit in support of his application, Mr Knab says that he does not dispute the conditions regarding the payments ordered on account of costs but he seeks more time to fulfil them. He said:

"7. That if the Court do not allow this extension then in reality this business will close down in paying debts only and is just unfair to the parties which its interested are invested on this company if forced to make short time payments."

Mr Knab was able to attend the chambers hearing this morning with his solicitor. He told the Court that he was not disputing the conditions imposed but, as he quite frankly put it, his real problem was that he did not have any funds available at the present time to make the payments ordered by the Court but he gave a categorical assurance to counsel and to the Court that he would be in a position to make the various payments covered by the order before 31 March 2001. After listening to Mr Knab and his counsel I do not believe that the defendants are deliberately disobeying the Court's "unless" Order but, I would expect strict compliance from now on.

I, therefore, make the following amendment to clause 4 of the order of 28 February 2001:

"4. In respect of order no. 3 of 23 February 2001, the defendants will:

(i) pay to Mr Josef Hoeller in Austria before 31 March 2001 in Austrian shillings the full amount, as agreed between counsel, of his February return air fare to Tonga.

(ii) pay the balance in the agreed sum of $2,484.00 to Mr Niu's office before 31 March 2001.

Order no. 6 of 23rd February 2001 is to be read accordingly."

Clause 6 of the Consent Order of 28 February relating to insurance cover is also amended by deleting "within seven days from the date of these orders" and substituting therefore the words "before 23 March 2001".

In relation to the defendant's application for security for costs, the general rule is that such security may be ordered where it appears to the Court that the plaintiff is ordinarily resident out of the jurisdiction or that the address in the writ is intentionally incorrectly stated. The plaintiff is described in the pleadings as being of "Vaka'eitu Island, Vava'u". I do not see that description as being intentionally deceptive because he is resident on the Island at the moment and the statement of claim makes it clear that all the parties are Austrian citizens.

In a supporting affidavit, Mr Knab, says that his concern is that if the plaintiff is unsuccessful in his claim then he will not be able to meet any costs award because he has no assets in Tonga and he is unemployed.

One of the central disputes in this litigation, however, is over money which the plaintiff claims to have paid the defendants pursuant to the agreement they reached over The Resort. The defendants deny the figures Mr Hoeller claims to have paid to them but in her affidavit of 27 March 2000, Mrs Knab accepts that Mr Hoeller paid them a security bond of Austrian shillings ATS 50,000 in April 2000 and in about July 2000 Mr Hoeller's father paid the defendants ATS 60,000 as the plaintiff's contribution to the cost of shipping the container to Tonga and then, of course, apart from the goods belonging to the defendants, there are a considerable number of items in the container itself which the plaintiff claims belong to him and they, in a very real sense, can be seen as security pending the outcome of the case.

Given these factors and given the significant inconvenience and expense the plaintiff has already incurred because of the defendant's late adjournment application and given further the various indulgences extended to the defendants in connection with the proceedings to date, I am of the view that the justice of the case does not warrant the making of an order granting security for costs and, in the exercise of my discretion, I decline to do so. A further directions hearing is fixed for Friday 6 April 2001 at 9am.

Costs on the present applications are reserved.

Tu'i'onetoa v Pohiva

Supreme Court, Nuku'alofa
Ward CJ
C 1262/99

20-23, 26-28 March 2001; 28 March 2001

Defamation – qualified privilege – jury to decide whether motive improper

The defendant was a Peoples' Representative and published an article in the Kele'a newspaper of which he was the publisher at that time. The publication was a fresh stage in a long running campaign in his paper to suggest that the report of an audit of the finances in the Legislative Assembly for the years 1993 and 1994 should be made public. The article added, for the first time, the allegation that it had been improperly altered by the plaintiff. The plaintiff brought an action for defamation against the defendant. One of the defences raised by the defendant was that the occasion upon which the article was published was privileged in terms of section 10 of the Defamation Act (Cap 33). The defendant elected to be tried by jury and the Court had to decide the question of whether the article was made under the circumstances in section 10 and could, therefore, be protected by the qualified privilege under that section.

Held:

1. Two further matters had to be considered: first, whether the manner of publication was sufficiently directed only to persons who had an interest in receiving it and, if it was, secondly whether, in the circumstances of this case, the added allegation that the alteration was done by the plaintiff was sufficiently germane to the original subject to be protected by the same privilege.
2. An improper alteration of a report to cover up misuse of public funds must be a matter of sufficient interest to all members of the public in Tonga to allow the privilege to extend to the article even though published to other regions of the country. However, had it been proved that Kele'a was distributed beyond the country, the Court's ruling would have been otherwise.
3. The original defence was that the allegation that the plaintiff made the alteration was true but that can no longer be sustained. However, if the allegation was that this report had been improperly altered it must be germane to identify the person who made that improper alteration.

4. Therefore the publication of the article was privileged under section 10 unless the defendant was actuated by anger, ill-will or other improper motive. Whether that was so was a matter for the jury. The fact the allegation was untrue and the conduct of the defendant before the publication, the manner of publication and his subsequent conduct were all evidence the jury may consider in deciding that question. If they find he was actuated by an improper motive, section 10 gave the defendant no protection.

Case considered:
Adam v Ward [1917] AC 309

Statute considered:
Defamation Act (Cap 33)

Counsel for plaintiff	:	Mr Paasi and Ms Tonga
Counsel for defendant	:	Mr Tu'utafaiva

Judgment

This is an action for defamation. The allegation is that the defendant defamed the plaintiff in an article in the Kele'a. One of the defences raised by the defendant is that the occasion upon which the article was published was privileged in terms of section 10 of the Defamation Act (Cap 33) which reads:

> *"10. No criminal or civil proceedings for defamation of character shall be maintainable in respect of any communication made bona fide by any person in discharge of a legal, moral or social duty or in reference to a matter in which he has an interest and the person to whom such communication is made has an interest in hearing it unless it is proved that the person making such communication was actuated by anger, ill-will or other improper motive."*

Section 11 of the same Act provides that whether a communication was or was not made under any of the circumstances in section 10 shall be decided by the judge at the trial. Subsection 3 then provides;

> *"(3) If it is ruled by the judge that the communication was made under any of the circumstances mentioned in section 10 hereof then if there is no evidence that the defendant was actuated by anger, ill-will or other improper motive the judge shall direct a verdict for the defendant."*

The relevant part of the defence was that:

> *"... the defendant says that what was published ... [is] true based on the ground that he is a Representative of the People who has a moral and social duty to the people he represents and these are matters in which he has an interest and the people to whom such a communication is made*

also have an interest in hearing, and which cannot be held as defamatory of character under section 10 ..."

The defendant has elected to be tried by jury and I have now to decide the question of whether the article was made under the circumstances in section 10 and could, therefore, be protected by the qualified privilege under that section.

The burden of proving that the article comes within the privilege is on the defendant and he must prove every matter that is needed to bring the statement within it. There is no dispute that the defendant is a Peoples' Representative and that he published this article in the newspaper of which he was the publisher at that time. The publication was a fresh stage in a long running campaign in his paper to suggest that the report of an audit of the finances in the Legislative Assembly for the years 1993 - 1994 should be made public. This article added, for the first time, the allegation that it had been improperly altered by the plaintiff.

There is no dispute about the position of the defendant and the paper nor of the fact of the publication and so the question of whether the circumstances are such as to render the occasion privileged under the section is one of law for the court.

The defendant gave evidence that he considered it part of his duty as a Member of Parliament to bring all matters of maladministration to the attention of the general public especially in relation to the manner in which public funds are used by public bodies. The question for the court is whether the defendant had a duty to make the communication and the people to whom it was made had a proper interest in receiving it. The interest must not be an idle curiosity but a real and legitimate interest and there must be a real duty to publish the statement. It is not sufficient that the defendant believed he had such a duty however genuinely that belief may have been held.

The defendant is the first Peoples' Representative for Tongatapu. I accept that his election as a Peoples' Representative does impose a duty on him to keep his electors informed of matters that may cause them genuine concern. Maladminstration of Parliamentary funds must be a matter of sufficient import and I have no hesitation in finding that the electors in Tongatapu have a sufficient interest in receiving such information.

It is necessary in the present case to consider two further matters. First is whether the manner of publication was sufficiently directed only to persons who had an interest in receiving it and, if it was, secondly whether, in the circumstances of this case, the added allegation that the alteration was done by the plaintiff is sufficiently germane to the original subject to be protected by the same privilege.

On the first, there is authority on the equivalent provision in England that publication in a newspaper rarely attracts such a privilege because the publication will inevitably be to many people who do not have a sufficient interest in receiving the statement. There is evidence that Kele'a is sold throughout Tonga. I am satisfied that an improper alteration of a report to cover up misuse of public funds must be a matter of sufficient interest to all members of the public in Tonga to allow the privilege to extend to the article even though published to other regions of the country. The fact the allegation is now acknowledged to have been untrue does not affect the qualified privilege except insofar as it relates to the question of malice, ill-will or other improper motive.

It was originally pleaded by the plaintiff that Kele'a is distributed abroad but that was disputed by the defence. The plaintiff adduced no evidence to establish the wider circulation. Had it been proved that Kele'a was distributed beyond the country, my ruling would have been otherwise.

The second point is whether the further allegation that the alteration was done by the plaintiff is also protected by the same privilege. I adopt the statement of Lord Loreburn in *Adam v Ward* [1917] AC 309 at 320;

> *"The fact an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant or pertinent to the discharge of the duty or exercise of the right of the safeguarding of the interest which creates the privilege will not be protected. ... the judge has to consider the nature of the duty of right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion."*

The original defence was that the allegation that the plaintiff made the alteration was true but that can no longer be sustained. However, if the allegation was that this report had been improperly altered it must be germane to identify the person who made that improper alteration.

I rule therefore that the publication of this article was privileged under section 10 unless the defendant was actuated by anger, ill-will or other improper motive. Whether that is so is a matter for the jury. The fact the allegation was untrue and the conduct of the defendant before the publication, the manner of publication and his subsequent conduct are all evidence the jury may consider in deciding that question. If they find he was actuated by an improper motive, section 10 gives the defendant no protection.

Tu'i'onetoa v Pohiva

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 5/2001

20 July 2001; 27 July 2001

Defamation – qualified privilege - jury to decide motivation of defendant
Practice and procedure – appeal against jury verdict – open to jury to accept evidence – appeal dismissed

In the November/December 1998 issue of the Kele'a, a newspaper published in the Tongan language, there was an article concerning a report from the office of the Auditor General which had been submitted to the Speaker of Parliament on 30 September 1990. The report contained a recommendation that monies received by some Members of Parliament should be refunded as they were not entitled to receive them. The article alleged that the report had been later resubmitted with the portion which contained the recommendation to refund money wrongly received, erased and replaced with a different explanation. The article claimed that this alteration had been made by the appellant. The appellant was the Auditor General for the Government of Tonga and the respondent was the editor, owner and publisher of the Kele'a. The appellant commenced proceedings against the respondent claiming that the article was defamatory of the appellant. The defence pleaded that the publication concerning the appellant was true, and that the publication was the subject of qualified privilege. At the conclusion of the evidence, the Chief Justice, after hearing submissions from counsel delivered a ruling that the publication of the article was privileged under s 10 of the Defamation Act unless the respondent was actuated by anger, ill-will or other improper motive. He held that whether that was so is a matter for the jury. The jury found that the respondent was not so actuated and judgment was entered for the respondent with no order for costs. The appellant contended that the Chief Justice erred in holding that whether the defendant was actuated by anger, ill-will or other improper motive was a matter for the jury to decide rather than the Judge at trial.

Held:

1. Section 11(3) made it clear that if there was no evidence that the defendant was so actuated, the judge shall direct a verdict for the defendant, with the result that it was the jury that made the decision, albeit on the direction from the judge. The converse must also be so. If there was evidence that the defendant was so actuated, it must be the jury that made the decision whether in fact he was.

2. The Court considered that ss 10 and 11 were intended to express the common law. To the extent that there may be any ambiguity in the two sections, it was appropriate, in arriving at a proper interpretation of them, to have regard to the common law. There was no doubt that at common law, it was the jury that decided if the defendant had proved that the plaintiff was actuated by malice.
3. The Supreme Court was correct to rule that it was for the jury to decide whether the respondent was actuated by anger, ill-will or other improper motive. This ground of appeal did not succeed.
4. There was ample evidence from the respondent that he claimed to have believed that the statement he published was true at the time of the publication. It was open for the jury to accept that evidence. There were no grounds for concluding that accepting the respondent's evidence on his belief at the time was unreasonable or perverse. The challenge to the verdict of the jury finding that the respondent was not actuated by malice, was not made out. This ground of appeal did not succeed.
5. The appeal was dismissed with costs to the respondent to be agreed or taxed.

Cases considered:

Adam v Ward [1917] AC 309
Horrocks v Lowe [1975] AC 135
Metropolitan Railway v Wright [1886] App Cas 152

Statute considered:

Defamation Act (Cap 33)

Counsel for appellant : Ms Tonga
Counsel for respondent : Mr Tu'utafaiva

Judgment

[1] The appellant (the plaintiff in the Supreme Court) sued the respondent for defamation. Following a trial before the Chief Justice and a jury, judgment was entered for the respondent, in accordance with the answers the jury gave to the issues. In the course of the trial, the Chief Justice gave a ruling on the defence of qualified privilege. The appellant has appealed against the ruling and the jury's verdict.

Background

[2] At the relevant time and at the time of the trial, the appellant was the Auditor General for the Government of Tonga. The respondent was the editor, owner and publisher of the Kele'a, a newspaper published in the Tongan language. He was also a Member of Parliament.

[3] In the November/December 1998 issue of the Kele'a there was an article concerning a report from the office of the Auditor General which had been submitted to the Speaker of Parliament on 30 September 1990. The report containing a recommendation that monies received by some Members of Parliament should be

refunded as they were not entitled to receive them. The article alleged that the report had been later resubmitted with the portion which contained the recommendation to refund money wrongly received, erased and replaced with a different explanation. The article claimed that this alteration had been made by the appellant.

[4] The article concluded with a paragraph which, translated, reads:

> "However, it is proper that particular notice should be taken of the dangerous situation the Audit Department is placed because it is not independent and we have today experienced the bad (disastrous) consequence where the auditor has altered the correct result of independent examination carried out and put aside the truth and covered it instead with lies for the purpose of protecting members of the House (Legislative Assembly)."

[5] On 24 November 1999 the appellant commenced proceedings against the respondent claiming that the article was defamatory of the appellant. For the purposes of this appeal, it is unnecessary to detail the particulars provided in support of the allegation that the article was defamatory. In general terms, it was claimed that the article would be understood to mean that the appellant was untrustworthy, dishonest, that he concealed the truth, and that he was unfit to be Attorney-General. He claimed general damages of $100,000, exemplary damages of $50,000, and the costs of the proceedings.

[6] The statement of defence pleaded several defences. Relevant to the issues on this appeal are pleadings that the publication concerning the appellant was true, and that the publication was the subject of qualified privilege pursuant to s 10 of the Defamation Act (Cap 33).

[7] The action was tried before the Chief Justice and a jury between 20 and 28 March 2001. At the conclusion of the evidence, the Chief Justice, after hearing submissions from counsel delivered a ruling that the publication of the article was privileged under s 10 of the Defamation Act unless the respondent was actuated by anger, ill-will or other improper motive. He held that whether that was so is a matter for the jury.

[8] The issues put to the jury and their answers were:

> Did the article in the Kele'a of November - December 1998 defame the plaintiff by damaging his reputation or exposing him to hatred, contempt or ridicule or causing him to be shunned?
>
> Answer: Yes Majority six to one
>
> When the defendant published that article was he actuated by anger, ill-will or other improper motive such malice?
>
> Answer: No Majority five to two
>
> What is the proper sum of damages?
>
> No answer required.

[9] As a consequence of those answers, judgment was entered for the defendant with no order for costs.

The ruling on qualified privilege

[10] The issue of qualified privilege turns on the proper application of ss 10 and 11 of the Defamation Act:

> 10. No criminal or civil proceedings for defamation of character shall be maintainable in respect of any communication made bona fide by any person in discharge of a legal, moral or social duty or in reference to a matter in which he has an interest and the person to whom such communication is made has an interest in hearing it unless it is proved that the person making such communication was actuated by anger, ill-will or other improper motive.
>
> 11(1). Whether a communication was or not made under any of the circumstances mentioned in either section **9** or section **10** hereof shall be decided by the judge at the trial.
>
> (2). If the judge rules that the communication was made under any of the circumstances enumerated in section **9** hereof he shall enter judgment for the defendant.
>
> (3). If it is ruled by the judge that the communication was made under any of the circumstances mentioned in section **10** hereof then if there is no evidence that the defendant was actuated by anger, ill-will or other improper motive the judge shall direct a verdict for the defendant.

[11] In his ruling the Chief Justice referred to the sections in the Act we have set out above, the pleading of qualified privilege in the statement of defence, the publication of the article, and the respondent's evidence concerning the reasons he gave for making the publication. He stated the question for the court to be whether the defendant had a duty to make the communication and the people to whom it was made had a proper interest in receiving it.

[12] He accepted that the respondent's election as a People's Representative for Tongatapu imposed a duty on him to keep his electors informed of matters that may cause them genuine concern. He found that the electors in Tongatapu had a sufficient interest in receiving information concerning the maladministration of parliamentary funds.

[13] He was satisfied that the improper alteration of a report to cover up misuse of public funds must be a matter of sufficient interest to all members of the public in Tonga to allow the privilege to extend to the article even though published to other regions of the country. If the allegation were that this report had been improperly altered, it must be germane to identify the person who made that improper alteration.

[14] For these, and other reasons set out in his ruling, he concluded that the publication of the article was privileged under s 10 unless the respondent was

actuated by anger, ill-will or other improper motive. Whether that was so was a matter for the jury.

[15] Although the notice of appeal set out a number of grounds for challenging the ruling, Mr Edwards for the appellant, in his submissions to this court, relied on one ground, namely that the Chief Justice erred in holding that whether the defendant was actuated by anger, ill-will or other improper motive was a matter for the jury. In support of his submission, Mr Edwards relied on s 11(1) of the Act. It was his submission that the effect of this subsection was that the judge at the trial was required to decide all matters referred to in s 10, including whether it was proved that the person making the communication was actuated by anger, ill-will or other improper motive.

[16] We do not accept that submission for two reasons. First, subs (3) of s 11 makes it clear that if there is no evidence that the defendant was so actuated, the judge shall direct a verdict for the defendant, with the result that it is the jury that makes the decision, albeit on the direction from the judge. The converse must also be so. If there is evidence that the defendant was so actuated, it must be the jury that makes the decision whether in fact he was.

[17] Secondly, we consider that ss 10 and 11 are intended to express the common law. To the extent that there may be any ambiguity in the two sections, it is appropriate, in arriving at a proper interpretation of them, to have regard to the common law on this issue. There can be no doubt that at common law, it is the jury that decides if the defendant has proved that the plaintiff was actuated by malice. In *Adam v Ward* [1917] AC 309, 318 Lord Finlay LC said:

> "It is for the judge and the judge alone to determine as a matter of law whether the occasion is privileged unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury."

[18] In Gatley on Libel and Slander at § 583 the authors state the rule to be:

> "If the judge rules that the occasion is privileged, the plaintiff must, in order to succeed in the action, prove that the defendant was not using the occasion honestly for the purpose for which the law gave it to him, but was actuated by some indirect ulterior motive, e.g. malice in the popular acceptation of the term, and this is a matter for the jury."

[19] The Chief Justice was correct to rule that it was for the jury to decide whether the respondent was actuated by anger, ill-will or other improper motive. This ground of appeal cannot succeed.

The finding of malice

[20] It was submitted on behalf of the respondent that the finding of the jury that the respondent was not actuated by malice — it was malice that the appellant alleged — should be set aside on the ground that it was against the weight of evidence. The test to be applied is a strict one. The statement of that test by Lord Selbourne LC in

Metropolitan Railway v Wright [1886] App Cas 152, 153 has been followed in subsequent cases:

> It is not enough that the judge, who tried the case, might have come to a different conclusion on the evidence than the jury, or that the judges in the court where the new trial is moved for, might have come to a different conclusion; but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the judge, should return such a verdict.

[21] Mr Edwards submitted that the respondent must have known, at the time of publication, that the allegation that the appellant had dishonestly amended the original report was false. We accept that if it could be established beyond doubt that the respondent had that knowledge, that would be a ground for setting aside the jury's verdict. However, Mr Edwards was unable to point to evidence that established such knowledge beyond doubt. He referred to correspondence following the publication that he submitted ought to have made it clear to the respondent that the allegation the respondent had made in the article was untrue. He also referred to the respondent's failure to make a full apology when he had that knowledge. While evidence of the respondent's state of mind after the publication and until trial may be relevant in establishing the respondent's state of mind at the time of publication, what the appellant was required to prove was that the respondent was actuated by malice at the time of the publication.

[22] Mr Edwards submitted that the respondent was careless in failing to check the correctness of the allegation he was intending to make before publishing the article. But carelessness or even recklessness is not sufficient. In *Horrocks v Lowe* [1975] AC 135, 152 Lord Diplock said that the test of malice is very simple. It is: has it been proved that the defendant did not honestly believe that what he said was true, that is, was he either aware that it was not true or indifferent to its truth or falsity? Later, he observed that recklessness may not be sufficient:

> If "reckless" here means that the maker of the statement has jumped to conclusions which are irrational, reached without adequate inquiry or based on insufficient evidence, this is not enough to constitute malice if he nevertheless does believe in the truth of the statement itself. The only kind of recklessness which destroys privilege is indifference to its truth or falsity.

[23] In his statement of defence, the respondent pleaded justification, that is that the allegations in the article were true. In his evidence he consistently said that at the time of publication he believed that it was the appellant who had made the alteration referred to in the published report. Even after the hearing the appellant and another witness assert that it was not the appellant that made the alteration, the respondent said, in cross examination, that he did not believe them. He asserted that at the time he wrote the article he was not aware that the appellant was overseas. In his cross examination there is the following passage at page 163 of the transcript:

> "But at the time I wrote this article I believed bonafide that it was him and also considering the environment he was actually the person who did the alteration.
>
> And you say that at the time of publication you believed what you believed was correct?
>
> Yes bonafide belief.
>
> And your bonafide belief you did not confirm that belief was the truth?
>
> Yes, I did. I had searched and tried to get evidence from the environment of the report and I discovered that this was not a draft report … There was a deliberate attempt to change the final report and that deliberate attempt was done by the Auditor General … And I drew the conclusion that the person who had the power for this was the plaintiff and it was he who did the amendments."

Later at page 165, in answer to a question whether he believed the report had been altered:

> "That was the state of my mind at the time I had published this article after considering all environments and came to this conclusion. That was my bonafide belief."

[24] It was not until the conclusion of the evidence that the respondent acknowledged that the report was not true and that the defence of justification did not apply.

[25] In his summing up the judge dealt with the issue concerning the respondent's state of mind at the time of publication in a manner that was fair and objective. He fully put the case for the appellant and the case for the respondent. There was no challenge to any part of the summing up. The following two passages are particularly relevant:

> "Mr Pohiva, as he told you, is an experienced publisher, a publisher of some years experience, in fact. You heard what he said about it, he said that he considered the situation, he looked at the documents, looked at the alterations, considered the points I've already described and decided that he was right in his assumption. Having made that assumption, for that is what it was, he then decided that he needed to check it no further. He didn't take any of the steps to check it that I have suggested might have been possible — such as checking the hand writing or trying to find out a bit more about where the report had come from, that he received. Neither did he think of asking the man that he was, as it turned out, defaming to give his side. He told you that if he publishes an incorrect article in Kele'a, it's not for him to correct it; it's for the Prime Minister or the Speaker or Parliament."

> "If you feel that the plaintiff has shown that he was irresponsibly publishing, regardless of whether or not it was actually true or not, then you must find for the plaintiff. Does his subsequent refusal to publish a retraction and his determination to pursue his allegation that it was true to the door of the court help you in deciding what was his real attitude when he published. You may have to consider whether in fact publishing in that case was done, as the defendant has said so many times, in good faith. Would a man truly acting in good faith, knowing how damaging his allegation was, would he have failed to check and take some extra check as to whether the story was right? It is matter for you but the fact that, subsequently, when it was pointed out to be wrong, he failed still to check it further, may give you some indication of why he didn't take a check at the time of publication. If you feel that the defendant was acting out of a proper motive and no improper motive when he published that letter, then you will answer the 2nd question in the negative. If on the other hand you feel the plaintiff has demonstrated on balance that he published that simply not caring whether it was true or not or not caring about the effect it would have on the man that it referred to, then you will answer that question in the positive — 'yes'."

[26] It is apparent from the passages in the evidence to which we have referred, from other passages in the evidence, and from the Chief Justice's summing up, that there was ample evidence from the respondent that he claimed to have believed that the statement he published was true at the time of the publication. It was open for the jury to accept that evidence. There are no grounds for concluding that accepting the respondent's evidence on his belief at the time was unreasonable or perverse. The challenge to the verdict of the jury finding that the respondent was not actuated by malice, has not been made out. This ground of appeal cannot succeed.

The result

[27] The appellant has failed to make out the two grounds of appeal on which he relied. The appeal is dismissed with costs to the respondent to be agreed or taxed.

Salvation Army (Tonga) Trust v Nau

Land Court, Nuku'alofa
Ford J
L 7/2000

2, 3 April 2001; 18 April 2001

Land law – competing interests in allotment – good faith
Equity – estoppel – defence between parties to agreement

Mosese Kuki was the landholder of a town allotment (api kolo) in Longolongo, Kolomotu'a. The defendant (Manese Nau) entered into an "Agreement to Maintain Town Allotment" with the landholder on 11 June 1999. On 5 November 1999, the plaintiff (the Salvation Army) entered into a lease agreement with the landholder. Contrary to the terms of the June agreement, the landholder failed to disclose to the defendant that he was negotiating a lease with the plaintiff and nor, for that matter, did he disclose to the Salvation Army the fact that he had entered into the June agreement with the defendant under which he had undertaken "not to make any other agreements with any other party in relation to this api without the knowledge of Manese Nau". The landholder took no part in the proceeding and was believed to be somewhere in New Zealand. On 25 October 1999 the Ministry of Lands issued a Certificate confirming that Cabinet had approved the lease of the api and a formal lease in the format prescribed in the Land Act (Cap 132), was made between His Majesty King Taufa'ahau Tupou IV, King of Tonga, as Lessor and the plaintiff Trust as Lessee on 5 November 1999. The confused situation was discovered and attempts to resolve the matter between the parties failed. On 30 May 2000 the plaintiff obtained an injunction restraining the defendant from entering the property until resolution of the dispute or further Order of the Court. The plaintiff's position was that it had been granted a valid lease in compliance with all the relevant provisions of the Land Act and as, all other things being equal, a registered lease was valid against any unregistered competing interest, that was really the end of the matter. The defendant contended that the landholder had, in the agreement of 11 June 1999, granted the defendant lawful authority to look after the town allotment while he was absent in New Zealand and the agreement provided that he was not entitled to cancel the contract without the defendant's consent. The defendant had carried out work on the property such as clearing the scrub, cutting the grass, demolishing the dilapidated building and erecting a single wire boundary fence and argued that the Salvation Army was under a duty to take reasonable steps to make inquiries as to why someone else was carrying out that work and they should then have reported the matter to the officials at the Ministry of Lands. Further, the defendant argued that in his application

for Cabinet approval to the lease, the landholder had completed a false declaration so the lease to the Army was invalid. Finally, the defendant contended that the landholder's false declaration gave rise to the defence of estoppel and, in a similar vein, he argued that because of the work carried out by the defendant on the property, Mr Kuki was estopped in equity from cancelling the binding provisions of the June agreement without the defendant's consent.

Held:

1. The Army did not know anything about the defendant's claimed interest in the 'api until March 2000 and by then the plaintiff had been the lawful lessee of the property for some months. Further, the Army had no knowledge of the spasmodic maintenance type work which the defendant apparently had carried out on the property over some five or six days between the months of September and November 1999. The Salvation Army acted in completely good faith throughout.
2. Estoppel was a rule of evidence codified in section 103 of the Evidence Act (Cap 15). As a rule of evidence it can only operate as a defence as between parties to the litigation. Mosese Kuki, the landholder, was not a party to the proceeding. In any event, in the absence of hearing evidence from either Mr Kuki or the defendant, the Court was not in a position to reach a considered conclusion as to whether or not any of the definitions set out in section 103 would have application to the facts of this case nor, for that matter, whether it would be appropriate to recognise and invoke any other equitable principle.
3. Damages were made up of tender processing costs of $1,000 and rent of $450 per month for accommodation of its officers at a dwelling house in Sipu Road, Kolomotu'a. The Court anticipated the dwelling house would be complete by mid-August 2001 (as opposed to October 2001 as claimed) and therefore awarded damages of $7,075.
4. As the defendant suffered from an unspecified physical disability and could not appear, the Court found that it would be inappropriate to penalise the defendant further by way of a solicitor/client costs award. However, there was no reason why the plaintiff should be out-of-pocket as a direct result of the delays resulting from the defendant's non-appearance. The defendant's conduct effectively resulted in the hearing, which should have concluded during the morning session running over into the afternoon. The plaintiff was entitled to appropriate compensation and that was reflected in the costs award.
5. The following orders were made: a declaration that the plaintiff was the rightful occupier of the land in question; an order requiring the defendant to remove any materials left on the land by him or his agents and thereafter to refrain from entering the premises; damages in the sum of $7,075; and costs were to be agreed or as taxed and, in the event of taxation, two hours of the plaintiff's counsel's Court appearance time was to be allowed at full solicitor and own client charge out rate.

Cases considered:

Fie'eiki v 'Ilavalu [1995] Tonga LR 190
Fonua v MBf Bank Ltd [1999] Tonga LR 4
Harley v McDonald [2002] 1 NZLR 1 (PC)
Inward v Baker [1965] 1 All ER 446
OG Sanft & Sons v Tonga Tourist and Development Co Ltd, Hamilton and the Minister of Lands [1981-88] Tonga LR 26
Sisifa Sila v Soane Ngahe (Land Court, L 1087/98, Finnigan J, 31 March 2000)

Statutes considered:

Evidence Act (Cap 15)
Land Act (Cap 132)

Rules considered:

Supreme Court Rules

Counsel for plaintiff : Mr Garrett
Counsel for defendant : Mr Niu

Judgment

The Court was told that although the Salvation Army has had a presence in Tonga since 1986 it was not until 1999 that it established a charitable trust which could hold property on the Army's behalf. That charitable trust is the plaintiff in this proceeding. For ease of reference I may simply refer to it as the "Salvation Army" or the "Army" but the Trust is a separate entity from the Church and the Army's social programmes.

The case is about a dispute between the plaintiff and the defendant over their respective rights to a town allotment (api kolo) in Longolongo, Kolomotu'a. The plaintiff has a lease of the land which is dated 5 November 1999. The defendant claims prior rights to the property through an agreement described as an "Agreement to Maintain Town Allotment" he entered into with the landholder, Mosese Manu Kuki, on 11 June 1999. Both parties agree that the real villain in the piece is the landholder, Mosese Kuki. Contrary to the terms of the June agreement, he failed to disclose to the defendant that he was negotiating a lease with the plaintiff and nor, for that matter, did he disclose to the Salvation Army the fact that he had entered into the June agreement with the defendant under which he had undertaken "not to make any other agreements with any other party in relation to this api without the knowledge of Manese Nau".

Mr Kuki took no part in the present proceeding. He is believed to be somewhere in New Zealand but his exact whereabouts is unknown.

In 1999 the Officer in charge of the Salvation Army in Tonga was a Major Fraser. He was replaced on 14 January 2000 by the present District Officer, Captain Garth Stevenson. Major Fraser is presently in Christchurch, New Zealand, and he was not called as a witness for the plaintiff but Captain Stevenson was along with Mr Siope Lomu, the Acting Chief Valuer from the Lands Office.

Mr Niu, for the defendant, called evidence from Tevita Fohe, a long serving minister with the Salvation Army and Mr 'Ekuasi Kaivaha, a planter who had been employed by the defendant to carry out some maintenance work on the api towards the end of 1999.

Mr Fohe said that, on a date which he could not remember but the likelihood is that it was sometime in the first half of 1999, he was approached by Mosese Kuki, the landholder, and asked whether the Salvation Army wanted an api because he had an api to lease. Mr Fohe went with Mosese to see the land which had an old dilapidated building on it. He then put Mosese onto Major Fraser and it appears that Major Fraser handled the negotiations on behalf of the Salvation Army from that point on.

In a letter dated 24 August ostensibly written by Mosese Kuki but probably typed out for him by Major Fraser, Mr Kuki accepted the Salvation Army's offer to lease the api for 50 years for a cash payment on settlement of $15,000 and annual rental payments thereafter of TOP $400 for the first 25 years, subject to adjustment for the second 25 years. On that same day, 24 August 1999, a formal application in the prescribed form to lease the api signed by the trustees for the plaintiff and Mosese Kuki was filed with the Ministry of Lands. The application form included a declaration by Mr Kuki that *"there is no impediment to prejudice this lease"*.

On 25 October 1999 the Ministry of Lands issued a Certificate confirming that Cabinet had approved the lease of the api and a formal lease in the format prescribed in the Land Act (Cap 132), was made between His Majesty King Taufa`ahau Tupou IV, King of Tonga, as Lessor and the plaintiff Trust as Lessee on 5 November 1999.

The Salvation Army then engaged a firm of architects, Jaimi Associates of Nuku'alofa, to design a new three bedroom residential house for the property and early in 2000 the architects proceeded to call for tenders and prepare a tender report for the Army. The Court was told that by the end of February the preliminary work had been carried out and all that remained was for the successful tenderer to be formally notified so that construction work could commence. The Army anticipated that the dwelling house would be ready for occupation by its Tongan officers in June 2000. Unfortunately, for the plaintiff, that was not to be.

On Monday 13 March 2000, Mr Fohe was driving past the property when he was surprised to see a group of workmen carrying out some clearing work. He reported what he had seen to Captain Stevenson who had by then taken over from Major Fraser and the Captain told him to go and find out who the workmen were. Upon inquiry, Mr Fohe was told that the men were working for "the owner" of the api, Manase Nau.

A meeting was then hurriedly arranged between Captain Stevenson and Manase Nau and later with Manase's son. Captain Stevenson suspected that the Naus had simply made a genuine mistake in identifying the property and so he took along to the meeting a survey map to point out the boundaries of the plaintiff's property. The Captain was somewhat taken aback, however, when Mr Nau's son produced the agreement signed between his father and Mr Kuki on 11 June 1999 (which the Nau's represented as a lease) and Captain Stevenson noted that the legal description on the agreement was exactly the same as that shown on the plaintiff's lease. He then knew immediately that they had a problem.

Both parties hoped that they would still be able to work through the confused situation without having to involve lawyers. Initially the defendant had said to Captain Stevenson that if the Salvation Army paid him $1000 then he would walk

away from the property. At the second meeting, Mr Nau's son said that his father would release his interest in the api for a payment of $5000. On both occasions, Captain Stevenson responded by pointing out that he had no authority to determine such a matter and he would need to obtain instructions from his superior officers.

Within two days of discovering the workers on the land, Captain Stevenson had instructed the plaintiff's solicitors in the matter and an exchange of correspondence then took place between the lawyers for the respective parties but the matter was not resolved. At one point, the defendant's solicitors said that their client would suffer damage if he had to give up the property but he would be prepared to walk away if the Salvation Army would pay him $10,000 compensation.

On 30 May 2000 the plaintiff obtained an injunction restraining the defendant from entering the property until resolution of the dispute or further Order of the Court. That injunction continues in force.

At the hearing, Mr Garrett said that while the plaintiff had some sympathy with the defendant's plight, any fraud or deceit by the landholder, Mr Kuki, in his dealings with the defendant was a matter between the defendant and Mr Kuki. The plaintiff's position, as Mr Garrett explained it, was that it had been granted a valid lease in compliance with all the relevant provisions of the Land Act and as, all other things being equal, a registered lease is valid as against any unregistered competing interest, that was really the end of the matter.

Mr Garrett submitted that had the Salvation Army known about the 11 June agreement between Mosese Kuki and the defendant prior to the approval of the lease application, then it probably would have felt obliged morally, if not legally, to walk away from the deal but he emphasised that the Army did not find out about the agreement's existence until March 2000 which was long after Cabinet had approved the lease. Counsel further submitted that the Salvation Army did not have any duty to make inquiry of Mr Kuki so as to ensure that his title was not subject to any equitable interest, nor was the Army aware that the defendant had carried out any work on the api until March 2000 and immediately thereafter Captain Stevenson began to take appropriate action.

For the defendant, Mr Niu submitted that the landholder, Mr Kuki, had, in the agreement of 11 June 1999, granted Manase Nau lawful authority to look after the town allotment while he was absent in New Zealand and the agreement provided that he was not entitled to cancel the contract without the defendant's consent. Mr Niu highlighted the work which the defendant had carried out on the property such as clearing the scrub, cutting the grass, demolishing the dilapidated building and erecting a single wire boundary fence. He submitted that in those circumstances, the Salvation Army was under a duty to take reasonable steps to make inquiries as to why someone else was carrying out that work and they should then have reported the matter to the officials at the Ministry of Lands. As Mr Niu put it, *"They didn't. They pressed on regardless and got title to the api and then they tried to evict the defendant in breach of his rights of natural justice."* Mr Niu submitted that if Cabinet had been aware of the defendant's competing claim then it most likely would not have granted the lease but it would have told the parties to *"go away and sort the matter out"*.

Mr Niu's other principal submission was that in his application for Cabinet approval to the lease, the landholder, Mosese Kuki, had completed a false declaration because the form he signed had said, *"I ... declare that there is no impediment to prejudice this lease"* whereas the June agreement had been such an impediment and

the lease to the Army was, therefore, invalid because *"Mosese Kuki did not have what he purported to give to the plaintiff, namely, an unencumbered title"*.

Finally, Mr Niu submitted that Mosese Kuki's false declaration gave rise to the defence of estoppel and, in a similar vein, he submitted that because of the work carried out by the defendant on the property, Mr Kuki was estopped in equity from cancelling the binding provisions of the June agreement without the defendant's consent.

As long ago as 1981 the Privy Council recognised in *OG Sanft & Sons v Tonga Tourist and Development Co Ltd, Hamilton and the Minister of Lands* [1981-88] Tonga LR 26, that equitable principles apply to leasehold interests even after a lease has been approved by Cabinet and validly registered. Thus, it was said in that decision:

> *"The Privy Council wishes to emphasise that equitable principles can apply only to leasehold interests after they have been validly granted ..."*

The Privy Council then cited with approval the following passages; first, from Halsbury:

> *"The court will also protect a person who takes possession of land or exercises an easement over it under an expectation, created or encouraged by the owner, that he is to have an interest in it, and, with the owner's knowledge and without objection by him, expends money on the land ..."*

and then from the judgment of Denning MR in *Inward v Baker* [1965] 1 All ER 446 at page 448:

> *"... if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity ...*
>
> *So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated when it would be inequitable so to do."*

A case that has remarkable similarities to the present is the unreported decision of *Sisifa Sila v Soane Ngahe* (Land Court, L 1087/98, Finnigan J, 31 March 2000). In those proceedings the plaintiff, who held a registered lease to a town allotment, sought an order requiring the defendants to vacate the property. The defendants claimed that they had lived on the premises for so long and made so many

improvements that they had acquired rights to the Land. They claimed that the owner of the land had an obligation to advise the Minister that the land was not available for lease and consequently that the Minister had been led into authorising the lease by a mistake on the part of the landholder. They claimed that the landholder was estopped from evicting them. There were related claims made of fraud and misrepresentation.

The plaintiff's claim in that case was described by Finnigan J as:

> *"... simple and direct. She [the plaintiff] said that she had a valid lease, made properly in accordance with the Land Act, and thus she had a right over the land contained in the lease over all other would-be occupiers."*

After summarising the issues, the learned Judge said:

> *"Suffice it to say that the law governing the plaintiff's claim is clear. She has the right to occupy the land in terms of the lease, ie, for residential purposes for 20 years from 29 July 1996, so long as she pays $50 per year. This right is given by the Land Act, which is a code, but it may be taken away if there has been some breach of the law or some breach of a promise or some breach of natural justice."*

His Honour went on to conclude:

> *"The evidence has shown no breach of the law, no promise or surrender by the third party [the landholder] and no breach of natural justice ... The third party's [landholder's] permission for the defendant to occupy the land which is covered by the lease has been actively withdrawn, and they must now let the plaintiff enter on the part of the Land."*

I have no difficulty in reaching that same conclusion on the facts of the present case. The Salvation Army acted in completely good faith throughout. Although there was a suggestion that Major Fraser may have driven past the property one day when the defendant's workers were on the site, and indeed this was conceded by the plaintiff, the evidence on this point was totally speculative and I am not prepared to give it any greater weight than that. I am satisfied, on the balance of probabilities, that the Army did not know anything about the defendant's claimed interest in the api until March 2000 and by then the plaintiff had been the lawful lessee of the property for some months. I am equally satisfied, on the evidence, that the Salvation Army had no knowledge of the spasmodic maintenance type work which the defendant apparently had carried out on the property over some five or six days between the months of September and November 1999.

Mr Niu's submissions in relation to the equity of the matter and the defence of estoppel were directed primarily at the conduct of the landholder, Mosese Kuki, in allowing the defendant to incur expense in maintaining the property. Counsel submitted that Mr Kuki was thereby estopped in terms of the June agreement from leasing the land or dealing in any other way with the property without the defendant's prior consent. Although no reference was made to the *OG Sanft* case, the defendant's submissions on the applicable equitable principles followed a similar line to the passage quoted above from the Privy Council decision.

In *Fie'eiki v 'Ilavalu* [1995] Tonga LR 190, Hampton CJ noted that in Tonga estoppel is a rule of evidence codified in section 103 of the Evidence Act (Cap 15). As a rule of evidence it can only operate as a defence as between parties to the litigation. In the present case, Mosese Kuki is not a party to the proceeding. In any event, in the absence of hearing evidence in this case from either Mr Kuki or the defendant, the Court is not in a position to reach a considered conclusion as to whether or not any of the definitions set out in section 103 would have application to the facts of this case nor, for that matter, whether it would be appropriate to recognise and invoke any other equitable principle.

Perhaps the one distinguishing factor between the present case and the facts in the *Sila* decision is that in *Sila* any representations or promises by the landholder would have been oral whereas in the present case the landholder had entered into a written agreement with the defendant. Counsel spent some time during their respective submissions analysing the status of the June agreement. Mr Garrett described it as an agreement "for profit or benefit relating to the use or occupation" of a holding without the Minister's approval and hence, he submitted, it was unlawful in terms of section 13 of the Land Act. Mr Niu described it more as a "caretaker agreement" under which Manase Nau undertook to look after the api for the landholder who was going to live in New Zealand and he suggested that it was obviously designed to overcome the provisions of section 44(2) of the Land Act which provides that if an allotment is abandoned for a period of more than two years then it will be forfeited to the Crown.

For the purposes of this proceeding, it is unnecessary for the Court to have to rule whether or not the agreement is unlawful in terms of section 13 of the Land Act and, in any event, given it's unclear language, it would be difficult to make a finding as to whether or not the agreement was entered into "for profit or benefit" within the meaning of section 13 without having heard evidence from any party to the agreement. Whatever the exact status of the agreement as between the two named parties, I am satisfied, on the facts, that it did not create any legal impediment precluding Mosese Kuki from agreeing to lease the api to the plaintiff. The agreement was not in a form prescribed in the Land Act and, on the evidence before me, I am not persuaded that it created any equitable interest in the property. Save in some exceptional situation, such an unregistered agreement could never pose a serious challenge to the interests of a lessee claiming under a valid registered lease.

Having upheld the plaintiff's claim I now turn to the question of damages.

The plaintiff's claim was quite straightforward. It proceeded on the basis that had the defendant not appeared on the scene in March 2000 then the tender would have been let, work would have proceeded and the house would have been ready for occupation by Salvation Army officers in June 2000. As it was, all work in connection with the project came to a complete standstill in about the middle of March. The plaintiff had to pay the architects $1000 for having gone through the wasted process of calling for tenders and submitting a tender report and since June the Army has had to pay rent of $450 per month for accommodation of its officers at a dwelling house in Sipu Road, Kolomotu'a. The plaintiff, therefore, claims the $1000 figure plus $450 per month from June 2000 until October 2001 when it anticipates that the new dwelling house will be completed.

When work stopped in about mid-March 2000, it was anticipated that the dwelling house would have been completed by June 2000, a period of some three

months. If by this judgment work on the tender process is able to proceed again almost immediately then the anticipated completion date should be three months from now, namely July 2001 but the plaintiff's claim is based on a completion date of October; the additional three months apparently represents the plaintiff's estimate of the time that will be involved in going through the tender process again. Even though the evidence on this point was not challenged, I did not find it particularly convincing. The architect was not called as a witness and it seems to me that inevitably there must be some saving in time in going through the tender process on the second time around. Instead of three months, therefore, I am prepared to allow an additional six weeks which comes to a total damages figure under this head of $7075 made up as follows:

(a)	rental payment at $450 per month from June 2000 to mid-August 2001. (ie, 13 ½ months) =	6075.00
(b)	tender processing costs =	1000.00
		7075.00

Turning to the question of costs, Mr Garrett made a strong plea for costs to be awarded against the defendant on a solicitor/client basis. He stressed that the plaintiff was a charitable trust funded by public donations and although the Salvation Army had considerable sympathy for the position the defendant found himself in, the fact of the matter, as counsel put it, was that the defendant had buried his head in the sand and had failed to face up to the "hopelessness of his case". Mr Garrett relied upon the decision of Ward CJ in *Fonua v MBf Bank Ltd* [1999] Tonga LR 4 upheld on appeal, where the Court had awarded costs to the defendant on a solicitor and own client basis because the plaintiff had persisted in what the Chief Justice had described as "a thoroughly worthless action". Mr Garrett submitted that likewise, the present case was "a case which the defendant never had a hope of winning".

It would need to be quite an extraordinary situation before the *Fonua* principle could apply to a defendant. If a plaintiff genuinely believes that a defendant does not have "a hope of winning" then the law provides a specific remedy to cover the situation. Quite apart from a strike-out application which is a remedy available to both a plaintiff and a defendant, Order 14 of the Supreme Court Rules provides that where a plaintiff considers that the defendant does not have a defence to a claim then he can apply for Summary Judgment and that procedure is designed to bring matters to a head very speedily. If the Court agrees that the defendant does not have a defence then judgment will be entered for the plaintiff immediately. No equivalent remedy is available to a defendant.

There is one aspect of the present case which caused the Court some concern and as a matter of first impression appeared to come close to the type of extraordinary conduct that would need to be established before I would be prepared to award solicitor/client costs against a defendant. What happened was that the defendant did not appear at any stage of the hearing nor did he give evidence. On the morning of the second day, the commencement of the hearing was delayed because the Court was informed that the defendant was to be the next witness and he must have been held up on his way into town. After waiting some time, the Court was told that the defendant would not be appearing and there was an unclear reference to some "physical disability". No medical certificate was produced.

The delays and the eventual non-appearance of the defendant appeared at first to be almost contemptuous and if the Court had reached that conclusion then it may well have been prepared to uphold Mr Garrett's claim. Counsel had, however, without being specific, referred to a physical disability from which the defendant apparently suffers and there was a passing reference made to this condition in the plaintiff's own evidence. In these circumstances, it would be inappropriate to penalise the defendant further by way of a solicitor/client costs award.

Having said that, however, there is no reason why the plaintiff should be out-of-pocket as a direct result of the delays resulting from the defendant's non-appearance. In the recent case of *Harley v McDonald* [2002] 1 NZLR 1 (PC) which was an appeal from the Court of Appeal of New Zealand, the Privy Council in its judgment delivered 10 April 2001, at para 67, said that it is open to the court to penalise conduct *"which leads to a waste of the court's time or some other abuse of its process resulting in avoidable cost to litigants."* In this case, the defendant's conduct effectively resulted in the hearing, which should have concluded during the morning session running over into the afternoon. The plaintiff is entitled to appropriate compensation on this account and that will be reflected in the costs award.

In the result, I make the following orders:

1. A declaration that the plaintiff is the rightful occupier of the land in question.
2. An order requiring the defendant to forthwith remove any materials left on the land by him or his agents and thereafter to refrain from entering the said premises.
3. Damages in the sum of $7075.00
4. Costs to be agreed or as taxed and, in the event of taxation, two hours of the plaintiff's counsel's Court appearance time is to be allowed at his full solicitor and own client charge out rate.

R v Fakatava

Supreme Court, Nuku'alofa
Ford J
Cr 90-93/2000

5-8 March, 17 April 2001; 26 April 2001

Criminal law – joint enterprise – common intention gauged from conduct

On the night of Sunday 12 December 1999 the complainant, Toka'one Kolo, who was 20 years of age, was out walking around Ma'ufanga with a couple of friends. He noticed another group of Ma'ufanga youths sitting around drinking methylated spirits behind Luia Fakatova's shop and he approached them and asked for some cigarettes. He was not given any cigarettes but he ended up in a scuffle and punches were thrown. The complainant decided that he was outnumbered and so he and his friends then ran off but they returned a short time later and threw stones at the drinking group. In the meantime, the drinkers had been joined by some other boys who had been at the Catholic Church choir practice and some girls who were also caught up in the stone throwing. The boys from the choir practice then invited the drinkers to go with them and find Toka'one and beat him up. It is unclear exactly how many went off in pursuit of Toka'one but certainly the four accused were willing and active participants in the venture and there were probably up to four others involved. The pursuers eventually tracked Toka'one down and he was violently assaulted. The complainant had multiple lacerations including a laceration of the scalp which had resulted in blood loss and required stitching, a deep laceration above the right eye which also required stitches, another laceration on the right leg between the knee and the ankle, a fractured hand and various swellings. He was discharged from hospital after two and a half days. It was not possible to determine from the evidence which of the accused caused the particular wounds to the complainant and the appellants contended that, therefore, each of them was entitled to be acquitted.

Held:

1. The Court was satisfied that all four accused took an active role in the attack on the complainant on the ground.
2. When the four accused set out together to look for the complainant they embarked on a "joint enterprise". The objective was to catch the complainant and beat him up. It was not necessary that there should be any kind of elaborate pre-arrangement to constitute a joint enterprise but the assailants must share a common purpose to cause harm to the victim and make it clear by their actions to the other that that was their common

intention. The common intention or agreement was gauged from their conduct.

3. Each party to the joint enterprise was equally liable for the consequences of acts done in pursuance thereof. Each of the accused was guilty of the crime charged and they were convicted accordingly.

Cases considered:

Anderson v Morris [1966] 2 QB 110
Hunter v Sara [1999] 105 A Crim R 241
Mohan v R [1967] 2 AC 187
Moriarty v Brookes (1834) 6 C&P 684
R v Petters and Parfitt [1995] Crim LR 501

Statutes considered:

Constitution of Tonga (Cap 2)
Criminal Offences Act (Cap 18)
Indictments Act 1915 (UK)

Counsel for Crown	:	Mr Tapueluelu
Counsel for first and second accused	:	Mr Veikoso
Counsel for third and fourth accused	:	Mr Tu'utafaiva

Judgment

On the night of Sunday 12 December 1999 the complainant, Toka'one Kolo, who was then 20 years of age, was out walking around Ma'ufanga with a couple of friends. He noticed another group of Ma'ufanga youths sitting around drinking behind Luia Fakatova's shop and he approached them and asked for some cigarettes. He was not given any cigarettes but he ended up in a scuffle and punches were thrown.

The complainant, Toka'one, decided that he was outnumbered and so he and his friends then ran off but they returned a short time later and threw stones at the drinking group. In the meantime, the drinkers had been joined by some other boys who had been at the Catholic Church choir practice and some girls who were also caught up in the stone throwing - one or more of them was hit with stones.

The boys from the choir practice then invited the drinkers to go with them and find Toka'one and beat him up. It is unclear exactly how many went off in pursuit of Toka'one but certainly the four accused were willing and active participants in the venture and there were probably up to four others involved who, for some reason, do not appear before me. The pursuers eventually tracked Toka'one down. He was hiding on the roof of a house in Vuna Road opposite Faua wharf.

Two of the accused, 'Oueni Ohi and Fe'ao Tanginoa, climbed up onto the roof after Toka'one and there was some fighting. Toka'one had a stick or piece of wood and he was using that to protect himself and then he lost the piece of wood and he fell off the roof. The complainant said in his evidence that he was pushed off the roof but, in statements made to the police, two of the accused said that he jumped off the roof and this was confirmed by an independent witness. It has not, therefore, been proved to my satisfaction beyond reasonable doubt that the complainant was pushed off the roof.

The complainant said that he fell on his knees and they were dislocated but the doctor who examined him said in evidence that he found no sign of any dislocation of the knees. The complainant also said in his evidence in chief that when he fell down from the roof he could not see what was happening because he was protecting his face. In cross-examination, however, he said that when he hit the ground he blacked-out and he did not know anything after that until the police arrived. There is other evidence which suggests that after the complainant fell he was able to run in the direction of the main road before the youths attacked him. So, although it is not possible for me to determine the precise spot on the api where the attack took place, there is no doubt that the complainant was viciously set upon. He was punched and kicked and one of the group used a stick or piece of timber to attack him. The complainant lost consciousness for a period.

When the attack started the complainant's friends ran off and, although it seems a number of people were watching the assault take place, no one came to the complainant's assistance apart from Sevesi Siola'a, a security guard from Davina's Bar and Restaurant along the road. Sevesi had noticed the youths chasing someone as they ran past Davina's and he later went along to the api where the noise was coming from to see what was happening. By the time he arrived on the scene the complainant was on his back on the ground being beaten up by about seven or eight boys. He was bleeding from the head. As Sevesi entered the property, he yelled out that the police had arrived which was not correct but the mention of the police was sufficient to scare the attackers off and they proceeded to leave the scene. Sevesi, with assistance, lifted the complainant and carried him to the side of Vuna road and waited there for the police to arrive. The police arrived a short time later having been called by a neighbour. Their records show that they received the call-out at 1:15 a.m. on the morning of 13 December 1999.

The police then took the injured complainant to hospital. In the front of the police van were the driver and the sergeant in charge of the case. In the rear of the van were the injured complainant, Toka'one, his rescuer, Sevesi Siola'a, another helper Tevita Halafihi and two of the accused - Fakatava and Kolositi. I mention the composition of the van load because Fakatava and Kolositi claimed in Court that they themselves had being beaten up on that van journey.

The doctor who examined the complainant in hospital described his injuries in Court. He said that he had multiple lacerations including a laceration of the scalp which had resulted in blood loss and required stitching, a deep laceration above the right eye which also required stitches, another laceration on the right leg between the knee and the ankle, a fractured hand and various swellings. He was discharged from hospital after two and a half days.

The attack was a serious one; potentially life-threatening. One of the eye witnesses, Tevita Halafihi, said in evidence that after the attackers ran off he entered the api because he wanted to see if the complainant was still alive. That gives an indication of the ferociousness of the assault but the motive for the attack is not clear. Crown counsel asked the complainant early on in the trial how the fight started and he referred to an incident which had occurred about a week prior to 13 December 1999 on the same api as the stone throwing incident. The complainant said that on that occasion the youths were drinking methylated spirits out of a bucket and they let him join them but they became upset and a fight broke out after he poured some "refresh powder" into the bucket to make the methylated spirits taste sweeter. It appears that at

least one of the accused was present that day. On 12 December when the complainant approached the group of youths for some cigarettes they again were drinking methylated spirits and they were drunk. Perhaps, when people are drunk on methylated spirits it becomes an idle exercise to try and look for some rational motive.

All the accused made statements to the police. Fakatava and Kolositi challenged the admissibility of their statements but after hearing evidence on the voir dire, I ruled that the statements were admissible. These two accused also complained that they had been beaten up by the police and one of the others in the police van on the night of the incident. I do not accept that any of the police in the van punched the two accused as alleged. It does seem, however, that the witness, Sevesi Siola'a, the security guard from Davina's who had come to the complainant's rescue, did assault both of the accused in the police van. In explanation he said, "I was just upset at what they had done to the other boy." He said that the policeman in the back of the van stopped him from going any further. I do not accept that the two accused sustained injuries of the type, and to the extent, which they claimed in Court.

Perhaps, in all the circumstances, Mr Siola'a's actions after the incident were understandable. Exactly why it was necessary, however, for the police to have the two accused in the back of the same van as the injured complainant and the two witnesses is something that was not explored before me but the potential for an incident of the type which I have just described must, upon reflection, have been obvious.

Both Fakatava and Kolositi admitted in their statements to the police being involved in the attack on the complainant. They told the Court that their statements were given under duress and after assaults and threats from the police but I do not accept that evidence. They had both been drinking methylated spirits before the incidents. Tanginoa had also been drinking methylated spirits. He admitted chasing after the complainant "to beat him up" and he says that he climbed onto the roof of the house but before he could get involved in the fight, the complainant had jumped and he says that he did not take part in any of the attack on the ground. Ohi was not drunk. He had been at the church choir practice. He admitted fighting the complainant on the roof but he says that when he climbed down from the roof he and Fakatava went home.

I do not accept that Tanginoa and Ohi did not take part in the attack on the complainant on the ground. On the contrary, I am satisfied beyond reasonable doubt that they took a very active role in the assault. Kolositi, in his statement to the police, said that all four of the accused were beating the complainant on the ground and that evidence was corroborated by the evidence of Tevita Halafihi who I found to be a reliable witness. He told how the people who he had seen on the top of the roof had then come down and joined in the attack.

All the accused are charged with causing bodily harm contrary to section 107 of the Criminal Offences Act (Cap 18). The word "harm" is defined in the section and for present purposes the relevant definition is:

"(c) any wound which is not severe."

To constitute a wound the continuity of the whole skin must be broken - *Moriarty v Brookes* (1834) 6 C&P 684. There need be no profusion of blood; one drop would be sufficient.

Some problems arose in the present case over the "Particulars of Offence" set out in the indictments. At the end of the prosecution case, Crown counsel applied for leave to amend two of the particulars. The application was opposed by both defence counsel but after hearing legal submissions I ruled that the amendments could be made without injustice and so I allowed the application. The difficulty arose because the particulars contained more detail than was strictly necessary. The original particular in relation to Fakatava, for example, stated:

> *"Tu'ipulotu Fakatava, on or about the night of 13th December, 1999 at Ma'ufanga you did together with Mateaki Kolositi, Oueni Ohi and Fe'ao Tanginoa attack Toka'one Kolo wherein you beat him with a piece of timber on the head and legs, thereby causing him injury."*

The amendment sought to add after the words *"head and legs"* the additional words *"and punched and kicked him on the body"*.

The amendment sought in relation to Ohi's particulars was to include the allegation that he had thrown the complainant off the roof in addition to the existing allegation of having beat him with a piece of timber on the body.

In a case of this nature involving multiple assailants and different types of injuries it is not necessary and perhaps unwise in the drafting of an indictment go into such evidentiary details. Not only will such particulars often require amendment after all the evidence has been heard but they can mislead the defence in that counsel may elect, as was alleged in this case, not to pursue a particular issue in cross-examination because he was misled by the details pleaded in the particulars to believe that it would not be a relevant issue.

In England section 3 of the Indictments Act 1915 requires the indictment particulars to give "reasonable information as to the nature of the charge" and the Indictment Rules 1971 require the particulars to "disclose the essential elements of the offence".

The position in Tonga is governed by clause 11 of the Constitution of Tonga (Cap 2), which requires the indictment particulars to clearly state "the grounds for the charge". Without spelling it out, therefore, in as much detail as the English provision, clause 11 requires the particulars to contain at least the basic reason for the charge and, in this regard, the English provisions provide a useful guide as to the requirements.

Emmins on Criminal Procedure, 7th ed (1997) gives a precedent indictment particular for a bodily harm charge which, adapted to the present case, would simply read:

> *"A on or about the day of ... did together with B, C and D wilfully and without lawful justification cause bodily harm to X."*

Such a particular would have been sufficient to inform the accused of the substance of what he allegedly did. If further particulars were considered necessary, they could be applied for and if the Crown did not disclose them voluntarily then, in an appropriate case, the Court would make an Order.

Returning to the facts of the present case, the evidence is that the complainant had sustained three "wounds" to the body such as to constitute "harm" within the

meaning of section 107. There was the wound to the side of the scalp, the wound above the right eye and the wound to the right leg between the knee and the ankle. Although I am satisfied beyond reasonable doubt that all of the accused took part in the attack on the complainant, it is quite impossible to determine from the evidence which of the accused caused the particular wounds to the complainant's body which I have identified. It is also a possibility that one or more of the wounds were, in fact, inflicted by others in the group attacking the complainant apart from the four accused.

The situation is not dissimilar to that in *Mohan v R* [1967] 2 AC 187. In that case the two appellants, father and son, attacked a man called Mootoo Sammy with cutlasses killing him. The evidence indicated that only one wound proved fatal but it could not be established who inflicted the wound. The appellants contended that each of them was entitled to be acquitted unless it was proved either that he inflicted the fatal wound or that in attacking Sammy they were acting in pursuance of a pre-arranged plan. The Privy Council dismissed the appeals on the basis that as the appellants were attacking the same man at the same time with similar weapons and with the common intention that he should suffer grievous bodily harm, each of them was present aiding and abetting the other and thus there was no need to prove any pre-arranged plan.

In the present case, the prosecution's position is even stronger because I am satisfied beyond reasonable doubt that in carrying out the attack the four accused were acting in concert. When they set out together to look for the complainant they embarked on what has been recognised in a number of reported decisions as a "joint enterprise". The objective was to catch the complainant and, as Fakatava said in his statement to the police, "beat him up because he has caused trouble many times".

The relevant principle was stated by Lord Parker in *Anderson v Morris* [1966] 2 QB 110 as follows:

> *"Where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, [and] ... this includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise."*

It is not necessary that there should be any kind of elaborate pre-arrangement to constitute a joint enterprise - *Hunter v Sara* [1999] 105 A Crim R 241, but the assailants must share a common purpose to cause harm to the victim and make it clear by their actions to the other that that was their common intention - *R v Petters and Parfitt* [1995] Crim LR 501. The common intention or agreement is gauged from their conduct.

In a commentary on *Petters v Parfitt* the learned editors of the 1995 **Criminal Law Review**, page 501, say:

> *"It is different if there is an agreement between A and B that the crime be committed, even though that agreement is tacit and made immediately before, or in the course of the commission of the offence. A and B see a policeman approaching, they exchange glances, and A goes for the officer while B stands by, ready to intervene if A seems to need his assistance. There is now evidence on which a jury could find an agreement to collaborate in the commission of the offence, a joint enterprise. If B*

> *knocks down the second approaching policeman, A will be liable for that assault. The agreement has to be deduced from the conduct, but that is usual in joint enterprise cases.*
>
> *As the Court puts it in the present case, there must be a "common shared intention"-"each has the same intention as the other and each knows that the other intends the same thing."*

The attack on the complainant by the four accused in the present case was carried out
270 pursuant to the common design and each party to the joint enterprise is equally liable for the consequences of acts done in pursuance thereof. It matters not that the Crown has been unable to prove which of the accused inflicted the wounds that I have identified nor, for that matter, whether the wounds were inflicted by one of the other assailants who has not been charged. They were all in it together - part of a joint enterprise.

That being the position, I find each of the accused guilty of the crime charged and they are convicted accordingly.

Knab v Hoeller

Supreme Court, Nuku'alofa
Ward CJ
C 1016/00

15 May 2001; 16 May 2001

Damages – assault – amount awarded much less than amount claimed
Costs – amount awarded would have fallen into jurisdiction of lower court – winning party's costs reduced accordingly

In September 2000 the parties, both Austrian nationals, were involved in the running of a resort, the Popoa Village resort on Vaka'eitu Island, but it is clear that there was, by then, bad feeling arising from disputes about the actual involvement and investment in the resort. There was a minor disagreement over the defendant's stated intention to hold a kava party on the beach. This exploded into an assault of the plaintiff by the defendant in front of two guests and some of the staff. Despite filing a defence denying all knowledge of the assault, there was no dispute in court that the defendant assaulted the plaintiff and was liable for it. The plaintiff claimed damages of $20,000 for the loosening of his top right incisor and the pain caused then and subsequently together with the embarrassment he felt as a result of such an incident occurring in the presence of the resort guests and staff.

Held:

1. The proper award for the damage to the top right incisor bearing in mind the pain at the time and the suffering since was $800. No evidence was sought from the staff as to the effect the assault had on their attitude to their employer or to any actual loss of income from the guests who left so nothing was allowed for that. However, the Court added a small amount for the embarrassment to make a total award of $1100.
2. In any case where the award was such that it would have fallen within the jurisdiction of a lower court, the winning party's costs should be limited to the scale appropriate in that court. The case could have been brought in the Senior Magistrate's Court so the Court allowed plaintiff's costs limited to a scale appropriate to that court which was fixed at $200.

Counsel for plaintiff : Miss Tonga
Counsel for defendant : Mr Niu

Judgment

This is a claim for damages for assault in September 2000. At that time the parties, both Austrian nationals, were involved in the running of a resort, the Popoa Village resort on Vaka'eitu Island, but it is clear that there was, by then, bad feeling arising from disputes about the actual involvement and investment in the resort.

Despite filing a defence denying all knowledge of the assault, there has been no dispute in court that the defendant assaulted the plaintiff and is liable for it. Effectively the only dispute has been as to the actual immediate cause of the attack and the extent of the attack. As to the former, the defendant contended that it was a direct result of the general disagreements over the resort. I accept that was the basic, underlying cause but I accept the plaintiff's account that the actual incident which exploded into the attack was a minor disagreement over the defendant's stated intention to hold a kava party on the beach. I also accept the evidence of the plaintiff as to the actual extent of the attack. He was supported in his account by a number of members of the staff of the resort and I accept that their versions, despite a number of minor discrepancies, were truthful.

The damages claimed are for the loosening of the top right incisor of the plaintiff and the pain caused then and subsequently together with the embarrassment he felt as a result of such an incident occurring in the presence of the resort guests and staff. I accept that the injury was the result of a blow to the face by the defendant.

The plaintiff told the court how he had severe pain from the tooth and great difficulty eating for a period of three to four weeks. Since that time, the pain has become spasmodic but, when it occurs, produces a sensation of needles being pushed up through his upper jaw. The difficulty in eating food was not such that the defendant could not eat a proper diet but that he had to have his food prepared in such a way that he did not have to chew hard or tough food and had to take care he only ate on the left side of his mouth. To a limited extent that condition continues to the present day. I accept that evidence.

He also gave evidence of how he attended a dental clinic run apparently by visiting dentists at a Mormon school in Tongatapu but they could not correct the problem except by extraction because of lack of materials in Tonga. He clearly hopes to avoid losing the tooth but cannot afford, at present, to go abroad for treatment. No evidence has been led as to the likelihood of such treatment being available or successful or the cost.

In those circumstances I can only make an award on the basis of the loss of such a tooth because I accept that it is still loose and, if not treated, will eventually need to be extracted. It is a front tooth so it will leave a visible gap and may also lead to loosening or displacement of the upper incisors that may have a pronounced effect on his appearance. The plaintiff is a man approaching sixty.

I consider the proper award for such a tooth bearing in mind the pain at the time and the suffering since is $800. I also accept that the assault, although a symptom of the deeper problems between these men, was totally unjustified and, taking place as it did in front of two guests who apparently left the resort hurriedly as a result and of some of the staff of the plaintiff, would have caused him embarrassment. No evidence was sought from the staff as to the effect it had on their attitude to their employer or to any actual loss of income from the guests who left so I can allow nothing for that.

However, I am willing to add a small amount for the embarrassment to make a total award of $1100.

The original claim was for damages of $20,000 and so the claim had to be filed in the Supreme Court. Mr Niu for the defendant suggests that claim was grossly inflated and could never have been justified. Had it been a more realistic figure, the matter could have been dealt with in a lower court where costs would have been lower and the delay much less. Miss Tonga, who did not draft the pleadings and took over the conduct of the action at a very late stage, accepts the claim was far too high but points out that the defence of a complete denial by the defendant gave little room for any adjustment.

The filing of claims for ridiculous and unrealistic sums in damages is far too common in Tonga. It is a practice that should stop. Such a claim discourages negotiation and settlement. Many a defendant confronted by such a claim will react by disputing everything about the case from fear of having to pay such a large sum. In many cases, a reasonable claim will result in a satisfactory negotiated conclusion and, if not, be heard in the Magistrate's Court with all the resulting saving of time and expense. Where the plaintiff succeeds but is only awarded a substantially smaller sum than that claimed, it is unconscionable that the losing party should have to pay the extra costs unnecessarily incurred.

In any case where the award is such that it would have fallen within the jurisdiction of a lower court, the winning party's costs should be limited to the scale appropriate in that court. This case could have been brought in the Senior Magistrate's Court. The plaintiff shall have his costs but limited to a scale appropriate to that court which I fix at $200.

I would add that it is surprising how rarely counsel, when faced with such a claim, avail themselves of the procedure in Order 16. Under that rule, should the final award not exceed the sum tendered, the tendering party is unlikely to have to pay any of its opponent's costs.

Fukofuka v Peacock

Supreme Court, Nuku'alofa
Ford J
C 784/00

19, 20, 22 February, 2 March, 14 May 2001; 17 May 2001

Practice and procedure – no case to answer submission - upheld
Company law – effect of not reregistering company on legal status of company – still able to litigate
Contract law – once possession and title pass to purchaser vendor has no right to repossession

The case concerned the ownership of a D155A model Komatsu bulldozer, serial number 15682, registered as H1364. Nippon submitted that it was the owner. The defendants, the shareholders and directors in a company called Vaokakala Holdings Co Limited ("Vaokakala"), claimed that the machine was the asset of a partnership between Gateway and Vaokakala. On 1 October 1991 there was a written sales agreement between Nippon and Gateway regarding the sale of the bulldozer. It was unclear whether Gateway made any payments in accordance with the agreement. In August 1999 a partnership agreement was entered into between Gateway and Vaokakala where the bulldozer was listed as an asset of the partnership. The last witness called by the plaintiff was the Assistant Registrar of companies. He gave evidence that the plaintiff company had never reregistered under the 1995 Companies Act. At the end of his evidence, counsel for the defendant made a "no case" submission on the grounds that the plaintiff was no longer a legal entity and therefore was unable to continue with the case.

Held:

1. Although the plaintiff had never reregistered under the new Act it had not, according to the evidence before the Court, ever been removed from the old register and in that situation the Act contained a mechanism which could conceivably allow the plaintiff to proceed with this litigation should steps be taken to remove it from the old register. Therefore the Court did not uphold the no case submission on that particular point.
2. If a purchaser defaulted on making payment of the balance of the purchase price after possession and title have passed to the purchaser then the vendor could sue for recovery of the debt but a vendor was not entitled to re-possess the subject matter of the sale. The plaintiff failed to satisfy the

Court at the end of its case that it was the owner as pleaded in the statement of claim.

3. The Court upheld the 'no case' submission on grounds that differed from those advanced by the defendant. In the interests of justice and the efficient disposition of this litigation it was right and proper that the Court should stop the case without having to require the defendants to call their evidence thus prolonging what could only be an inevitable outcome. The plaintiff's case could not get any better; it could not succeed.

Case considered:

Rasomen v Shell Co of Aust [1997] 75 FCR 216

Statutes considered:

Companies Act 1912
Companies Act 1995

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

Judgment

In the late 1980s a Japanese company, Tokai Kogyo Co Limited, carried out a multi-million dollar government contract restructuring the Nuku'alofa foreshore along the entire length of Vuna road. One of its sub-contractors on the job was a Tongan company called Gateway Enterprises Limited.

As the contract neared completion date, the Japanese company had to make a decision as to what to do with the surplus equipment and machinery which then totalled some 28 units value at about $500,000. Instead of taking all the equipment back to Japan, Tokai Kogyo decided to transfer it to a new company that it would establish in Tonga. The new company was called Nippon Tonga Enterprises Limited ("Nippon"). It was registered under the Companies Act 1912. There were three shareholders: Tokai Kogyo and Gateway each held 40% of the shares and another entity called the Lavaka Estate held the remaining 20%.

In November 1989 the 28 items of plant and machinery previously owned by Tokai Kogyo were sold to Nippon at a price considerably below the estimated half million dollar market value. The purchase price under the written agreement was to be paid by Nippon in instalments over a five-year period.

The present case concerns one piece of equipment only out of the 28 items included in the sale agreement. The item in question is a D155A model Komatsu bulldozer, serial number 15682, registered as H1364. The issue the Court has to determine is the ownership of the bulldozer at the present time.

Nippon says that it is the owner. The defendants, who are the shareholders and directors in a company called Vaokakala Holdings Co Limited, ("Vaokakala") claim that the machine is the asset of a partnership between Gateway and Vaokakala.

The proceeding before the court is part of the "fallout" from the failed Gateway/Vaokakala partnership. There is another action before the Court scheduled to go to trial later in the year in which, as I understand it, issues relating to the partnership and its operations will need to be determined. Nothing in this judgment is

intended to encroach into any of the issues that will need to be resolved at that hearing. I suspect, for example, that there will be a challenge as to whether, in fact, a partnership even existed between Gateway and Vaokakala. In this judgment, I refer to the relationship as a "partnership" simply for convenience because it was the term used in evidence but it has not been necessary for me to decide whether or not that description accurately reflects the legal association between the two companies. That question will need to be decided in the context of the other hearing.

The plaintiff's case concluded on 14 May. It had run for some five days over a three-month period. The delays resulted from circumstances beyond the control of the Court.

The last witness called by the plaintiff on 14 May was a Mr Lusio Lausi'i who is the Assistant Registrar of companies. He gave evidence that the plaintiff company had never reregistered under the 1995 Companies Act. At the end of his evidence, counsel for the defendant made a "no case" submission on the grounds that the plaintiff was no longer a legal entity and therefore was unable to continue with the case.

As the submission was based on legal issues which required no examination of the evidence, I heard the submission without putting the defendant to an election as to whether he would be calling evidence. Such a course is a recognised exception to the settled rule of practice that when counsel for the plaintiff closes his case and counsel for the defendant wishes to submit that there should then and there be judgment for the defendant, counsel for the defendant must elect to call no evidence.

In support of his application, counsel for the defendant noted that the tenth schedule to the Companies Act provides that every existing company had to apply for reregistration under the new Act by 31 January 2001 and failure to make application for reregistration was evidence that the company had ceased to carry on business.

Section 400 of the 1995 Act provides that on the removal of the last company from the old register in accordance with either clause 3(3) or 5(1) of the tenth schedule, the Companies Act 1912 was automatically repealed. The evidence from the Assistant Registrar was that the last company was removed from the register on 1 February 2001 but he must have been referring to removal only in accordance with clause 3(3) of the tenth schedule because there is no way that he could have complied with the requirements of clause 5(1). Clause 3(3) relates to the removal from the old register of companies reregistering under the new Act. Clause 5(3) provides for a more elaborate system of removal on notice of those companies that failed to reregister by 31 January.

Counsel for the defendant also relied on section 333 of the 1995 Act which provides that any property owned by the company immediately before the removal of a company from the Tongan register automatically vested in the Crown with effect from the removal of the company from the register. He submitted that this provision shows that the legislature very clearly intended that any company not reregistering automatically ceased to exist as a legal entity.

Although, on the face of it, there appears to be some force in the defendant's submissions in relation to the effect of failure to reregister under the new Company's Act, clause 5(1) of the tenth schedule to the Act, which requires the Registrar to remove from the old register every company that has not reregistered by 31 January 2001, must be read subject to the subclauses that follow.

Subclause 5(2) provides that Part XVII of the Companies Act shall apply with such modification as may be necessary to the removal of companies from the old register.

Part XVII sets out the procedures that the Registrar of Companies is required to go through before a company can be removed from the new register and, by virtue of clause 5(2) of the tenth schedule, that same procedure applies with any necessary modifications to the removal of a company from the old register.

The procedure includes the Registrar having to give formal notice to the company of his intention to remove the company from the old register and then a period of time is allowed in which the company can lodge an objection on certain specified grounds and those grounds include the fact that the company is a party to legal proceedings or that it would not be just or equitable to remove the company from the register and, on application, the Court could make an order pursuant to section 332(2) of the Act that the company is not to be removed from the register. Clause 5(4) of the tenth schedule provides that upon the making of a Court order under section 332(2), the Registrar is required to register the company on the new register.

In the present case the Assistant Registrar of Companies was unable to confirm that any notice of intention to remove the plaintiff company from the old register had been given in accordance with the Act. Based on the evidence before the Court, therefore, the plaintiff company, Nippon, continues to exist on the old register.

Section 400(2) of the Companies Act provides that the repeal of the old 1912 Companies Act will not affect legal proceedings to determine rights and privileges acquired under that Act and any such proceedings may be "instituted, continued or enforced".

In other words, the position appears to be that although the plaintiff has never reregistered under the new Act it has not, according to the evidence before the Court, ever been removed from the old register and in that situation the Act does contain a mechanism which could conceivably allow the plaintiff to proceed with this litigation should steps be taken now to remove it from the old register.

In all the circumstances, I am not prepared to uphold the no case submission on this particular point.

That, however, is not an end to the matter. I have now heard all the plaintiff's evidence and the position is that if the Court at the conclusion of the plaintiff's case concludes as part of its overall consideration of a no case submission, that no case has been established at law then, it should stop the case at that point even though the defendant has not been required to make an election to call no evidence. A similar approach was approved by the Australian Federal Court in *Rasomen v Shell Co of Aust* [1997] 75 FCR 216.

In considering the evidence before the Court, I propose to follow the approach of the Federal Court in the *Rasomen* case where it said at page 228:

> *"... the function to be performed by a trial judge sitting without a jury who has decided to entertain a no case submission is no different from that which has to be performed by a judge who has heard all the evidence of the parties in the ordinary way and who has to give final judgment. In both cases, the judge must make findings of fact, after assessing the quality of the evidence."*

The principal witness for the plaintiff was Uiliami Fukofuka who has been managing director of Nippon since the company was established in about September 1989. He told how Nippon had been established by the Japanese firm Tokai Kogyo to take over all the machinery and plant left behind in Tonga after completion of the foreshore contract. He then described how on 1 October 1991 Nippon sold the bulldozer pursuant to a written "sales agreement" to Gateway for $25,000. The provisions in that agreement relating to the terms of payment are important and I set them out in full:

> ***"3. Terms of payment.***
> *(i) $5000, which had been paid previously on September 1990 by Gateway to NTE.* (Nippon)
> *(ii) Payment of the balance be made on an instalment basis with an interest of six (6) per cent per annum.*
> *(iii) Payment shall be made every month and each payment shall be $400 until the full balance of $21,200 is paid.*
> *(iv) Payment shall be made direct to the office of NTE at Poutaha.*
>
> ***4. Arrears.***
> *In case of any arrears in payment, it shall be settled in an amicable manner between the two parties."*

Mr Fukofuka said that the written Sales Agreement put in place something that had been verbally agreed back in about August 1990 between Nippon and Gateway.

Gateway was formed as a family company by Mr Uiliami Fukofuka's older brother, Paula, back in the early 1970s. It had been involved in a number of different business ventures over the years and had traded successfully but it began to experience major cash flow problems because of its involvement in the foreshore project. As Paula explained it in evidence, Gateway had a quarry and it expected to obtain the sub-contract supplying rocks for the foreshore job. In anticipation, the company borrowed heavily from the Bank and purchased a grader, excavator, tractor, loader and trucks. Unfortunately for Gateway, the Japanese company, Tokai Kogyo, entered into a special arrangement with the government for the supply of rocks for the foreshore embankment and Gateway ended up with only the sub-contract for looking after labour, transport and food for the workers. From that point in time, it appears that Gateway's debts continued to mount.

From here on, for convenience and ease of reference, I will refer to the Fukofuka brothers by their first names - Uiliami (Nippon) and Paula (Gateway).

In his evidence, Uiliami confirmed that Gateway paid Nippon the $5000 deposit for the bulldozer but he was unable to say whether any of the monthly instalments had been paid. Uiliami was pressed in cross-examination as to why he could not tell the Court whether monthly payments had been made by Gateway and, as I understand it, his explanation was threefold. First, he was able to confirm that money had been paid in respect of a bulldozer but he said that the money could have been hire charges for another machine - not the bulldozer involved in this case. Secondly, Gateway, for some reason which was not altogether clear from the evidence, had a debt to Nippon for a considerably larger sum than the $20,000 figure and Uiliami could not be sure from his records whether payments that had been made were instalments on account

of the purchase price of the bulldozer or payments on account of the debt generally. Finally, Uiliami explained that Nippon had moved office and a number of records had disappeared.

These explanations are consistent with the overall impression the Court formed about Nippon, namely, that it had never been a well run company. The Court was told by Uiliami that the last shareholders meeting was back in 1994 and no formal statements or accounts have been prepared since then. The last annual return was filed in the Companies Office in 1990. At the present time, the company has no staff but Uiliami said that it does have people available who could be called upon if necessary. It apparently shares part of a very small office. As has been noted, it has not reregistered under the new Companies Act.

I have departed from the narrative but my observations about the plaintiff company, Nippon, help understand some of the subsequent events.

The evidence was that Gateway, in fact, had had possession of the bulldozer for some considerable time prior to the signing of the Sales Agreement on 1 October 1991. Paula in his evidence said that Gateway took over the machine after Tokai Kogyo completed the foreshore contract. For some time prior to the signing of the Sales Agreement, Gateway had been actively trying to sell the machine to a potential buyer in New Zealand. The idea was that from the proceeds of sale, $20,000 would be paid to Nippon being the balance of the purchase price and the surplus would assist Gateway with its cash-flow problems. The deal with the New Zealand company fell through but the evidence shows that Gateway continued to have the machine on the market after the signing of the written agreement. Paula said, and I accept his evidence in this regard, that the written agreement dated 1 October 1991 was drawn up so that Gateway would have documentary evidence to show a potential purchaser that it had title to the bulldozer.

What then happened to the bulldozer between 1991 and 1999 was not altogether clear from the evidence but it appears that Gateway continued to use the machine at its quarry at Longoteme. It may have hired it out from time to time. In about the middle of 1999, Paula entered into an agreement with his nephew, Simote 'Uhila, the second defendant, who had recently returned from the USA. Simote had earth moving equipment of his own and Paula said that the arrangement they agreed to was that Simote would come with his equipment and Paula would have the Gateway equipment and they would work together at the quarry, take off the expenses and share what was left. Simote had as a business adviser, the first defendant, Gavin Peacock, and the two of them set about forming a company called Vaokakala Holdings Ltd.

On 23 August 1999, Paula, on behalf of Gateway and Simote on behalf of Vaokakala (which at that stage was still to be formed) signed a "Partnership Agreement" to operate the quarry business. The shareholding in the partnership was stated to be Gateway 50 percent and Vaokakala 50%. In his evidence before me, Paula said that he never entered into a partnership and the so-called "Partnership Agreement" was a document prepared by Gavin Peacock for the Bank because the Bank wanted a document drawn up before it would open an account for the business venture. For the purposes of the present proceeding, it is not necessary for me to determine whether or not Gateway and Vaokakala formed a partnership in the legal sense but I suspect that that will be one of the central issues to be determined in the other civil action between Gateway and Vaokakala which is to be heard later in the

year. For ease of reference, however, I will continue to refer to the association as a partnership.

The written partnership agreement contained a schedule setting out a list of "all opening partnership assets contributed". One of the assets included in the list is:

"One D.8. Bulldozer."

In evidence it was explained that the D series of bulldozers relates to Caterpillar models and a D.8 is a large Caterpillar bulldozer. Neither Gateway nor Vaokakala owned a D.8 but the assets did include a D.4 and a D.6 which were included in the list. I am satisfied, however, that the reference to the D.8 machine in the schedule to the partnership agreement was intended to be a reference to the Komatsu bulldozer which is the subject of this proceeding and Paula accepted that that was his understanding. Uiliami's evidence was different. Although he was not a party to the partnership agreement, he had been called in to chair meetings of the partnership when major problems started to develop between Paula on one hand and Simote and Gavin Peacock on the other. Uiliami says that in that capacity he had seen the schedule to the partnership agreement and he had noted the reference to the D.8 bulldozer but it did not concern him although he said that if the reference had been to a Komatsu bulldozer he would have immediately reacted because, as he put it, Gateway had not paid off the balance owing on the bulldozer and so he would have "re-possessed" it on behalf of Nippon. Because of the conclusions I have reached, it is not necessary for me to finally resolve this issue one way or the other. I think it is significant that Paula says that in about April 2000 he had a serious disagreement with his brother and walked out of a meeting because Uiliami said that he wanted the bulldozer returned but Paula thought the machine belonged to Gateway even though the company had not paid the full purchase price.

At the present time the bulldozer is still being used in quarry work. The defendants say that it is being used by their company Vaokakala and they say that they are entitled to use the machine because Vaokakala's partner, Gateway, obtained much more out of the partnership by way of partnership profits and sale of partnership assets than the value of Vaokakala's use of the bulldozer. These are all matters in dispute which will need to be resolved in the other civil proceeding before the court.

Having then outlined the history of the rather sad saga of bulldozer H1364, I now turn to the ownership question and it seems to me to be a matter which can be determined relatively simply on the law. The key document, in my view, is the Sales Agreement dated 1 October 1991 between Nippon and Gateway. Under that agreement the bulldozer was sold by Nippon and title passed to Gateway. Possession had already passed over a year earlier.

The law in such situation is clear. If a purchaser defaults on making payment of the balance of the purchase price after possession and title have passed to the purchaser then the vendor can sue for recovery of the debt but a vendor is not entitled to re-possess the subject matter of the sale.

After referring to various authorities on the subject, the learned authors of **Benjamin's Sale of Goods**, p1247, states:

> *"... the assumption behind these cases is that, once the seller has lost both his possession and his right of stoppage in transit, and has transferred the property in the goods to the buyer, he has no remedy against the goods themselves, and his only remedy is a claim for the price or for damages under the contract."*

The text then goes on to refer to the following passage from **Benjamin, Sale of Personal Property** (8th ed.) p.829:

> *"Whenever the property has passed and the goods have reached the actual possession of the buyer, the seller's sole remedy is by personal action. He stands in the position of any other creditor to whom the buyer may owe a debt; all special remedies in his favour qua seller are gone."*

The property in goods passes under a contract of sale where the terms of the contract show a clear intention that it will pass or, as **Halsbury**, vol 41, para 706, puts it:

> *"The intention of the parties, as shown by the terms of the contract, the conduct of the parties and the circumstances of the case, determine the time when the property in the goods is to be transferred."*

In the present case, there was no retention of title clause and there was nothing in the written contract of 1 October 1991 stating that the passing of title was dependent on payment of the purchase price. On the contrary, the agreement had a specific provision saying that, "*in the case of any arrears in payment, it shall be settled in an amicable manner between the two parties*".

As I have said, the evidence satisfies me well beyond the balance of probabilities that title to the bulldozer passed to Gateway with the signing of the 1 October 1991 agreement. Paula in his evidence quite frankly acknowledged that. Thereafter Nippon had no right of re-possession. Its remedy was confined to an action for debt.

Paula was asked in his evidence in chief who did he think the bulldozer belonged to in June 2000 and he replied:

> *"To my knowledge, I was not able to pay (the balance owing) for the bulldozer and so I wanted Nippon to take back the bulldozer."*

If, at that stage, only Nippon and Gateway had been involved then the type of compromise reached between the two brothers would not have caused any controversy and arguably the arrangement may have been consistent with the provision in the contract relating to settlement of any arrears "in an amicable manner". The problem in this case, however, is that by June 2000 it was not simply a dispute between the companies operated by the two brothers - a third party had become involved through the partnership arrangement, namely, Vaokakala, and that company was claiming an entitlement to the bulldozer. It was no longer possible, therefore, for the two brothers to turn a blind eye to the legal position and reach an arrangement or compromise that may have suited them but failed to have any regard to the Vaokakala claim.

This Court is being asked through the plaintiff's pleadings to examine and rule upon the legal position. My finding is that since October 1991 the legal owner of the bulldozer has been Gateway. In other words, the plaintiff in the present case has failed to satisfy me at the end of its case that it is the owner as it has pleaded in the statement of claim. What my finding will mean in terms of the partnership dispute between Gateway and Vaokakala is something that will need to be resolved in the other proceeding before the Court. In the present case, I uphold the 'no case' submission on grounds that differ from those advanced by the defendant but none the less follow inexorably from the evidence before the Court. In the interests of justice and the efficient disposition of this litigation it is right and proper in my judgment that I should stop the case at this stage without having to require the defendants to call their evidence thus prolonging what can only be an inevitable outcome. The plaintiff's case cannot get any better; it cannot succeed.

I hold that there is no case for the defendants to answer. They are entitled to costs to be agreed or taxed.

Police v Tapueluelu

Supreme Court, Nuku'alofa
Ford J
CrA 06/01

7 May 2001; 18 May 2001

Criminal procedure – whether defendant entitled to jury trial

On 1 February 2001 a summons was issued against the defendant, Mateni Tapueluelu, charging him with criminal defamation contrary to section 5 of the Defamation Act (Cap 33) and requiring him to appear before the Magistrates' Court. It was alleged in the summons that on or about 21 November 2000, as assistant editor of the "Taimi 'O Tonga" newspaper, he published a letter in the newspaper defaming the Hon Minister of Police, William Clive Edwards. When the defendant appeared before the Learned Magistrate on 27 February 2001 his counsel made a submission that his client was entitled under clause 99 of the Constitution to be tried by a jury and he made an application to that effect. The police prosecutor opposed the application. He argued that a recent amendment to section 8 of the Defamation Act (No 27 of 2000) meant that the case could only be dealt with in the Magistrates' Court and that the defendant was not, therefore, entitled to a jury trial in the Supreme Court. The Learned Magistrate made a Ruling that the defendant was indeed entitled to a jury trial in the Supreme Court and he proposed to hold a preliminary inquiry to ascertain whether the Crown could make out a sufficient case to put the defendant on trial in the Supreme Court. At that point the Crown applied for, and was granted, an adjournment in which to appeal the Learned Magistrate's Ruling.

Held:

1. The leading authorities made it clear that whether or not a case was indictable depended on the nature and gravity of the offence committed, irrespective of the procedural manner in which it might subsequently be dealt with by the Crown.
2. Whilst it was true that "on the face of it" a section 5 offence was a hybrid offence which could be dealt with either summarily or on indictment, in reality that option was never available because clause 99 of the Constitution provided that any such offence was, in fact, an indictable offence triable in the Supreme Court and clause 11 enshrined that right. Once that proposition of principle was accepted then everything else fell into place and the jury trial guarantee was safeguarded.

3. The Learned Magistrate was correct in his Ruling in that clause 99 guarantees to a defendant charged with any offence carrying a punishment exceeding two years imprisonment or a fine exceeding $500 the right to trial by jury.
4. The appeal was dismissed.

Cases considered:

Pedras v R (Court of Appeal, CA 10/00, 21 July 2000)
R v Guildhall Justices [1976] 1 All ER 767

Statutes considered:

Constitution of Tonga (Cap 2)
Defamation Act (Cap 33)
Defamation Amendment Act (No 27 of 2000)

Counsel for appellant : Mr Kefu
Counsel for respondent : Mr Tu'utafaiva

Judgment

When a person is charged with a criminal offence, it is important for the proper administration of justice that the procedures to be followed should be clearly understood. Unfortunately, that does not appear to be the situation in the Kingdom when a person is charged with criminal defamation. The Court was told that this was one of several cases awaiting clarification of the law.

On 1 February 2001 a summons was issued against the defendant, Mateni Tapueluelu, charging him with criminal defamation contrary to section 5 of the Defamation Act (Cap 33) and requiring him to appear before the Magistrates' Court. It is alleged in the summons that on or about 21 November 2000, as assistant editor of the "Taimi 'O Tonga" newspaper, he published a letter in the newspaper defaming the Hon. Minister of Police, William Clive Edwards.

When the defendant appeared before the Learned Magistrate on 27 February 2001 his counsel made a submission that his client was entitled under clause 99 of the Constitution to be tried by a jury and he made an application to that effect. The police prosecutor opposed the application. He argued that a recent amendment passed last year to section 8 of the Defamation Act (No 27 of 2000) meant that the case could only be dealt with in the Magistrates' Court and that the defendant was not, therefore, entitled to a jury trial in the Supreme Court.

The Learned Magistrate made a Ruling that the defendant was indeed entitled to a jury trial in the Supreme Court and he proposed to hold a preliminary inquiry to ascertain whether the Crown could make out a sufficient case to put the defendant on trial in the Supreme Court. At that point the Crown applied for, and was granted, an adjournment in which to appeal the Learned Magistrate's Ruling.

In this Court, Crown counsel submitted that there should be no preliminary inquiry but the matter should be dealt with solely in the Magistrates' Court. He argued that an accused was only entitled to a jury trial if a case was referred to the Supreme Court and the Magistrate was not bound to refer a case to the Supreme Court unless it fell outside the jurisdiction of the Magistrates' Court.

Counsel for the Crown then went on to submit that while there appeared to be an overlap in jurisdiction in relation to a charge under section 5 of the Defamation Act in that an offence under that section can be tried in either the Magistrates' Court or the Supreme Court at the Crown's election, last year's amendment to section 8 of the Defamation Act provided that a charge under section 5 could now only be heard in the Magistrates' Court. Relying on that amendment, Crown counsel argued that the Learned Magistrate was wrong in proposing to conduct a preliminary inquiry with a view to having the case referred to the Supreme Court for trial.

For his part, counsel for the defendant agreed that, on the face of it, there was an overlap and that a charge of criminal defamation under section 5 of the Act came within the jurisdiction of both the Magistrates' Court and the Supreme Court, but he argued that in such a situation the case could be tried summarily in the Magistrates' Court only with the consent of the defendant. If the defendant did not consent to the charge being tried summarily then the Crown had no option in the matter - the case had to be tried on indictment in the Supreme Court which meant that the defendant had the right to elect trial by jury. Going on from there, counsel submitted that the amendment last year to section 8 of the Defamation Act, which the Crown submitted took away the jurisdiction of the Supreme Court to hear a charge under section 5, was unconstitutional and therefore void because it removed the right of an accused person, guaranteed under clauses 11 and 99 of the Constitution, to have a charge under section 5 of the Defamation Act tried by a jury.

Section 5 of the Defamation Act reads as follows:

> *"5. Every person who shall defame the character of any person not occupying any of the positions enumerated in section 3 hereof (a reference to His Majesty the King and Her Majesty the Queen) shall on conviction thereof be liable to a fine not exceeding $1000 and in default of payment to imprisonment for any term not exceeding one-year."*

It has long been recognised that criminal offences fall into three categories of offence, namely, those triable on indictment only, those triable only summarily in the Magistrates' Court and the so-called hybrid offences which can be tried either way. Prior to last year's amendment to section 8 of the Defamation Act which came into force on 7 November 2000, a charge under section 5 of the Defamation Act was a hybrid offence which, on the face of it, could have been tried either summarily or on indictment. The reason for this overlap of jurisdiction relates back to the penalty that can be imposed for criminal defamation under section 5 of the Act, namely a fine of up to $1000.

The Magistrates' Court has jurisdiction to hear criminal cases where the punishment does not exceed a fine of $1000 or three year's imprisonment. The Supreme Court has jurisdiction to hear all criminal cases where the maximum penalty exceeds $500 or two year's imprisonment. In other words, the $1000 maximum fine that could be imposed for a section 5 offence appeared to mean that the case could be dealt with either summarily in the Magistrates' Court or by jury on indictment in the Supreme Court. Last year's amendment to section 8 of the Act, however, purported to take away the jurisdiction of the Supreme Court in relation to criminal defamation charges under section 5. The Amendment provides:

"8(2) All criminal proceedings for violation of sections 5 and 6 of this Act shall be by summons and determined in the magistrate's (sic) court".

The question that now arises in the context of the present appeal is whether last year's amendment to s 8 of the Act is consistent with clauses 11 and 99 of the Constitution. As the Court of Appeal observed in the recent unreported decision of *Pedras v R* (Court of Appeal, CA 10/00, 21 July 2000):

130 *"The right to elect trial by jury is set out in clauses 11 and 99 of the Constitution.*

Clause 11 provides that no person shall be tried for an indictable offence unless he has first received an indictment and continues:

"But whoever shall be indicted for any offence if he shall so elect shall be tried by jury ..."

Clause 99 states:

"Any person committed for trial before the Supreme Court ... shall if he shall so elect be tried by jury ..."

The full relevant passage from clause 99 of the Constitution reads as follows:

140 *"99. Any person committed for trial before the Supreme Court on a charge of having committed any criminal offence punishable by a term of imprisonment exceeding two years or a fine of five hundred pa'anga or both such penalties shall if he shall so elect be tried by a jury ... and the law of trial by jury shall never be repealed."*

The Crown submits that as clause 99 has application only where an accused person is committed for trial in the Supreme Court and as section 8(2) of the Defamation Act now precludes an offence under section 5 from ever being referred to the Supreme Court, that is really the end of the matter - a person facing a charge of criminal defamation can never have an entitlement to a jury trial.

150 Taken to its logical conclusion, however, the Crown's approach would mean that it would be possible for Parliament to pass a law increasing the jurisdiction of the Magistrates' Court and then decreeing that every criminal offence, apart from murder for example, shall be tried summarily and such legislation would not infringe against clause 99 of the Constitution because clause 99, so the argument would run, guarantees a jury trial only where a case was referred to the Supreme Court in the first place. The objective could even be achieved in a more subtle way by taking criminal defamation cases out of the loop one year, assault cases another year, theft cases after that and so on. Such an outcome would, of course, be completely inconsistent with the behest in the final part of clause 99 that, "*the law of trial by jury shall never be*
160 *repealed*" and the even stronger direction in clause 11 of the Constitution that, "*But whoever shall be indicted for any offence if he shall so elect shall be tried by jury and this law shall never be repealed*."

It seems to me that clause 99, in guaranteeing the right to a jury trial in the circumstances prescribed, also sets in place a process for giving effect to the guarantee. The process is that the clause makes every offence punishable by a term of imprisonment exceeding two years or a fine exceeding five hundred pa'anga ($500) an indictable offence. Although the clause does not spell that proposition out in so many words, it does state that a person charged with having committed an offence subject to those penalties shall upon committal for trial before the Supreme Court, if he so elects, be entitled to trial by jury. A person can be committed for trial in the Supreme Court only on an indictable offence and what the clause is saying therefore is that any offence which carries a punishment of the type defined in the clause is an indictable offence.

The Crown's argument is that an offence does not become an indictable offence until the point in time when the Crown elects to proceed by way of indictment and if that point is never reached because the Crown (dealing with a hybrid offence situation) elects to proceed summarily then clause 99 will never have any application. In the same way, the Crown says that if legislation prescribes that a certain type of offence is to be dealt with summarily (as in the case of section 8(2) of the Defamation Act) then it can never be referred to the Supreme Court for trial and so, again, clause 99 would have no application.

In my opinion, that approach is wrong. Not only would it allow Parliament to circumvent the provisions of clause 99 of the Constitution altogether by passing amending legislation along the lines that I have hypothesised, it also pre-supposes that whether or not an offence is indictable is determined by whether the Crown elects to proceed on indictment whereas the leading authorities make it clear that whether or not a case is indictable depends on the nature and gravity of the offence committed, irrespective of the procedural manner in which it might subsequently be dealt with by the Crown - *R v Guildhall Justices* [1976] 1 All ER 767 at 769. If, at the time an offence was committed, it was capable of being tried on indictment then it is classified as an indictable offence even though it may have subsequently been dealt with summarily.

Whilst the analysis in the *Guildhall Justices* case would be of relevance when dealing with the so-called hybrid type of offence, the effect of clause 99 of the Constitution is to remove from the category of hybrid offence any offence punishable by a term of imprisonment exceeding two years or a fine of $500. That is why, earlier in this Judgment, when referring to the effect of section 5 of the Defamation Act, I used the expression "on the face of it". Whilst it is true that "on the face of it" a section 5 offence is a hybrid offence which can be dealt with either summarily or on indictment, in reality that option is never available because clause 99 of the Constitution provides that any such offence is, in fact, an indictable offence triable in the Supreme Court and clause 11 enshrines that right. Once that proposition of principle is accepted then everything else falls into place and the jury trial guarantee is safeguarded.

I find that the Learned Magistrate was correct in his Ruling in that clause 99 guarantees to a defendant charged with any offence carrying a punishment exceeding two years imprisonment or a fine exceeding $500 the right to trial by jury. Section 35 of the Magistrates' Courts Act provides that in certain circumstances an indictable offence may end up being dealt with summarily in the Magistrates' Court but that situation could only ever come about with the defendant's consent.

In the present case, the defendant does not consent to the case being dealt with summarily. He is entitled under clause 99 of the Constitution to have the case tried by a jury (assuming that upon preliminary inquiry the Magistrate finds that a case to answer has been made out) and section 8(2) of the Defamation Act must be read subject to the important constitutional safeguards contained in clause 99.

The appeal is, therefore, dismissed.

The Court was advised by counsel for the defendant, without any demur by counsel for the Crown, that there is a similar case to the present appeal awaiting a fixture where the only relevant factual difference is that the alleged defamation of the
220 Hon Minister of Police occurred prior to the passing last year of the amendment to section 8 of the Defamation Act.

I can indicate that it follows from what I have said above, if such advice regarding the other case is correct, then my analysis of the legal situation would apply *a fortiori* to that case also and the defendant will be entitled to be tried by a jury in the Supreme Court in the event, of course, that the Magistrate is satisfied that the Crown has made out a case to answer.

Taufa v Editor of Taimi 'O Tonga

Supreme Court, Nuku'alofa
Ward CJ
C 458/2000

29, 30 May 2001; 1 June 2001

Defamation – publication of correction and apology far less prominently than article – showed lack of intent to remedy the wrong
Damages – calculated based on effect on plaintiff - not his family

The plaintiff was a serving police officer and, in early April 2000, was a passenger in a car that was the cause of an accident which resulted in the death of one young woman and injury to another. On 15 April 2000, the Taimi 'o Tonga published, on page 3, a prominently displayed report of the accident and death including a photograph of the victim. The article suggested that the plaintiff was driving the vehicle at the time and that the police investigation of the case was being delayed because the plaintiff is the son of a senior officer of the Prisons Department. The father of the plaintiff spoke on the telephone to one of the editorial staff of the paper in Tonga and pointed out the falsity of the allegation. He was told the other man did not care to speak to him and that he should speak to a lawyer. The plaintiff's father did so and, on 17 April, the lawyer wrote to the newspaper pointing out that the report was false and had caused considerable distress to the plaintiff and his family. The letter sought publication of an apology and correction and payment of $5,000 and modest costs as compensation for the tort. Although the letter required an answer within 14 days, no reply was received. However, an apology was published in the newspaper on 2 May. It was on page 27 and was displayed far less prominently than the original article. No defence was filed and judgment was given on liability against both defendants. A hearing was held to assess the appropriate level of damages.

Held:

1. It was clear that the article had a very unfortunate effect on the members of the plaintiff's family. However, the damages were to the plaintiff for the effect on him of the article. Any effect on his family would not be part of the award except to the extent that it caused the plaintiff added distress to know that the untrue allegation had caused his family to doubt and to criticise him.
2. Any correction and apology should have been full and given similar prominence to the original article. When the correction and apology have been published so it was less likely to be seen and was in less than

complete terms, it may be evidence that the intention was to avoid doing all that was reasonable to remedy the wrong. The Court was satisfied that was the case.

3. The Court awarded general damages of $5,000 and costs.

Counsel for plaintiff : Mrs Vaihu
Counsel for defendants : Mr Tu'utafaiva

Judgment

The plaintiff is a serving police officer and, in early April 2000, was a passenger in a car that was the cause of an accident which resulted in the death of one young woman and injury to another. On 15 April 2000, the Taimi 'o Tonga published, on page 3, a prominently displayed report of the accident and death including a photograph of the victim. The article suggested that the plaintiff was driving the vehicle at the time and that the police investigation of the case was being delayed because the plaintiff is the son of a senior officer of the Prisons Department.

The first that the plaintiff and his family knew of the article was a number of telephone calls from members of their family in New Zealand who had read it. The father of the plaintiff spoke on the telephone to one of the editorial staff of the paper in Tonga and pointed out the falsity of the allegation. He was told the other man did not care to speak to him and that he should speak to a lawyer.

The plaintiff's father did so and, on 17 April, the lawyer wrote to the newspaper pointing out that the report was false and had caused considerable distress to the plaintiff and his family. The letter sought publication of an apology and correction and payment of $5,000 and modest costs as compensation for the tort.

Although the letter required an answer within 14 days, no reply was received. However, an apology was published in the newspaper on 2 May. It was on page 27 and was displayed far less prominently than the original article. It stated:

> "Correction
>
> Correction is hereby made to the news of the 11 April, which shows that Halatoa Taufa was driving the vehicle that caused the accident resulting in death. Correction is hereby made that Halatoa was only a passenger and he was not the driver. Any inconvenience caused by the article is hereby regretted."

No defence was filed and judgment was given on liability against both defendants. A hearing was held to assess the appropriate level of damages.

There can be no doubt that that this was a serious libel. It was totally untrue and was published without any attempt to confirm the facts. The fact the plaintiff was a serving police officer makes the allegation in a case such as this more serious. However, the defence points out that the plaintiff had just been awarded the Baton of Honour and he had been celebrating. In the car with him were two prison officers, one of whom was the driver, and they had all been drinking. The plaintiff admitted he was drunk and they were all on their way to a dance. He agreed he took no steps to stop his drunken companion from driving.

The plaintiff gave evidence of the effect the report had on his colleagues in the police force and the probable effect on his career. I consider the undisputed

allegations about his conduct on that night would have a similar effect and reduce any damages in relation to his work.

It is clear that the article had a very unfortunate effect on the members of the plaintiff's family. However, the damages in this case are to the plaintiff for the effect on him of the article. Any effect on his family will not be part of the award except to the extent that it caused the plaintiff added distress to know that the untrue allegation had caused his family to doubt and to criticise him.

The attitude of the staff member of the newspaper was unfortunate but it is correct that an apology was published. Counsel for the plaintiff criticises it on a number of grounds. It was given nothing near the prominence of the original article, it was limited in its correction and, in particular, it did not correct the unfounded suggestion that the police enquiry was being delayed because of the position held by the plaintiff's father. Those criticisms are well founded.

Such a correction should be full and should be given approximately similar prominence to the original article. In this case the original article was prominently displayed on the third page in the part of the paper carrying major news. The apology was small, on the twenty seventh page immediately above a number of far more prominent advertisements.

If a newspaper publishes an article that is shown to be incorrect but then publishes an apology and correction, it will go some way to reducing the damages. Not only does it show an intention to correct the wrong but it helps negative any suggestion of malice. When as here, the apology is published so it is less likely to be seen and is in less than complete terms, it may be evidence that the intention was to avoid doing all that is reasonable to remedy the wrong. I am satisfied that is the case here.

There was no dispute the article was wrong and it was wrong on two extremely damaging facts. Despite that, the manner of the publication of this retraction suggests that the paper had little interest in properly correcting its error. The court will always consider the spirit and intention of the party who publishes the defamatory article and I have taken that into account in my assessment of damages.

At the same time, the complaint of counsel for the plaintiff that the correction was incomplete must be seen against the request by the plaintiff's lawyer. When such a retraction is sought, it is sensible to draft a suggested form to be printed. Had that been done here, the failure to include a correction of the suggestion about the investigation may not have occurred.

The statement of claim sought damages of $10,000 under each of three heads of general, aggravated and punitive damages.

Damages in defamation cases differ in some ways from other torts. Proof of actual damage is not necessary and the damages are at large. The court must attempt to assess an appropriate figure to compensate the victim of the libel for the distress and hurt that has been caused. It is relevant to that also to consider the extent of the publication. This is a newspaper that circulates in a number of other countries where there is a significant Tongan population. The court will, in such a case, always take into account the undeniable fact that many of the people who have read and believed the false statement may continue to believe it and the victim is left to some extent with the feeling that people he meets may still believe the worst of him in relation to the allegations.

The attitude of the defendants may aggravate the award but, in most cases, that will be taken as part of the assessment of general damage. As I have pointed out, the
130 attitude shown by the defendants in the way the apology was published is a matter that has aggravated the award in this case to a limited degree.

Whilst it may be appropriate in some case to award punitive damages, they are generally only awarded where the court considers that the general damages, after taking into account any aggravating factors, do not sufficiently punish a particularly bad case. I do not consider punitive damages are appropriate in this case.

In the circumstances, I consider a proper award in this case is one of $5,000 general damages. The defendants must also pay the plaintiff's costs.

Tapueluelu v Soakimi

Supreme Court, Nuku'alofa
Ford J
C 176/01

7 May 2001; 5 June 2001

Practice and procedure – strike out application – abuse of process – should have brought judicial review proceedings – struck out
Judicial review – abuse of process to bring ordinary action for public law elements

The plaintiff, Semisi Tapueluelu, was the Superintendent of Prisons. He was suspended from his job as Superintendent of Prisons by the Minister of Prisons on 22 October 1998 pending an inquiry as to wrong doings alleged against him. In about October 1999 a court of inquiry was constituted by Cabinet pursuant to section 15 of the Prisons Act (Cap 36) to inquire into 11 specific charges brought against the plaintiff which related to alleged incidents occurring between December 1996 and September 1998. On 3 May 2000 the court of inquiry released its decision. It convicted the plaintiff on one of the charges and fined him $25 but he was acquitted on the remaining 10 charges. The plaintiff commenced the present proceeding on 13 March 2001. He named the chairman and the two other members of the court of inquiry as the defendants. In his pleading the plaintiff attacked not only the procedures adopted by the court of inquiry and the conduct of the hearing itself but he went further and alleged that section 15 of the Prisons Act under which the court of inquiry was established was unconstitutional and he sought orders declaring section 15 of the Prisons Act and the court of inquiry and its decision illegal. He further sought a declaration that Part one of the Prisons Act (in particular sections 15 to 22) was also unconstitutional and null and void because it provided no rights of appeal against findings of a court of inquiry. The Solicitor General acting for the defendants applied to strike out the claim on the grounds that it disclosed no reasonable cause of action and further that the claim was an abuse of process because it should have been brought by way of an application for judicial review instead of by way of ordinary action commenced by writ and statement of claim. Counsel for the plaintiff explained that the decision to proceed by way of ordinary action rather than by way of application for judicial review was deliberate because the claim was not the usual type of claim in which review is sought but rather a constitutional challenge.

Held:

1. It was a well-established principle in English administrative law that in litigation involving predominantly public law elements it was, as a general rule, an abuse of process to proceed by way of ordinary action instead of application for judicial review.
2. By challenging the underlying sections in the Prisons Act under which the tribunal was established as being inconsistent with the Constitution, the plaintiff was effectively challenging the legality of the court of inquiry's decision and, in the absence of appeal rights, the proper procedure for such a challenge was by way of judicial review.
3. The proceeding related predominantly to public law issues and as such it should have been commenced by way of application for judicial review rather than ordinary action; but even if it could be said to come within one of the exceptions to the general rule then the Court would have held that the delay in commencing proceedings, in all the circumstances, amounted to an abuse of process.
4. The proceedings were struck out as an abuse of process. The defendant was awarded costs.

Cases considered:

Clark v University of Lincolnshire and Humberside [2000] 3 All ER 752 (CA)
Faleola v Kingdom of Tonga [1999] Tonga LR 114 (CA)
Fotofili v Free Wesleyan Church of Tonga & Kingdom of Tonga [1994] TLR 111
O'Reilly v Mackman [1983] 2 AC 237

Statutes considered:

Constitution of Tonga (Cap 2)
Prisons Act (Cap 36)

Counsel for plaintiff : Mr Tu'utafaiva
Counsel for defendants : Mr Taumoepeau

Judgment

The plaintiff, Semisi Tapueluelu describes himself in his statement of claim in this proceeding as the Superintendent of Prisons "but presently suspended from his job". He says he was suspended from his job as Superintendent of Prisons by the Minister of Prisons on 22 October 1998 pending an inquiry as to wrong doings alleged against him.

In about October 1999 a court of inquiry was constituted by Cabinet pursuant to section 15 of the Prisons Act (Cap 36) to inquire into 11 specific charges brought against the plaintiff which related to alleged incidents occurring between December 1996 and September 1998. On 3 May 2000 the court of inquiry released its decision. It convicted the plaintiff on one of the charges and fined him $25 but he was acquitted on the remaining 10 charges.

The plaintiff commenced the present proceeding on 13 March 2001. He names the chairman and the two other members of the court of inquiry as the defendants. In

his pleading the plaintiff attacks not only the procedures adopted by the court of inquiry and the conduct of the hearing itself but he goes further and he alleges that section 15 of the Prisons Act under which the court of inquiry was established is unconstitutional and he seeks orders declaring section 15 of the Prisons Act and the court of inquiry and its decision illegal. He further seeks a declaration that Part one of the Prisons Act (in particular sections 15 to 22) is also unconstitutional and null and void because it provides no rights of appeal against findings of a court of inquiry.

The Solicitor General acting for the defendants has applied, pursuant to Order 8 Rule 6 of the Supreme Court rules to strike out the claim on the grounds that it discloses no reasonable cause of action and further that the claim is an abuse of process because it should have been brought by way of an application for judicial review instead of by way of ordinary action commenced by writ and statement of claim.

In response, counsel for the plaintiff explained that his client's decision to proceed by way of ordinary action rather than by way of application for judicial review was deliberate because the claim was not what he called, the usual type of claim in which review is sought but rather a constitutional challenge. As counsel rather succinctly put it, the plaintiff's main submission is that section 15 of the Prisons Act which provides for the establishment of a court of inquiry, is unconstitutional because it is contrary to clause 84 of the Constitution of Tonga (Cap 2) which vests the judicial power of the Kingdom in the Court of Appeal, the Supreme Court, the Magistrates' Court and the Land Court but it does not authorise judicial or quasi-judicial powers to be exercised by a court of inquiry. Counsel's submission was that, as there is nothing in clause 84 of the Constitution that authorises the establishment of a court of inquiry, it follows that section 15 of the Prisons Act, under which the court of inquiry in this case was established, must be unconstitutional.

Counsel submitted that the plaintiff's claim for the various declaratory judgments was sufficient in itself to give rise to a cause of action and he did not need to seek damages or other relief against the defendants as had been argued by counsel for the defendant.

In response to the submission that the plaintiff should have proceeded by way of application for judicial review rather than ordinary action, counsel for the plaintiff argued that it was not necessary for the plaintiff to adopt that procedure in this particular case for the reason, as I understand it, that the judicial review procedure applies when a declaration is being sought declaring a particular decision null and void but in the present proceeding the plaintiff, as counsel put it, is *"not seeking a declaration that the tribunal's decision is null and void for unfairness or any of the usual reasons but a declaration that section 15 of the Prisons Act, under which the tribunal was established, is unconstitutional and therefore null and void"*.

Counsel went on to acknowledge that the plaintiff has no grounds for saying that the Tribunal was not entitled to make the findings it did nor was he challenging the appointment of the members of the court of inquiry. His challenge was confined to the underlying legality of section 15 and whether or not it was consistent with the constitution. On this basis, so his argument ran, as the plaintiff was not challenging the court of inquiry's decision, it was not necessary for him to proceed by way of application for judicial review.

The significance of whether the plaintiff should have proceeded by way of judicial review or by way of ordinary action lies in the fact that it is a well-established

principle in English administrative law that in litigation involving predominantly public law elements it is, as a general rule, an abuse of process to proceed by way of ordinary action instead of application for judicial review. It is now over 18 years since Lord Diplock made his well-known speech in the House of Lords in the case of *O'Reilly v Mackman* [1983] 2 AC 237 which set out the basic rule in these terms:

> *"... it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to admit a person seeking to establish that a declaration of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 (the judicial review rules) for the protection of such authorities. "*

That principle was applied by Ward CJ in *Fotofili v Free Wesleyan Church of Tonga & Kingdom of Tonga* [1994] TLR 111, approved by the Court of Appeal in *Faleola v Kingdom of Tonga* [1999] Tonga LR 114 (CA). In the present case the plaintiff argues that he is not challenging the tribunal's decision but he is seeking a declaration that the section in the Prisons Act which provides for the establishment of the court of inquiry is contrary to the Constitution. Counsel claims, without citing any authority for the proposition, that the type of declaration he seeks cannot be obtained through judicial review proceedings but only through ordinary action.

I am afraid that I cannot accept that the plaintiff is able to unshackle himself from the tribunal's decision in the way he seeks to do and come along to this Court seeking a declaration in the abstract about the legality of section 15 of the Prisons Act. The approach suggested by the plaintiff, if accepted, would be akin to asking the Court to make a binding declaration on a purely academic or hypothetical question and it totally ignores the reality of the situation which is that the legality of the court of inquiry's decision is an integral part of the plaintiff's claim. Some six or seven pages of the statement of claim are taken up entirely with the findings of the court of inquiry. By challenging the underlying sections in the Prisons Act under which the tribunal was established as being inconsistent with the Constitution, the plaintiff is effectively challenging the legality of the court of inquiry's decision and, in the absence of appeal rights, the proper procedure for such a challenge is by way of judicial review.

There is no question that, as part of the review process, this Court has power to determine whether a statutory power is consistent or otherwise with the Constitution. As the learned authors of "Judicial Review of Administrative Action "(1996), page 101:

> *"... Parliamentary sovereignty is subject to the rule of law, and judicial review is integral to that concept. "*

Halsbury, vol 37, paragraph 577, confirms that the court has the same declaration making powers on review as in an ordinary action:

> *"The jurisdiction to grant a declaration or an injunction on an application for judicial review is concurrent with the jurisdiction to grant*

such forms of remedy or relief in actions begun by writ or originating summons.

In the recent decision of *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, the Court of Appeal noted that Lord Diplock had recognised that there could be exceptions to the general rule which he had laid down in *O'Reilly v Mackman* regarding the exclusivity of the Ord 53 procedure. In the *Clark* case the court was called on to consider the appropriateness of a student proceeding in a claim against a university by ordinary action based on breach of contract rather than by way of judicial review. The university contended that the plaintiff should have proceeded by way of judicial review and that it was an abuse of process to sue in contract.

The Court of Appeal accepted that while a university is a public body and the preferable procedure for commencing court proceedings would usually have been by way of review, in the case before it the proceeding was based on the contract between the student and the university thus bringing it within one of the exceptions to Lord Diplock's general rule so that it did not have to be brought by way of judicial review. The court, nevertheless, went on to consider the effect of delay in commencing proceedings when the relief claimed is one of the discretionary remedies such as a declaration. Lord Woolf noted (para 35):

> *"Whilst in the past, it would not have been appropriate to look at delay of a party commencing proceedings other than by judicial review within the limitation period in deciding whether the proceedings are abusive, this is no longer the position. Whilst to commence proceedings within a limitation period is not in itself an abuse, delay in commencing proceedings is a factor which can be taken into account in deciding whether the proceedings are abusive. If proceedings of a type which would normally be brought by judicial review are instead brought by means of an ordinary claim, the court in deciding whether the commencement of the proceedings is an abuse of process, can take into account whether there has been unjustified delay in initiating the proceedings. "*

The present case, in my opinion, is not concerned with one of the exceptions to the *O'Reilly v Mackman* rule. The proceeding relates predominantly to public law issues and as such it should have been commenced by way of application for judicial review rather than ordinary action but even if it could be said to come within one of the exceptions to the general rule Lord Diplock spoke about then I would have held that the delay in commencing proceedings in this case, in all the circumstances, amounted to an abuse of process.

As it is, I uphold the defendant's application on the grounds of non-compliance with the rule laid down by Lord Diplock in *O'Reilly v Mackman* and on that basis I now order the proceedings to be struck out as an abuse of process. The defendants are entitled to costs to be agreed or taxed.

Attorney-General v Saulala anors

Supreme Court, Nuku'alofa
Ward CJ
Cr 10/01

25, 29 May 2001; 5 June 2001

Practice and procedure – Notice of Motion for contempt of court – insufficient evidence - dismissed

On 17 November 2000 and 5 December 2000 two editions of "Check It Out", a current affairs programme that took the form of a panel discussion, were screened. The first defendant hosted both shows. The panellists in the November broadcast were the second and third defendants and, in December, were the fourth, fifth and sixth defendants. The subject of both programmes was the publication by the newspaper "Taimi 'o Tonga" of the contents of a petition that had been presented to the King and which alleged misconduct by the Minister of Police. The transcripts of both programmes were before the court and the intention and content of each was clearly to refute the allegations made in the petition. Before the broadcast of the first show, the Minister had issued defamation proceedings against the editor and one of the writers in "Taimi 'o Tonga" in relation to the newspaper's publication of the contents of the petition. During the broadcast of the first programme, the first defendant had made reference to that civil action pointing out that the allegations were very strong and that the Minister of Police had sued the paper for $750,000. On 7 February 2001, the Attorney-General filed a Notice of Motion for contempt on the basis that the comments were likely to prejudice the due administration of justice by interfering with or affecting the fairness of the trial of the civil action brought by the Minister of Police. The court's concern was that it would have to decide whether the comments in the programme were likely to prejudice the due conduct of the civil trial but the pleading in the civil trial was not before the court and the only evidence of its contents, contained in an affidavit of Crown counsel, was incomplete and clearly hearsay. Crown counsel contended, relying upon a statement in Halsbury's Laws of England, that the court could take judicial notice of the civil case.

Held:

1. When the court is considering a further or consequential order in a case, it may look at its own records and proceedings in that action in order to understand the nature of the later application but a party cannot circumvent the normal rules of evidence whenever any court case or document is to be produced.

2. Section 36 of the Evidence Act (Cap 15) gives no authority to the court to take judicial notice of its own proceedings without proof unless they are admitted facts.

3. The prosecution, when they failed to produce the pleadings or other sufficient evidence of the civil proceedings in the case of *Edwards v Moala and Tapueluelu*, failed to establish a sufficient case for the defendants to answer. The charge of contempt was dismissed.

Cases considered:

Attorney-General v Times Newspapers Ltd [1974] AC 273; [1973] 3 All ER 54
Bramblevale Ltd, Re [1970] Ch 128
Comet Products UK Ltd v Hawkex Plastics Ltd [1971] 2 QB 67
Craven v Smith (1869) LR 4 Exch 146
Lonrho Plc, Re [1990] 2 AC 154
R v D [1984] AC 778

Statute considered:

Evidence Act (Cap 15)

Counsel for prosecution	:	Mr Kefu
Counsel for defendants	:	Mr Edwards

Judgment

This case arises from comments made in two television programmes broadcast by the seventh defendant company on 17 November 2000 and 5 December 2000. Both were editions of "Check It Out", a current affairs programme that takes the form of a panel discussion.

The first defendant hosted both shows. The panellists in the November broadcast were the second and third defendants and, in December, were the fourth, fifth and sixth defendants.

The subject of both programmes was the publication by the newspaper "Taimi 'o Tonga" of the contents of a petition that had been presented to the King and which alleged misconduct by the Minister of Police. The transcripts of both programmes are before the court and the intention and content of each is clearly to refute the allegations made in the petition.

It is not disputed that, prior to the first broadcast, the Minister had filed an action against the editor of and one of the writers in "Taimi 'o Tonga" in relation to articles stating the same matters as had been alleged in the petition to His Majesty. During the broadcast of the first programme, the first defendant had made reference to that civil action pointing out that the allegations were very strong and that the Minister of Police had sued the paper for $750,000.

On 7 February 2001, the Attorney-General acting in the public interest, (see *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 311; [1973] 3 All ER 54) filed a Notice of Motion for contempt on the basis that the comments were likely to prejudice the due administration of justice by interfering with or affecting the fairness of the trial of the civil action brought by the Minister of Police.

That civil action was for defamation and the Notice of Motion set out the basic allegations made in the statement of claim. It stated the claim arose from the contents of two articles published by Taimi 'o Tonga. It claimed that the newspaper articles could be taken to mean, inter alia, that the Minister was corrupt, used prisoners to carry out his personal work, conspired to obstruct the course of justice, misused his position and procured the commission of two burglaries.

The Notice of Motion alleges that the November programme discussed one of the burglaries and the use of prisoners for private work and the December programme referred again to those topics and also to the other burglary.

Paragraphs 10 and 11 of the Notice state:

> *"(10) The television programmes directly discussed the facts and issues alleged in the civil matter [*Edwards v Moala and Tapueluelu*, C1003/00] and it was likely to prejudice the due administration of justice in that particular civil matter;*
>
> *(11) The defendants actively participated in the discussion of the facts and issues in the civil case knowing or were reckless and ought to have known that the civil claim had been lodged in the Supreme Court of Tonga."*

The Notice of Motion was supported by an affidavit sworn by Crown counsel stating that he had seen copies of both programmes. He refers to the fact a civil claim had been filed and that the first defendant had referred to it. He gave an account of the content of the two programmes.

Summonses to show cause were issued and affidavits were filed by the defendants. In chambers it was agreed between counsel that they would agree a translated transcript of the programmes and would file written submissions. Mr Kefu, counsel prosecuting the case, advised the court he did not wish to file any further affidavits but would wish to cross-examine the defendants on their affidavits.

When the submissions were filed, those of the defendants included a number of preliminary objections to the proceedings most of which I do not need to consider at this stage. However, one ground of objection was that the Notice of Motion and affidavit in support did not supply sufficient particulars to allow the defendants to know with any precision the allegation against them. Following some discussion of this, I invited counsel to provide further submissions on the question of whether, as these were criminal proceedings, the prosecution had to establish a prima facie case before the defendants could be required to show cause and whether, in this case, the evidence revealed such a case.

The court's concern was that, from the allegations in the Notice of Motion, it was clear the court would have to decide whether the comments in the programmes were likely to prejudice the due conduct of the civil trial. In order to do that it would need to know the particulars of that case. Although the Notice referred to the contents of the claim, the pleading was not before the court and the only evidence of its contents, contained in the affidavit of Crown counsel, was incomplete and clearly hearsay.

I gratefully acknowledge the quality of the submissions provided by both sides at short notice. Counsel agree that the procedure for trying contempt is a summary

one. Even in a case such as this where the contempt is outside the court and where the proceedings with which the offending statements are alleged to interfere have not yet reached a hearing, the authorities support the special process of summary trial; *Re Lonrho Plc* [1990] 2 AC 154 at 177, approving *R v D* [1984] AC 778 at 792. Counsel also accept that, because of the criminal nature of all such cases, the standard of proof is beyond reasonable doubt and the burden lies on the prosecution; *Re Bramblevale Ltd* [1970] Ch 128 at 137.

Mr Kefu submits out that in cases of contempt outside the court, the court decides on the prosecution's application whether there is sufficient evidence to initiate proceedings against the defendants. The proceeding is, at that point, akin to a magistrate's court conducting a preliminary inquiry and the court will not allow the case to proceed further if there is not a prima facie case. If that is so, he suggests, there must be sufficient evidence at this stage to put the other side to its defence.

I cannot accept the procedure in contempt is analogous. In a preliminary inquiry, the evidence is produced to the court and at that stage is subject, if the defence so wishes, to challenge. The defence may also call evidence in support of its case. If, despite this, the case is still committed to the higher court, the evidence is called again and, on the evidence as it is demonstrated in that trial, the defence may again submit no case.

The application in a case of contempt is a procedural step to ensure that the allegation discloses a proper case for contempt proceedings. I do not accept that the court is, at that stage doing more than noting that the Notice of Motion reveals a proper cause of action and that it is supported by an affidavit. The function of the court at that stage is not to assess the weight or sufficiency of the evidence produced at the time of the application to prove the grounds in the Notice.

Our rules do not set out any procedure for applications for committal except in cases where the contempt consists of disobedience to or failure to obey an order of the court and the procedure for other contempts set out in Order 52 of the English Rules, therefore, applies with such necessary modification as circumstances in Tonga require.

Under Order 52, once leave has been given by the Divisional Court, the prosecution is limited to the grounds stated in the Notice and the evidence filed with the application for leave. That procedure has not been applied in Tonga. The procedure used here has been to set a chambers hearing for directions and, at such hearing, to set a timetable which allows the prosecution also to file any additional affidavit evidence if it so wishes.

In the present case, Mr Kefu advised the court in chambers that he did not intend to file further evidence although it was agreed at the chambers hearing that the transcript of the programme would be admitted. Had that not occurred, I would venture to suggest the case could not have proceeded.

In cases where the contempt has been committed in the face of the court or by direct disobedience of a court order, the evidence is unlikely to be disputed. In cases such as this where the contempt was outside the court there may be dispute both of the facts themselves and whether they could have amounted to the particular interference with the court process that is alleged. The question for the court is not just whether the words were spoken and the knowledge of the alleged contemnors when they said them but also, if it should be found that they were said, whether the effect might be to interfere with the civil case. The court cannot in this case make any

finding without the details of the civil case with the trial of which it is alleged the comments would interfere.

Although I have not accepted Mr Kefu's submission regarding the court's role at the initial stages of the case and its effect on a possible submission of no case now, he agrees that, in order to prove the contempt, the court will need the details of the pleadings in the defamation action.

He submits that he does not need to produce the pleadings in evidence. The court can, he suggests, take judicial notice of the civil case.

He cites the authority of *Craven v Smith* (1869) LR 4 Exch 146 to support the statement in Halsbury's Laws that "the court is entitled to look at its own records and proceedings in any matter and take notice of their contents even though they may not have been formally brought before the court by the parties". With respect to the learned editors of Halsbury, I consider they have drawn a far wider principle than *Craven v Smith* establishes. What that case establishes is that, when the court is considering a further or consequential order in a case, it may look at its own records and proceedings in that action in order to understand the nature of the later application. I cannot accept it establishes a wider principle than that. I certainly do not read it as authority that a party can circumvent the normal rules of evidence whenever any court case or document is to be proved.

I would also need to be persuaded that the rule in *Craven v Smith* is applicable in Tonga. Apart from matters of such general knowledge that they need no proof, the matters of which the court may take judicial notice here are set out in section 36 of the Evidence Act (Cap 15). That section gives no authority to the court to take notice of its own proceedings without proof unless they are admitted facts.

I accept that a court may in some circumstances take judicial notice even of matters that are not notorious and which require further inquiry or research by the judge but the court must be very careful not to take judicial notice of facts requiring proof by evidence in the normal way and thus remove a party's obligation to produce it.

However, despite the reference to judicial notice, that is not what counsel is, in fact, inviting the court to do. What the prosecution is asking is that, if the court does not have sufficient evidence of the civil action to support the allegations in the Notice of Motion, it should remedy that by calling for the record to be produced of its own motion. That is a very different matter. I have no doubt that it would not be proper for the court to call for evidence, in any criminal matter, in order to fill a lacuna in the prosecution case.

The final matter is whether the defendants, having filed affidavits in reply to the Notice of Motion, are entitled to submit that the evidence to support the charges is insufficient to require them to show cause before the court considers their affidavits.

It is well established that all contempt proceedings are criminal in nature. Clearly special rules apply because of the need to deal quickly with many such cases. That is the reason why, despite the unlimited powers of punishment, summary procedure is used even though it deprives the defendant of jury trial. However, I cannot accept that the court is otherwise entitled to erode the rights normally enjoyed by any person accused of a criminal offence.

Criminal trial procedure ensures that no man need prove his innocence and it is therefore a cornerstone of our justice system that he need do nothing until the prosecution has produced sufficient evidence to establish its charge. It is only then

that he need, if he so wishes, to make a defence. It is clear that it is his decision whether or not to make a defence in contempt proceedings because he is not a compellable witness; *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67 at 75-6.

My researches have given me no assistance as to the stage in the proceedings at which the prosecution must demonstrate sufficient evidence in support of its allegation. Under the English Rules, it must be sufficient at the time of the initial application. As I have already stated, that is not the practice here and it was not the procedure followed in this case. I cannot accept that, under either system, the procedure is intended to deprive the defendant, beyond the requirement of summary trial, of any other right he would otherwise have in criminal proceedings. I am satisfied the defendants have the right to challenge the sufficiency of the evidence produced to the court before they need to make their own defence.

In this case, I rule that the prosecution, by failing to produce the pleadings or other sufficient evidence of the civil proceedings in the case of *Edwards v Moala and Tapueluelu*, has failed to establish a sufficient case for the defendants to answer.

The charge of contempt is dismissed.

Tukutau v Masoe

Supreme Court, Nuku'alofa
Ford J
C 381/00

29-31 May 2001; 7 June 2001

Damages – calculation for negligence – loss of use of van

On the morning of 11 September 1999 Sitalamu Tukutau, the plaintiff, was driving his Toyota mini van in an easterly direction along Ha'amoko Road, Ma'ufanga, with his two-year-old daughter. While the plaintiff was crossing the intersection of Ha'amoko Road and Heikoni Street a car driven by the defendant, Simote Masoe, travelling north along Heikoni Street collided with the front right hand side of the van pushing it a distance of some 6 metres into a rock fence outside one of the neighbouring homes. No one was seriously injured in the accident. The plaintiff alleged that his van was damaged to such an extent as a result of the accident that it could not be economically repaired and had to be written off. He claimed that the pre-accident value of the van was $5200 and sought to recover that sum together with $1400 for the loss of 7 months use of the van and $5000 for "loss of reputation" making a total damages claim of $11,600. The action was brought against the defendant based on breach of contract, breach of statutory duty, and negligence.

Held:

1. The action based on breach of contract was misconceived. The evidence did not support the existence of any type of contract.
2. The plaintiff established that the accident was caused through the negligence of the defendant.
3. After trying to reconcile the two contradictory pre-accident valuations of the van, the Court concluded that a fair amount to allow for the value was $1450.
4. The plaintiff's evidence supporting his claim of $1400 for seven months loss of the van was not believed by the Court and therefore this claim was rejected. There was no evidence led on the claim of $5000 damages for loss of reputation, therefore that too was rejected.
5. As a matter of law, even if there had been no loss of profits and no expense in replacing the chattel temporarily, damages may still be recovered for the loss of use of the van. The Court accepted that the plaintiff probably did give his father some produce for the use of the van and so was entitled to reimbursement of his outlay in this regard for a

reasonable period of time pending acquisition of a new van. The Court allowed the sum of $850 under this head.

6. Judgment was entered for the plaintiff for $2300 with costs.

Statute considered:
Traffic Act (Cap 156)

Counsel for plaintiff	:	Mr Veikoso
Counsel for defendant	:	Mr 'Etika

Judgment

At about 7 a.m. on the morning of Saturday 11 September 1999, Sitalamu Tukutau, the plaintiff in this case was driving his Toyota mini van in an easterly direction along Ha'amoko Road, Ma'ufanga. His two-year-old daughter was seated alongside him on what appears to have been described as a raised seating area situated in between the passenger seat and the driver's seat.

While the plaintiff was crossing the intersection of Ha'amoko Road and Heikoni Street a car driven by the defendant, Simote Masoe, travelling north along Heikoni Street collided with the front right hand side of the van pushing it a distance of some 6 metres into a rock fence outside one of the neighbouring homes.

Fortunately, no one was seriously injured in the accident. Just before the impact the plaintiff realised what was going to happen and pushed his daughter back behind the front seats hoping to protect her from the collision but she, nevertheless, suffered some minor trauma when she was thrown forward and her right shoulder struck the dashboard of the van. Both drivers suffered shock.

The plaintiff alleges, and there seems to be no serious dispute over the allegation, that his van was damaged to such an extent as a result of the accident that it could not be economically repaired and had to be written off. He claims that the pre-accident value of the van was $5200 and he brings this action against the defendant seeking to recover that sum together with $1400 for the loss of 7 months use of the van and $5000 for "loss of reputation" making a total damages claim of $11,600.

The plaintiff brings his claim against the defendant based on breach of contract, breach of statutory duty and in tort based on negligence. The contract is alleged to have been partly oral and partly in writing. The oral part is said to have arisen immediately after the accident when the defendant apologised and offered to pay for the repair costs. The written part is said to consist of an invoice from "Si'i Kae Ola Motor Part" which set out the pre-accident value of the vehicle at $5200.

In my view, the action based on breach of contract is misconceived. Although circumstances can arise where a forbearance to sue may constitute valuable consideration, there was no submissions made to that effect in this case and, in any event, the evidence simply does not support the existence of any type of contract.

The plaintiff was on much stronger grounds in his traditional type of pleading for motor vehicle accidents based on negligence. He alleged that the defendant had failed to stop at a compulsory stop sign, that he had failed to keep a proper lookout and that he had been travelling at a speed which was excessive in the circumstances. The accident was investigated by the police and the defendant was charged with

negligent driving contrary to section 25(1) of the Traffic Act (Cap 156). He pleaded guilty and on 9 April 2000 was convicted and fined $45.

On the evidence, I am satisfied that although there was a compulsory stop on both sides of Heikone Street, sometime prior to the accident the stop sign on the southern entrance to Ha'amoko Road had been moved and only the pole was in place at the time of the accident. Counsel for the plaintiff nevertheless submitted that if the defendant had been driving with due care and attention he should have realised that he was approaching a compulsory stop. I agree with that submission. The pole standing on its own should have alerted the defendant to the fact that it was a controlled crossing and, had he looked, the defendant would have seen the reverse side of the compulsory stop sign across the road and he should have been able to instantly work out that he was required to stop before entering the Ha'amoko Road intersection.

Unfortunately, it seems to be an accepted hazard of driving motor vehicles in Tongatapu that traffic signs can be defaced, moved or interfered with. Moreover, the authorities do not appear to be overly anxious to remedy the problem. The compulsory stop sign missing at the time of this accident on 11 September 1999 has still not been restored.

Apart from failing to stop at the crossing, the plaintiff has satisfied me on the balance of probabilities that the defendant was also negligent in travelling at an excessive speed approaching an intersection and in failing to keep a proper lookout. In cross-examination, the defendant admitted that he was travelling in excess of the speed limit of 40 kilometres per hour and I accept the evidence of police sergeant Alani Lomavita of the Traffic Department that the defendant had admitted to him that he was in the wrong and in explanation had told the officer that he had not had enough sleep the night before. The defendant told the Court that at the time of the accident he was driving home after dropping off someone who he had gone out with the night before.

Although some questions by defence counsel in cross-examination seemed to have been directed at establishing contributory negligence on the plaintiff's part, contributory negligence was not pleaded and, in any event, I would not have found any negligence on the plaintiff's part.

I, therefore, hold that the plaintiff has succeeded in establishing that the accident was caused through the negligence of the defendant in one or more of the respects outlined.

Turning to the question of damages, the variation in the pre-accident value of the van by the so-called expert witnesses called by either side was quite extraordinary. The plaintiff called a Mr Saia Kaitu'i of Si'i Kae Ola Motor Part. He produced an "Invoice" dated 20 September 1999 in which he had recorded the pre-accident value of the vehicle following examination at $5200.

The defendant called a Mr Juan Carlos Giles of Faleata Enterprises who produced a "Quotation" dated 21 September 1999 in which he recorded the pre-accident value of the van following inspection at $800.

The plaintiff's evidence in cross-examination was that he had purchased the van in New Zealand in 1998 for NZ $3000 and he thought that he had paid $1000 for freight and $800 for duties. No receipts were produced.

The Court's task in trying to reconcile the two pre-accident valuations has not been made any easier by the fact that counsel for the plaintiff failed to serve a copy of

Mr Kaitu'i's "Invoice" on the defendant 7 days prior to the hearing as had been agreed between the parties so that defendant's counsel had no prior knowledge of the invoice and, for his part, the defendant's counsel failed to disclose Mr Giles's valuation report prior to the hearing nor did he put his pre-accident valuation figure to Mr Kaitu'i in cross-examination for his opinion or comment. Counsel always has a duty to "put the case" of his client, or at least the relevant part of the case, to the witness giving evidence. In this case, counsel for the defendant should have put to the plaintiff's expert witness the essence of the contradictory evidence that would be given by the defendant's own expert, Mr Giles. In particular, he should have put to Mr Kaitu'u the proposition that Mr Giles's had estimated the pre-accident value at only $800.00 and given him the opportunity of commenting on the figure or of trying to explain the very significant difference in the two valuations. He did not do so and counsel for the plaintiff did not seek leave to recall his expert. In the circumstances, I must now try and determine where the justice of the case lies.

Of the two so-called experts I preferred the evidence of Mr Giles who impressed me as being the more reliable. He is a very experienced engineer/mechanic and he also carries out panel beating work. He described the van from his observations as being "… in a very poor condition and rusting" at the time of the accident. He said that if the plaintiff had paid NZ $3000 for it the year before then he had paid too much.

Mr Kaitu'i, who was the plaintiff's expert witness, was asked after being sworn in whether he was a mechanic and he replied that he was a "sales representative". In answer to a question from the Court later on he explained that he was a spare parts salesman but the Court was not impressed when under cross-examination he was unable to give any estimate of the costs of a second-hand door or a steering wheel for the van after giving evidence that both of these items had been badly damaged in the accident. He did, however, say that he had been carrying out vehicle assessment work for some 12 years and that his evidence had been accepted in an earlier court case.

Counsel for the plaintiff submitted that Mr Giles's evidence should be rejected because he works for the insurance company that the defendant was insured with. I do not accept that statement as a correct reflection of the evidence. Mr Giles certainly carries out a considerable amount of assessment work for that insurance company but he works as an independent operator and his quotation book showed that he also carries out vehicle assessment and repair work for a variety of other clients.

I am prepared, however, to make some allowance for the fact that none of the details in Mr Giles's valuation report, apart from the pre-accident existence of rust, were put to Mr Kaitu'i in cross-examination and, notwithstanding the reservations I have expressed about his evidence generally, he may, if given the opportunity, have been able to persuade me to take a different view of some of the observations made by Mr Giles.

On balance, taking all these matters into account, I conclude that a fair amount to allow for the pre-accident value of the plaintiff's van is something in the order of $1,450 and that is the figure I am prepared to enter judgment for under this head.

The plaintiff's evidence in relation to his claim of $1400 for 7 months loss of the van was unsatisfactory in many respects. Virtually no evidence at all was led on the subject and most of the details only emerged during the course of cross-examination and then re-examination. The period of 7 months presumably was the time period in which it took the plaintiff to purchase a new replacement vehicle for the written-off

van. I say "presumably" because even this evidence was unclear. The plaintiff said that the replacement vehicle had cost him $8600 and that he had paid a deposit of $3000. He explained that he had not been able to afford to purchase a replacement vehicle any earlier. For a period of 3 months immediately after the accident he had apparently been able to have the use of his father's van for carting produce from his allotment to the markets. It is not clear from the evidence whether he had the use of some other vehicle for the remaining 4 months or indeed whether he even needed a vehicle during that period.

In cross-examination the plaintiff told the Court that he used his father's van everyday during the initial 3 month period and that there was no expense because his father had given him the use of the van. In re-examination, however, he said that in return for the use of the vehicle he had given his father's household a supply of various produce twice a week for the entire 3 month period and each supply was worth $100 or, in other words, a total of $200 per week. It was this expense that apparently formed the basis for his claim of $1400 although he was quite unable to explain why the claim was for only $1400 for a 7 month period if he had, in fact, outlaid $200 per week for the first 3 months of the period. The $1400 claimed in his statement of claim for the 7 month period is equivalent to $50 per week but in re-examination the plaintiff said that the claim he was making should have been for $50 per day. If this evidence was true then it should have been led as evidence in chief because it would have been an important part of the damages claim. In all events, I did not believe this part of the plaintiff's evidence and I reject it.

The plaintiff would or should have been aware shortly after he received the "Invoice" from Si'i Kae Ola Motor Part dated 20 September 1999, only nine days after the accident, that his van was a write-off. As part of his duty to mitigate, he should then have set about making reasonable efforts to obtain a suitable replacement vehicle. He was not entitled to simply sit back and wait 7 months until he could afford to purchase an obviously superior vehicle and then claim for loss of use of the van during the intervening period. In all events, he cited no authority in support of any such proposition and the claim is inconsistent with the accepted legal position as summarised in Charlesworth & Percy on Negligence, 8th ed, para 4.83:

> *"Consequential loss ... does not include any extra damage, occasioned by the impecunious position of the injured party, whereby the lost chattel could not be replaced within a reasonable time."*

I, therefore, reject the claim for 7 months loss of the van.

The other part of the plaintiff's damages claim of $5000 for "loss of reputation" remains a mystery. Simply no evidence at all was led on the matter and so I reject the claim totally.

Notwithstanding my observations about the plaintiff's evidence on quantum, I accept as a matter of law that even if there has been no loss of profits and no expense in replacing the chattel temporarily, damages may still be recovered for the loss of use of the van and I am also prepared to accept that the plaintiff probably did give his father some produce for the use of the van although nothing like the quantity he claimed in Court. He is entitled to reimbursement of his outlay in this regard for a reasonable period of time pending acquisition of a new van.

Having regard to all the factors I have mentioned, I am prepared to allow the sum of $850 under this head. The plaintiff, therefore, has succeeded in establishing liability and is entitled to judgment in the sum of $2300 together with costs to be agreed or taxed. I am not prepared to allow the plaintiff's interest claim of 10 percent from the date of the accident.

R v Makahununiu

Supreme Court, Nuku'alofa
Ford J
Cr 195/00

7, 8 June 2001; 8 June 2001

Evidence – admissibility of statements made by accused – voir dire hearing – all inadmissible

The accused was charged with abetment to a robbery that involved firearms. During the hearing the Crown wanted to call evidence involving oral statements made by the accused to the police on the night of his arrest (22 July 2000), other statements made on 24 July 2000, and the record of interview, charge form, and "confession" taken on 25 July 2000 and recorded in writing. The accused submitted that none of the evidence should be admitted because it was obtained with force and threats of violence in breach of section 21 of the Evidence Act or alternatively he submitted that it should be excluded by the Court in the exercise of the Court's discretion under the proviso to section 22 of the Evidence Act. There was then a hearing on the voir dire.

Held:

1. The Court was satisfied that any oral admissions obtained by the police breached section 21 of the Evidence Act and they were excluded for that reason.
2. The Court was left in doubt about the voluntariness of the written statements given by the accused to the police in the various documentation completed on 25 July. The Crown's obligation was to remove any such doubt. It did not do so and, in the exercise of the Court's discretion under the proviso to section 22 of the Evidence Act, the various written documentation were disallowed.
3. The outcome of the voir dire hearing was that all the statements made by the accused which the Crown sought to rely on were ruled inadmissible.

Case considered:

R v Vaiangina [1990] TLR 118

Statute considered:

Evidence Act (Cap 15)

Counsel for Crown : Miss Simiki
Counsel for defendant : Mr Tu'utafaiva

Oral Ruling on the Voir Dire

We have just completed a lengthy hearing on the voir dire. The Crown wants to call evidence which broadly falls into three categories:

- First, oral statements made by the accused to the police in answer to questions on the night of his arrest on 22 July 2000 and possibly running into the early hours of Sunday 23 July.
- Secondly, other statements made on 24 July in the course of a reconstruction of the crime and in answer to questions asked about the whereabouts of the stolen money.
- Thirdly, the traditional type of record of interview, charge form and so-called confession taken on Tuesday 25 July and recorded in writing.

The accused submits that none of this evidence should be admitted because it was obtained with force and threats of violence in breach of section 21 of the Evidence Act (Cap 15) or alternatively he submits that it should be excluded by the Court in the exercise of the Court's discretion under the proviso to section 22 of the Evidence Act.

The Crown accepted that it has the onus of establishing beyond reasonable doubt that the statements were not obtained in breach of section 21 of the Act. It called 5 police officers on the voir dire who were involved at different stages and to varying degrees in what I shall call the processing of the accused from the time he was arrested at his home on the night of Saturday 22 July until after he had made his confession statement on Tuesday 25 July 2000. They denied that anything untoward had happened.

With one or two exceptions which I suspect he may not have been aware of because his client had never relayed the information onto him, counsel for the accused very properly put his client's case to the various police officers who were called to give evidence and both the accused and his mother gave evidence. In summary, the accused's story was that:

- only one police car came around to his home that night;
- that among the officers who came to his home were constables Finau and Tonga;
- that he was not taken directly to the Mu'a police station but to the Vaini police station where he was stripped to his underwear, handcuffed, assaulted and verbally abused by Sergeant Naufahu and at least one other officer;
- that he was then taken to the Mu'a police station where he again was assaulted by Sergeant Naufahu and Constable Tonga and at one stage when the accused was seated cross-legged on the floor with his hands handcuffs behind his back, Constable Tonga stood on the handcuffs causing them to bite into his wrists resulting in severe pain and

> immediate swelling of his wrists and disfigurement of a bone in his right hand. The accused also described other alleged assaults by Constable Tonga including the officer standing on his left knee and pressing it downwards while he (the accused) was still squatted cross-legged on the floor with his hands handcuffed behind his back.

There was also a period during this "processing" when the accused was left sitting on the floor of a room in the police station completely naked and handcuffed. The accused described his treatment by the police as "torture". He said that they treated him like an animal and in the end he gave them the answers that they wanted to hear because he didn't want to get hurt any more.

The accused is aged 20. He was born in Tonga but has lived for some 17 years in the USA. His understanding of the Tonga language was limited, English being his main language. He is obviously an intelligent person and is very articulate. He expresses himself well. He knew his rights and on more than one occasion he asked to see a lawyer. That request was denied.

It is very easy for an accused who has made an incriminating statement to the police to have second thoughts about it later on and then try and challenge its admissibility under section 21 of the Evidence Act as having been given under duress or threats. The Court is ever mindful of that type of scenario and for that reason all evidence given on the voir dire needs to be scrutinised very carefully.

Some of the allegations made by the accused, I do not accept. I am satisfied, for example, that two police cars went to his home on the night of his arrest and I do not accept that Constable Tonga was one of the officers who was in attendance at that stage. Nor do I accept that they detoured to Vaini police station on the way back to Mu'a. One thing I do accept, however, is the evidence about the injuries the accused says he received to his wrists from the handcuffs.

The Crown's explanation for the injuries was that handcuffs will cause bruising and cuts into the skin if there is a lot of movement by the person wearing them. I do not accept that explanation as a reason for the injuries which the accused received to his right wrist in particular on the night in question. His mother described quite graphically how the wrist injuries appeared to her when she later saw the accused on a visit to the Mu'a police station. She wanted to get them examined by a doctor straight away. She told how she took the accused to hospital for x-rays after he was eventually released from police custody in early August 2000. An x-ray request form issued by the Tonga Medical Department on 4 August corroborated her evidence in this regard.

The outline of the injuries to the accused's wrists are still evident today almost 12 months later. All the evidence I have heard is consistent with the accused's account of what happened and of how Constable Tonga stood on the handcuffs deliberately to inflict severe pain on the accused.

Although the Crown called nearly all the police officers involved on the night of 22 July, it was significant that they never called Constable Tonga even though the accused's counsel had named him as the main culprit right from an early stage of his cross-examination of police witnesses.

In addition, I accept that the accused was subjected to the degrading experience of being left naked and handcuffed at the police station for a significant period of

time. Sergeant Naufahu told the court that he would have been left naked for at least quarter of an hour. No explanation was proffered by the police for this action.

Against the background, I am satisfied that any oral admissions obtained by the police breached section 21 of the Evidence Act and I exclude them for that reason — that includes any admissions made in the course of the demonstration or in answer to questions about the whereabouts of the stolen money.

Turning to the written statements taken on 25 July, I do not accept that the accused was beaten by Constable Siale at the time these statements were taken and I do not accept that they were obtained in breach of section 21 in the same way that the other apparent admissions were obtained. Counsel for the accused, nevertheless, submits in the alternative that the Court in the exercise of its discretion should reject these statements under the proviso to section 22 of the Evidence Act and he makes a point that they were taken in breach of the fourth principle laid down by Webster J in *R v Vaiangina* [1990] TLR 118 which says that after charges have been made, no questions about the offence should be put to the accused though he may, if he wants to, make a voluntary statement after a further caution.

In this case, not only had charges being laid prior to 25 July but the accused had actually appeared in the Magistrates' Court on 24 July in response to the charges. So the case certainly comes within the fourth principle Justice Webster spoke about but, nonetheless, if I was satisfied that the written statements were given purely voluntarily then I would, in the exercise of my discretion, allow them to be admitted into evidence.

On the one hand, it is tempting to conclude that being an articulate individual who knows his rights, the accused is not going to give a written incriminating statement to the police except on a voluntary basis. On the other hand, the fact is that he was still in police custody and he was still handcuffed at the time he gave the statements on 25 July - nearly three days after his arrest. He had appeared in the Magistrates' Court the previous day and there was no evidence of any trouble with him at that time or indeed at any time since his arrest.

I asked Crown counsel why the Crown considered that it was necessary to have handcuffs on the accused when he was being questioned on 25 July if the statement were being given on a purely voluntary basis as she had submitted. Her answer was "because of the nature of the offence". While I can accept, given the serious nature of the offence (abetment to a robbery that involved firearms) it may have been appropriate to have the accused handcuffed at the time of his initial arrest, without evidence that he had engaged in some violent acts or attempted acts of violence in the intervening period or some other sensible explanation, I cannot accept that the nature of the offence, in itself, entitled the police to still have the accused handcuffed some three days after his arrest.

I am, therefore, driven inexorably to the conclusion that the only reason the handcuffs were still on the accused at the time the written statements were obtained was to intimidate him and to remind him that at any time the police could do again to him what Constable Tonga had done to his wrists on the Saturday night. It is not without significance that as soon as he gave his written statements to the police on the 25th, the handcuffs were removed.

For these reasons, I am left in doubt about the voluntariness of the written statements given by the accused to the police in the various documentation completed on 25 July. The Crown's obligation was to remove any such doubt from my mind. It

has not done so and, in the exercise of my discretion under the proviso to section 22 of the Evidence Act, I disallow the various written documentation. The outcome of this voir dire hearing is that all the statements made by the accused which the Crown seeks to rely on are ruled inadmissible.

R v Makahununiu

Supreme Court, Nuku'alofa
Ford J
Cr 195/2000

6, 7, 8, 13, 14 June 2001; 6 July 2001

Criminal law – abetment – defence of duress – accused acquitted

On 21 July 2000 there was an armed robbery at the Tatakamotonga branch of the Western Union office. The robbery was committed by Sefo Moala. The evidence was that some $5950 in Tongan currency was stolen. Moala was apprehended later that same day and charged with robbery and unlawful possession of a firearm and ammunition. He pleaded guilty on both counts and on 12 June 2001 he was sentenced by Chief Justice Ward to a total term of imprisonment of 11 years. Two days later he was called as the Crown's principal witness in the case against the accused, Sitaleki Makahununiu, who is charged with abetting Moala in the robbery. It was submitted that the accused abetted in the commission of the Western Union office robbery by driving the getaway vehicle for Moala.

Held:

1. If the Court were satisfied the accused became aware that an armed robbery had just taken place inside the Western Union office but still voluntarily elected to remain with the principal offender and drive the getaway car then the Court would be bound to enter a conviction of abetment even though the accused had no prior knowledge of the robbery.
2. The fact that Moala put the gun to the accused's face to get him to start the car gave rise to the defence of duress.
3. The prosecution did not establish beyond reasonable doubt that the defence of duress could not be made out.
4. The accused was acquitted and discharged.

Cases considered:

DPP v Lynch [1975] AC 653
R v Funaki [1999] Tonga LR 256
R v Tukia [2001] Tonga LR 22
R v Turanga [1993] 1 NZLR 685

Statutes considered:

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

Counsel for Crown : Miss Simiki
Counsel for accused : Mr Tu'utafaiva

Judgment

On 21 July 2000 there was an armed robbery at the Tatakamotonga branch of the Western Union office. The robbery was committed by one, Sefo Moala. The evidence was that some $5950 in Tongan currency was stolen.

Moala was apprehended later that same day and charged with robbery and unlawful possession of a firearm and ammunition. He pleaded guilty on both counts and on 12 June 2001 he was sentenced by Chief Justice Ward to a total term of imprisonment of 11 years. Two days later he was called as the Crown's principal witness in the present case against the accused, Sitaleki Makahununiu, who is charged with abetting Moala in the robbery. In the particulars it is alleged that the accused abetted in the commission of the Western Union office robbery by driving the getaway vehicle for Moala.

I say at once that I found Sefo Moala to be a co-operative and truthful witness. He appeared to have accepted the enormity of what he had done and he is now resigned to serving the long prison sentence. He had a story to tell and I am satisfied that his account of what took place was given without embellishment or rancour.

He told the court that he was 32 years of age and he had lived for some 24 years in Hawaii. In 1998 he returned to Tonga from Hawaii. Moala's account was in reality the Crown's case. At about 10 a.m. on the morning of 21 July 2000, Moala approached a local rental car dealer and persuaded him to give him the key to a late model Toyota so that he could start the motor and check it out. He then, as he put it, "took off in the car without permission" and drove it to a bush road where he removed both licence plates from the vehicle. He had with him a bag in which he had some items of clothing. One of the items was a beanie hat which Moala had converted into a head mask by cutting out eye and mouth holes. Also in the bag was a .38 special pistol revolver with a revolving drum magazine capable of holding up to five bullets. After he ripped the licence plates off the car, Moala loaded the drum magazine of the gun with 5 live bullets and raised the cock of the pistol so that it was ready for firing. The gun remained in that cocked position throughout the subsequent robbery and getaway.

Moala then drove the car back out onto the main road and headed east towards Tatakamotonga. When he reached the village of Vaini he noticed the accused, who he knew only as "Leki" on the side of the road. He had known Leki to talk to for about a month because he was a friend of his first cousin and he was aware that Leki had recently returned to Tonga from the USA. He stopped the car on the side of the road and asked Leki if he wanted to go and have some beer with him and Leki accepted the offer. Moala suggested Leki get into the car and he continued driving east. At some point Leki asked where they were going and Moala told him that they were going to the Western Union office at Tatakamotonga to pick up some money that he was receiving from the States. When they arrived outside the office Moala parked the car and, without giving any reason, told Leki to jump into the driver's seat. He walked into the building carrying his small bag.

Moala then gave the court a rather graphic description of how he committed the robbery. His account was consistent with the evidence given earlier by the Western

Union Clerk on duty that day, Emele Petelo. She said that she was the only person in the office at the time, which was about 1.15 in the afternoon and she had not noticed Moala enter the building. She said that when she first looked up and saw him wearing the beanie mask, dark sunglasses and pointing a pistol towards her she thought that he was just joking and so she said "Hello". Moala said "she then freaked out, put her hands in front of her face and started screaming." Emele's evidence was that while she still had her hands up to her face she opened her eyes and saw Moala take the money from her tray, shove it into his bag and then run out to the car. She followed a short time later and tried to read the licence plate number as the car drove off but the plates, of course, had been removed. She said that she returned to her office and just felt numb — the fear, as she put it, came later.

After the robbery the car was driven to the outskirts of the village of Kolonga and abandoned on a bush track. An eyewitness observed the car being abandoned and noticed Moala and the accused then walk towards Kolonga. Moala said that when they reached the main road they waited for a bus and when it came along they climbed aboard and he sat down and counted out $500 from the money he had in his bag. He then went up to where the accused was sitting and stuck the money in one of his pockets and he yelled out to the bus driver to stop the bus and he got off at Kolonga. The accused carried on riding in the bus towards his home in Vaini. Another witness who got on the bus a short time later said that he sat beside the accused, they exchanged pleasantries and he noticed that the accused seemed "very happy" and he was looking around.

For his part, Moala said that he went and talked to some guys at Kolonga who knew him and he knew their faces but not their names and he bought them beer. After a while he told one of them that he would give him $20 if he would run him into town in his vehicle. The other person agreed but on the way they encountered a police road block outside the Vaini police station. Moala said that all the cars were being pulled over to the side of the road and stopped but he guessed that police officer stopping the vehicles must have known the driver of his car because he just waved them on. Moala's luck was not to hold, however, and he was apprehended later that same day.

The police recovered $2486 of the stolen money. The whereabouts of the remaining $3464 apparently remains a mystery.

It is against that background that the Crown invites the court to find the accused guilty of abetment in the robbery. It was implicit in the way the case was presented that the Crown accepted that the accused had no knowledge of Moala's intention to commit the robbery prior to when Moala entered the Western Union office. The Crown's case, however, was that even accepting the lack of complicity at that point in time, as soon as the accused heard the Western Union woman's scream he would have known that Moala had committed the robbery and, if he had wanted to, he could then have driven off but he elected to stay and drive the getaway car to Kolonga — hence in the Crown's submission the accused in a very real way aided and abetted in the commission of the robbery.

As with any criminal case the onus remains on the Crown throughout to prove each element of the offence beyond reasonable doubt. The accused does not have to prove anything and he does not have to give evidence. The accused in this case elected not to give evidence apart from on the voir dire and at the end of that trial within a trial, I upheld his objection to the admissibility of certain police evidence for reasons which were fully canvassed in my oral ruling.

At the end of the Crown case, Mr Tu'utafaiva, counsel for the accused, made a number of submissions in support of his plea for an acquittal. His principal submission was that the charge of abetment was misconceived because the robbery had been completed as soon as Moala had finished putting the stolen money into his bag. Counsel submitted that if Moala had been apprehended at that stage then he could have been charged with robbery but the accused could not have been charged with abetment in the robbery because he knew nothing about it at that point in time. Counsel further submitted that the accused should never have been charged with abetment in the robbery because the robbery had been completed before the accused knew anything about it. Mr Tu'utafaiva submitted that section 8 of the Criminal Offences Act (Cap 18) does not recognise an accessory after the fact as being an abettor.

At common law an accessory after the fact is a person not present at the time and place of the commission of the offence who, knowing that an offence has been committed, does some act which has the potential to assist the criminal to evade justice. An abettor, on the other hand, is a person who is 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 argument advanced by counsel for the accused in this case was that because the robbery offence had been committed at the point in time that the principal offender placed the Western Union money inside his bag, the accused, who did not at that point know that an offence was being committed, could not be guilty of abetment of the robbery.

A similar argument was considered and rejected by Finnigan J in *R v Funaki* [1999] Tonga LR 256. In that case the principal offender committed the crime of theft by uprooting kava plants and carrying them to the roadside. He then went and arranged for the accused to come in his car and help the principal offender by transporting the stolen goods.

In the court below, the magistrate had held that the crime of theft had been completed before the accused had become involved and hence that he was not guilty of abetting the crime under section 8 of the Criminal Offences Act. On appeal the learned judge rejected that finding and held that by transporting the stolen goods the theft was still going on even though all the ingredients of theft had been present for some time.

In *R v Tukia* [2001] Tonga LR 22, Ward CJ reached a similar conclusion in a case where, although the accused had not been involved at the scene of the armed robbery attack on a delivery van driver, he later participated in the disposal of the van and its contents and it was held that that action was sufficient to render him guilty of abetment of the armed robbery under section 8 of the Criminal Offences Act.

Mr Tu'utafaiva made special mention of the situation in New Zealand where a secondary party who is not an abettor can still be convicted of being an accessory after the fact. The point he made was that the driver of a getaway car might well be an accessory after the fact but there was no such offence under the criminal code in

Tonga. But an examination of the New Zealand cases reveals that even those authorities are unhelpful to Mr Tu'utafaiva's submissions on the time factor.

In *R v Turanga* [1993] 1 NZLR 685, which was a bank robbery case, the question that arose was whether the acts of the driver of a second car (as opposed to the getaway car) used to complete the escape could be sufficiently proximate and contemporaneous to constitute aiding. Counsel had conceded (a concession "properly made", the court held) that the driver of the getaway car was liable as a party "even though, when the robber enters that car, the crime is complete because the actus reus of the robbery was concluded when the money was removed from the safe or from the teller and passed into the hands of the robber."

Williams J., after considering the authorities and the dictionary definitions of the word "contemporaneous," concluded that it did not mean at exactly the same time that the principal offence is completed and he rejected a submission that assistance given by the driver of the second car to the principal parties after they had committed the aggravated robbery did not constitute aiding and abetting but instead gave rise to liability as an accessory after the fact. At page 690, the learned Judge said:

> "As Holmes J. once said, "elusive exactness is a source of fallacy throughout the law … The fallacy in the present submission is to focus too strongly on the exact time the main offence was completed and ignore the primary question of whether the accused has done or omitted an act for the purpose of aiding any person to commit the offence."

Applying the approach adopted in those cases to the facts of the present case, it seems to me that if I were satisfied the accused became aware that an armed robbery had just taken place inside the Western Union office but still voluntarily elected to remain with the principal offender and drive the getaway car then I would be bound to enter a conviction of abetment even though the accused had no prior knowledge of the robbery.

The Crown's case is that the accused heard the woman inside the office scream and at that point he should have known that a robbery was taking place. There was no evidence that the accused had, in fact, heard the scream. There was evidence from two women in the vicinity that they had heard the scream but the accused was sitting in a late model car and there was no evidence as to whether the windows were open or closed or whether the car radio was on or off and, even if the accused had heard the scream, there is no evidence that he would have associated it with the Western Union office. There were other offices in the Western Union building and there were other houses and people in the vicinity. This is a criminal case and I cannot base a conviction on speculation.

The Crown is on much stronger ground, however, in its submission that when the accused saw Moala running out of the building with his mask still over his face, waving a gun and carrying the bag he must have realised that a robbery had been committed. The Crown submitted that a crucial factor confirming that the accused was aware of what had happened is what was called "the profanity" which the accused uttered to Moala just before Moala got into the car.

A closer look at this part of the evidence is now called for because it gives rise to a new issue which was not fully explored in submissions before me but, nonetheless, is an issue which clearly arises from the Crown's own evidence. It is a

question of whether the accused, with the knowledge of Moala's criminal purpose, nevertheless, voluntarily elected to assist him by driving the getaway car or whether he was acting under compulsion sufficient to give rise to the defence of duress.

The element of compulsion arises out of the following passage of evidence which I set out in full. It is Moala's description of what happened after he left the Western Union office:

> *"I just ran out and went to the car and I saw Leki in the driver's seat and when I got closer I screamed at Leki, I just yelled at him to start the car but then Leki freaked out himself as I could just tell by the expression on his face that he was freaked out and when I got to the car the car was still not yet started then I pulled out the gun. I then put it to his face but I just put up the gun to my belly and then as a way of me -- that was my intention to intimidate him so that he would start the car and takeoff when I get in 'cause he said, before I did that, a profanity. "*

Moala agreed to write down the "profanity". The words the accused had used were, *"what the fuck you're doing?"*

In cross-examination Moala was asked whether he still had the gun cocked ready to be fired after the robbery. His answer was:

> *"Yes, I had it on all the time even when trying to get Leki to drive the car I had it cocked the whole time."*

Moala was asked in evidence in chief what happened when they reached Kolonga. He replied:

> *"We parked the car and he (the accused) got out and walked away. I called him to come back. I knew I intimidated him."*

*Halsbury's Laws of England***,** 4th ed, vol 11 (1), para 24 refers to "duress; compulsion" in these terms:

> *"Duress provides a defence to a charge of any offence other than murder and some forms of treason. Duress postulates the existence of threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance to the doing of acts which would otherwise be criminal ... the accused must show a proper foundation for the defence so that the issue is fit and proper to be considered by the jury; once this is done, it is for the prosecution to establish beyond reasonable doubt that the defence is not made out."*

On my analysis, the factors which the Crown rely upon to establish knowledge of the robbery and, hence, guilt of abetment of the robbery, such as the woman's scream, the running from the building by Moala while still wearing the mask and holding the gun and bag are all equivocal. The accused may or may not have heard the scream. If he did, then he may have been puzzled as to where it came from or what it meant. Similarly, his first reaction seeing Moala running from the building still wearing the mask and holding the gun and bag might well have been one of puzzlement or it may

have been similar to that of the Western Union lady who told the court that she thought Moala was "just joking". The car was parked close to the entrance to the building and the accused, therefore, would have had only a very short time to try and work out what was going on.

If the accused did have doubts about what was happening then the reality would quickly have started to crystallise when he heard Moala screaming at him to start the car. The fact that the car's engine was not already running is a telling point. Moala said that he had to put the gun to the accused's face to get him to start the car.

On any view of the facts, that action must give rise to the defence of duress. The Crown submitted that as the accused was in charge of the "steering wheel" he could still have driven the car to the Mu'a police station nearby or he could have opened the door and got out, but with a cocked gun pointed at his face it was no time for heroics on the accused's part. As Lord Morris said in *DPP v Lynch* [1975] AC 653 at 670:

> *"In the calm of the court-room measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well disposed."*

I do not accept that the car drove off at a "very high speed" as the Crown, in submissions, alleged. Moala was asked to describe the speed the car was driven at and he replied:

> *"I would not like to say. My intention was not to speed, my intention was to get away. We were just on the average. I was not paying attention to the speed because my intention was to get away."*

Another eyewitness told how, immediately after the robbery, she tried to call out and attract the attention of two police officers who were operating a speed camera a little further along the road. Given the likely deterrent effect of the presence of a speed camera, I would need very strong counter evidence indeed before I would be prepared to conclude that the getaway car took off at anything other than an average speed.

The accused is perhaps fortunate that he is not facing a charge in respect of the $500 which Moala apparently placed in his pocket but there may well be a sound reason for that, not least of all the requirement in section 126 of the Evidence Act (Cap 15) that would prevent the accused from being convicted upon the testimony of Moala (an accomplice) unless his evidence was independently corroborated.

The accused might also be morally criticised for not getting off the bus and reporting the robbery at the nearest police station but the failure to report a crime to the police is not a criminal offence.

The Crown made some point in closing submissions about the evidence from the witness on the bus from Kolonga who sat by the accused and described him as appearing "very happy." The court was invited to accept this evidence as an indication that the accused had been happy to facilitate in the commission of the robbery by driving Moala away from the scene. I am not prepared to draw the conclusion the Crown invites from this evidence. If the accused was "very happy", as alleged, an equally plausible explanation could have been just the sheer exhilaration of having survived the ordeal unscathed or perhaps simply the relief of finally being

free from the clutches of, what must by then have seemed to him to be, a crazy, mixed
310 up, dangerous individual.

In short, I see nothing in the accused's conduct which is inconsistent with his having acted at all material times under duress or, to express it in terms of the burden of proof, the prosecution has not established to my satisfaction beyond reasonable doubt that the defence of duress cannot be made out.

The accused is acquitted and discharged.

Langi v Lafo'ou

Land Court, Nuku'alofa
Ford J
L 1379/99

27, 28 March, 2 May 2001; 11 June 2001

Land law – succession rules – not to younger brothers
Natural justice – breach thereof – no opportunity to answer concerns

The original landholder was 'Otutoa who died in 1960. His widow, Litia, then held a life interest in the 'api until she died in 1989. The daughter of the landholder then wanted to establish title to the 'api in her second son's name, Tevita. After inquiries it was found that 'Otutoa's eldest brother, 'Aholo, had a son, Finau Folau, who was still alive at the time of Litia's death. Under the provisions of the Land Act (Cap 132) relating to the devolution of allotments, Finau Folau, as the eldest male heir of the body of the deceased holder's eldest brother, 'Aholo, was the person entitled to succeed to his late uncle's estate and on 16 March 1990 he swore an heir's affidavit deposing that he was the rightful heir to the allotment "Polata'ane". In 1991 Finau Folau died before the allotment had been registered in his name. His son elected to take his father's estate rather than "Polata'ane". Tevita's application for a deed of grant to be issued to him was then resurrected. Proof of age was obtained and on 23 July 1991 the plaintiff paid the necessary survey fees. On 27 February 1992 Hon Fakafanua wrote to the Minister of Lands in Nuku'alofa and advised him of Finau Folau's death and instructed him to proceed with the registration of the deed of grant in the name of the plaintiff. On 28 May 1999 the Minister of Lands issued a deed of grant to Sipanisi Lafo'ou, Tevita's second cousin. Tevita sought orders from the Court cancelling the deed of grant issued to Sipanisi and requiring the Minister to issue a new deed of grant to himself.

Held:

1. Under the Land Act, neither Sipanisi nor his father had any entitlement under the succession rules to the allotment in this case. Succession in this case ended with Finau Folau. The chain did not extend to any of the younger brothers and so Sipanisi had no heir's entitlement under the Act.
2. The Court found that the Hon Fakafanua when acting both as deputy Minister of Lands and later, upon his appointment as Minister of Lands, gave assurances to the plaintiff through his mother that his application had been approved and that the allotment would be lawfully granted to him. When he gave those assurances the Hon Fakafanua was fully aware that

there had initially been an heir to the property but, in his mind, that complicating factor had resolved itself when Finau Folau's son elected to take his father's allotment rather than "Polata'ane". The subsequent grant of the allotment to Sipanisi was in breach of the clear assurances which the former Minister had given that the grant would be made to the plaintiff.

3. Under the Land Act the estate holder was bound to grant an allotment to an applicant whose application the Minister had approved subject to the estate holder's right to have the matter reviewed by the Land Court any time within three months of the formal making of the grant. There was no provision that authorised an hereditary estate holder to give a direction to a Minister to cancel an application that had been approved by a former Minister and it was an error of law for the Minister to act on the direction and order the cancellation of the plaintiff's application.

4. The Court found that there had been a breach of natural justice. If there was concern about what the land representative had said to the estate holder away back in 1990 then the plaintiff and his mother should have been given an opportunity to answer those concerns; as they were not, that failure amounted to a breach of natural justice.

5. The plaintiff succeeded in his claim and the Court made an Order setting aside the registration of the first defendant as grantee of the allotment and directing the Minister of Lands to issue a new deed of grant in the name of the plaintiff. The plaintiff was entitled to costs in the action against the Crown.

Cases considered:

Hafoka v Mokofisi (Land Court, L 1202/96, 23 June 2000, Finnigan J)
Hakeai v Minister of Lands [1996] TLR 142 (CA)
Kilifi v Heimuli [1998] Tonga LR 247

Statute considered:

Land Act (Cap 132)

Counsel for plaintiff : Mr Fakahua
Counsel for second defendant : Ms Simiki

Judgment

On 28 May 1999 the Minister of Lands issued a deed of grant to Sipanisi Lafo'ou in respect of a tax allotment on the Island of Foa in the Ha'apai Group. The plaintiff in this proceeding, 26 year-old Tevita Langi, is Sipanisi's cousin. He seeks orders from this Court cancelling the deed of grant issued to Sipanisi and requiring the Minister to issue a new deed of grant to himself. It is a case where the relatives have fallen out over the land dispute. The plaintiff's mother referred to the relatives as "enemies".

The plaintiff, Tevita, was the first witness in the case. He said in evidence that he was too young at the relevant time to be able to give reliable evidence about the relevant background to the case but he indicated to the Court that his mother would

be giving evidence on all those matters. He confirmed that he has been looking after the land in question and it is presently being used for the grazing of his stock.

The plaintiff's mother, Monu'ia Langi said that the api in dispute had belonged to her late father, 'Otutoa Pahulu, and it was known as "Polata'ane". She said that it was a very special piece of land and it meant a great deal to her and her family because in 1918 it had been gifted to her father by the late Queen Salote as an "api to" in appreciation for the services he had provided at Her Majesty's wedding the previous year. 'Otutoa had supplied the boat and carried all the food from the citizens of Foa to the village of Pangai on the main island of Lifuka where the wedding feast was held. 'Otutoa subsequently became the town officer. He died in 1960.

Monu'ia said that her father had married three times. From the first marriage there was a son who died without issue and a daughter, Uluaki, who lived in the States but she did not have any male issue. There was no issue from 'Otutoa's second marriage and Monu'ia was the only issue from her father's third marriage to Litia. After 'Otutoa's death in 1960, Litia then held a widow's life interest in the api until her death on 8 June 1989. This case is concerned with what happened after Litia's death.

The day after Litia's funeral Monu'ia went to the office in Ha'apai of the Governor and deputy Minister of Lands, Hon Fakafanua, and made inquiries about having title to her late father's api granted to her second son, the plaintiff. As Tevita was not yet 16 years of age, however, she was advised to make the application in the name of her eldest son, Hiliau. She followed this advice but subsequently, after Tevita turned 16, the application was, again on the Governor's advice, changed back into Tevita's name.

Armed with the application form from the Governor's office, Monu'ia then set out to obtain approval to the grant of the 'api from the Tongatapu based estate holder. This process took time. The hereditary estate holder was the late Hon Tu'ipelehake. Initially he told her to return to Ha'apai and bring the land representative down to see him. Monu'ia dealt with the land representative in Ha'apai, Kelepi Tamale, and in September 1990 she traveled back to Tongatapu with Kelepi to meet again with Tu'ipelehake. Tu'ipelehake signed the plaintiff's application for a grant on 6 September 1990 and it was witnessed by his land representative. Monu'ia then returned to Ha'apai but when she took the completed application form into the Governor's office for processing she was told by one of the clerks in the office that they had received a telephone call to advise that the application was unlawful.

To understand why the application was alleged to be unlawful, it is necessary to go back to the family tree which was produced in evidence by the plaintiff.

Monu'ia's father 'Otutoa had been the holder of the api. He had one son who had died without leaving issue but 'Otutoa had several brothers, all of whom also predeceased his widow, Litia, but some of his brothers did have issue who were still alive at the time of Litia's death. 'Otutoa's eldest brother, 'Aholo, had a son in this category called Finau Folau.

Under the provisions of the Land Act (Cap 132) relating to the devolution of allotments, at the time of the widow's death in June 1989, Finau Folau, as the eldest male heir of the body of the deceased holder's eldest brother, 'Aholo, was the person entitled to succeed to his late uncle's estate and on 16 March 1990 Finau Folau swore an heir's affidavit deposing that he was the rightful heir to the allotment "Polata'ane".

That was the background to the allegation of illegality. Monu'ia had been aware that Finau Folau claimed to be the heir to the api but she was obviously either not

familiar with the relevant provisions of the Land Act or not prepared to accept the legal position and she was unwilling to accept Finau Folau's entitlement. She and Finau Folau were not on speaking terms over the matter.

It appears that when Hon Tu'ipelehake signed the plaintiff's application form in September 1990 he had no knowledge of Finau Folau's heir's claim. He was simply told by his land representative that there was no existing heir. Whether or not there was an heir to the allotment was undoubtedly a critical factor which the land representative should have been aware of.

The land representative, Kelepi Tamale, gave evidence but he is now 76 years of age and understandably his recollection of events that happened some eleven years ago was somewhat vague. It appears, however, that based on what he had been told by Monu'ia, he was satisfied that there were no heirs to the property and that Monu'ia's son Tevita, as the grandson of the former titleholder, was the appropriate person to be issued with the deed of grant. This was puzzling because it also appears that at least two other relatives including 'Aholo the father of the first defendant in this case, also attended the meeting with Hon Tu'ipelehake but they waited outside the room while the estate holder signed Tevita's application form. The estate holder had even inquired as to who the men were.

Unfortunately, I must conclude that the land representative did not make adequate inquiries at the time and if he had done so, and if he had been familiar with the relevant provisions of the Land Act, then he would have known that he should not have been asking Hon Tu'ipelehake to sign the plaintiff's application form. Tamale should have known that Finau Folau had completed an heir's affidavit. Even if Monu'ia had wrongfully withheld this information from him it is something that he could and should have ascertained from even very basic questioning of 'Aholo or the other relatives who had traveled down from Ha'apai for the meeting.

In all events, officials in the land office immediately became aware that there were two competing claims to the allotment but they also realised, quite properly, that in terms of the succession provisions in the Land Act, recognition could only be given to Finau Folau's claim. They therefore proceeded to put the plaintiff's application to one side while they continued processing Finau Folau's application. It turned out that Finau Folau already had a tax allotment registered in his name and that became a complicating factor because under the Land Act he was permitted to hold only the one tax allotment but that problem was, apparently, being worked through.

Then on 15 March 1991, in terms of this narrative, a very significant development occurred — Finau Folau died. He died before the allotment had been registered in his name. Monu'ia said that after Finau's death she went with his son, Siale Folau, to the Governor's office and the Governor told him that he then had to choose between succeeding to his father's api or to the allotment which is the subject of this proceeding. She said that Siale elected to take title to his father's api and that then left the way open for her son's application to be processed.

The Hon Fakafanua gave evidence. Although, perhaps understandably given the lapse of time, he could not recall the specific meeting with Monu'ia and Siale, he certainly recalled there being the two competing applications for the same api; he recalled Finau Folau's death and then the election by Siale to take his father's estate.

After Finau Folau's death and Siale's election to take his father's api, it appears that Tevita's application for a deed of grant to be issued to him was then resurrected. Proof of age was obtained and on 23 July 1991 the plaintiff paid the necessary survey

fees. On 27 February 1992 Hon Fakafanua wrote to the Minister of Lands in Nuku'alofa advising him of Finau Folau's death and instructing him to proceed with the registration of the deed of grant in the name of the plaintiff.

Viliami Tupou, deputy registrar of Lands at Ha'apai, gave evidence and he confirmed that from records held at the office, it appeared that at the time Hon Fakafanua wrote his letter to the Minister of Lands on 27 February 1992 requesting the deed of grant to be issued to the plaintiff, the processing of the plaintiff's application had been completed and he said, in evidence which I accept, that normally in that situation he would have expected the deed of grant to be issued to the plaintiff in about 1993/94.

Hon Fakafanua told the Court that he was appointed Minister of Lands in 1993 and he held the position for several years. Initially after his appointment he was under the impression that everything relating to the plaintiff's application had been completed and he assumed that the plaintiff had received the deed of grant to the allotment. Unfortunately for the plaintiff, it was not that simple.

Monu'ia's evidence, which I accept, was that on a number of occasions over the years she called at the Governor's office in Ha'apai and checked with both the Hon Fakafanua and his clerk as to whether the deed of grant had yet been issued in her son's name but invariably she was told that the office was awaiting advice or instructions "from Tonga". She even saw Hon Fakafanua when he visited Ha'apai after his appointment as Minister of Lands and on one of those occasions she recalled him telling the clerk to follow the matter up with "Tonga" but still nothing happened. Hon Fakafanua recalled Monu'ia's visits but he could offer no explanation for the delay in registration of the plaintiff's application. He said that normally when he wrote to Tongatapu (the Minister's office) instructing them to proceed with a registration, they acted immediately on his instruction. In this case, however, "Tonga" was silent.

Unfortunately, there is a complete gap in the evidence as to what happened to the plaintiff's application between February 1992 and the end of 1996. For some reason, which has not been satisfactorily explained to the Court, it appears that during this period the application simply remained filed but unactioned somewhere in the lands office at Nuku'alofa. The next development came towards the end of 1996. Monu'ia heard rumours that the api had been transferred into the name of Sipanisi Lafo'ou (the first defendant). When she inquired at the Governor's office she found that the transfer had not yet taken place but there certainly was an application on file from Sipanisi dated 25 September 1996 which had, like the plaintiff's application, been signed by the hereditary estate holder, Hon Tu'ipelehake. The estate holder had signed the application form on 19 October 1996.

Monu'ia then described the steps she took to try and stop Sipanisi's application from being processed. This included having an obviously somewhat heated conversation with Sipanisi's father, 'Aholo, and subsequently causing a solicitor's letter to be forwarded to the Governor. Her actions, however, were of no avail. A deed of grant in the name of Sipanisi Lafo'ou was eventually issued on 28 May 1999.

Sipanisi is related to the plaintiff. The family tree produced by the plaintiff showed that the landholder, 'Otutoa, had one sister and five brothers. The eldest brother was 'Aholo (the same name as Sipanisi's father). 'Aholo's son was Finau Folau who died in March 1991. 'Otutoa's second and third brothers had died earlier without

any issue but his fourth brother, Lafo'ou, had left issue, including a son, 'Aholo, who was Sipanisi's father.

In other words, to put the relationship in context, the first defendant, Sipanisi, is 'Otutoa's (the landholder's) great nephew whereas the plaintiff, Tevita, is 'Otutoa's grandson.

Under the Land Act, neither Sipanisi nor his father had any entitlement under the succession rules to the allotment in this case. The decision of Ward CJ in *Kilifi v Heimuli* [1998] Tonga LR 247, makes it clear that succession in this case ended with Finau Folau. The chain did not extend to any of the younger brothers and so Sipanisi had no heir's entitlement under the Act.

On 17 June 1997 the hereditary estate holder wrote to the Assistant Registrar for Lands at Ha'apai. It was an important letter. It began by referring to a letter he had received from the assistant registrar dated 11 February 1997 (which, unfortunately, was not produced). The letter from the estate holder read:

> *"17 June 1997*
>
> *Dear Sir,*
>
> *I have received your letter LSNR 2'2'97 dated 11/2/1997.*
>
> *The letter referred to the allotment formally held by the now deceased widow Litia 'Otutoa of Faleloa. I would like to let you know through this my letter that it is my wish that the application by Tevita Niuafe Langi be cancelled. I accepted that application on 6 September 1990 through incorrect information from the estate holder's representative who informed me that there was no existing heir while there was. Therefore, if the heir refuses to claim entitlement to this entitlement, it is now therefore reverted to the estate holder. I accepted Sipanisi 'Aholo's with the understanding that Tevita Niuafe Langi's application has already been cancelled, according to the letter to you from the Office at Nuku'alofa.*
>
> *Therefore the application by Tevita Niuafe Langi is now cancelled and the application by Sipanisi 'Aholo now stands.*
>
> *Sgd Hon Tu'ipelehake."*

Hon Tu'ipelehake confirms in that letter that he had accepted Sipanisi 'Aholo's application on the understanding that the plaintiff's application had earlier been cancelled but that was not correct. This fact was confirmed in a subsequent letter produced in evidence dated 17 August 1998 from the Minister of Lands which said in part:

> *"According to the Assistant Registrar for Lands at Ha'apai (Maka Taungatu'a) the former Governor of Ha'apai, Hon Fakafanua has never agreed to the cancellation of the first application (by Tevita Niuafe Langi) ..."*

The plaintiff's application had not been cancelled, it had simply been lying dormant in the Lands Office at Nuku'alofa for several years.

In his letter of 17 June 1997, the estate holder asks the assistant registrar to cancel the plaintiff's application and to proceed with Sipanisi's application. Despite protest by the plaintiff's mother this action was taken. The plaintiff's application was eventually cancelled on 4 February 1999 and the deed of grant was issued to Sipanisi on 28 May 1999. The Court is now being asked to cancel the deed of grant issued to Sipanisi and to order the Minister to issue a new deed of grant to the plaintiff.

The legal position, which has been stated many times by this Court, is that once a valid deed of grant is registered in accordance with the Land Act then it is final unless registration has come about as a result of an error of law (ie: it is 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.

In this case counsel for the plaintiff submitted that the only explanation for the lengthy delay in the processing of the plaintiff's application and for its eventual cancellation could be fraud and indeed that concession was made by one of the plaintiff's witnesses, Sione Leki, who has had some sixteen years experience with the Ministry of Lands, including two years stationed at the Ha'apai office. Fraud is a serious charge and the Court is unwilling to make a finding of fraud unless it is strictly proved. I say at once that I do not find any evidence to support a charge of fraud in this case and I do not accept the submission.

I have, nevertheless, reached the conclusion that virtually all of the other elements that can potentially defeat a registered deed of grant do, to a greater or lesser extent, exist in the present case.

First, I have no doubt on the evidence that the Hon Fakafanua when acting both as deputy Minister of Lands and later, upon his appointment as Minister of Lands, gave assurances to the plaintiff through his mother that his application had been approved and that the allotment would be lawfully granted to him. When he gave those assurances the Hon Fakafanua was fully aware that there had initially been an heir to the property but, in his mind, that complicating factor had resolved itself when Finau Folau's son elected to take his father's allotment rather than "Polata'ane".

After the election had been made in about March 1991, so far as Hon Fakafanua was concerned, the plaintiff was the appropriate titleholder. He arranged for the plaintiff's application to be duly processed and he wrote to the Minister's office in February 1992 with his instructions for the deed of grant to be issued in the plaintiff's name. As he told the Court, thereafter he assumed until he found out otherwise, that his instructions had been carried out and that the plaintiff was the new titleholder to the allotment. When Hon Fakafanua gave the assurances in his capacity as deputy Minister of Lands, they carried the same force, by virtue of the provisions of section 21 of the Land Act, as the assurances he later gave when he was Minister.

I have no difficulty in concluding on the facts of this case that the subsequent grant of the allotment to Sipanisi was in breach of the clear assurances which the former Minister had given that the grant would be made to the plaintiff.

Secondly, on 17 June 1997 the hereditary estate holder wrote to the assistant registrar for Lands in Ha'apai purporting to cancel the plaintiff's application and this request was duly acted upon but there is no procedure in the Land Act allowing an estate holder to cancel an application for an allotment that had been approved by the Minister and the plaintiff's application, as I have found, had several years earlier been

so approved. In terms of the succession provisions set out in some detail in the Land Act, the hereditary estate holder, apart from having to be consulted by the Minister, has very little say in the devolution process. The legal position was aptly summarised by Finnigan J in the recent unreported decision of *Hafoka v Mokofisi* (Land Court, L 1202/96, 23 June 2000):

> *"Where the land is on an hereditary estate, as became apparent in* 'Ameleki*, the rights and the role of an hereditary estate holder in the process of allocating land are limited ... Upon reversion ... it is still the Minister who once again allocates the allotment. The allotments of estates otherwise devolve in a clearly defined pattern that is set out in Part IV Division VII of the Act, Ss 80-88. The only persons involved in succession to allocated allotments are the family of the land holder and the Minister. The Minister is bound by the Act and his actions are subject to the approval of the Cabinet."*

Under section 34 of the Land Act the estate holder is bound to grant an allotment to an applicant whose application the Minister has approved subject to the estate holder's right to have the matter reviewed by the Land Court any time within three months of the formal making of the grant.

There is no provision in the Land Act authorising an hereditary estate holder to give a direction to a Minister to cancel an application that had been approved by a former Minister and it was an error of law for the Minister to act on the direction and order the cancellation of the plaintiff's application.

Thirdly, in my view, the facts of this case give rise to a very serious and fundamental breach of the principles of natural justice. The plaintiff had had a valid application which had been approved by the Minister, awaiting formal registration in the Lands office for a number of years. Without any consultation whatsoever, a subsequent Minister then proceeded to cancel that application and issue a deed of grant to the first defendant who, in the context of the whole history of the case, can only be described in colloquial terms as very much a "Johnny come-lately".

The natural justice principle has been well expressed in the following passage from the judgment of the Court of Appeal in *Hakeai v Minister of Lands* [1996] TLR 142:

> *"It is clear law that a person whose rights, interests or legitimate expectations are imperilled by an official's consideration of some other person's application will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made. This is what is known as natural justice. Here, Mauao ... was not given any opportunity to argue that he should have priority before the purported grant was made to the appellant. That was legally wrong. If he had been given the right to comment, this whole matter might well have ended then. It is to enable both sides of the case to be considered that the principle of natural justice exists."*

The same principles apply, a fortiori, to the facts of the present case. If there was concern about what the land representative had said to the estate holder away back in

1990 then the plaintiff and his mother should have been given an opportunity to answer those concerns. They were not and the failure amounted to a breach of natural justice.

In some situations when there is a finding of breach of natural justice it would be appropriate to remit the matter back to the Minister for his reconsideration. In the present case, however, there is an overwhelming reason why that course should not be followed and that relates to the conduct of the first defendant in relation to this whole proceeding.

The first defendant, Sipanisi Lafo'ou has taken no interest whatsoever in the case. He was not represented; he did not even file a statement of defence. Just why he adopted that attitude is not something that was canvassed in evidence but his total indifference to the claim has certainly not endeared the Court to his cause, whatever that might be. Perhaps his non-appearance is a silent acceptance of the merits of the plaintiff's claim.

For the reasons I have stated, regrettably at some length, the plaintiff has succeeded in his claim. I make an Order setting aside the registration of the first defendant as grantee of the allotment and I direct the Minister of Lands to issue a new deed of grant for Lot 81 Block 156/141 Tohi 238 Folio 31 in the name of the plaintiff.

The plaintiff is entitled to costs in the action against the Crown to be agreed or taxed.

Attorney-General v Moala and anor

Supreme Court, Nuku'alofa
Ward CJ
Cr 72/01 and Cr 78/01

28 June 2001; 5 July 2001

Practice and procedure – application for time extension to file affidavits - granted

The Attorney-General made applications to have the respondents committed for contempt of court. The court set a timetable for the filing of affidavits and the time allowed expired. On 5 June 2001 the Court made a ruling in another case that exposed a gap in the evidence in the applications. Counsel for the Attorney-General applied for an extension of time in order to file further affidavits to fill the gap. Counsel for the respondents in each case objected.

Held:

1. The important principle in criminal trials was that the defendant should know clearly the case he had to answer and be unhindered in his right to make a defence if he so wished. In indictable offences amendment to the indictment may be allowed, even at a late stage, as long as it would not cause injustice to the defendant.
2. The nature of the charge the prosecution intended to pursue against the defendants was already clearly stated. The evidence it wished to adduce by the additional affidavits raised no fresh allegation but simply supported the charge already made in the notice of motion and would ensure the court was able to determine the matters in contention.
3. The application was granted. Counsel for the Attorney-General was to file further affidavits within 14 days of the original order on 28 June 2001 and the respondents could file affidavits in reply within 14 days.

Case considered:

Attorney-General v Saulala anors [2001] Tonga LR 110

Counsel for applicant	:	Mr Kefu
Counsel for respondents in Cr 72/01	:	Mr Tu'utafaiva
Counsel for respondents in Cr 78/01	:	Mr Edwards

Judgment

These are both applications by the Attorney-General to have the respondents committed for contempt of court. In both cases, the court set a timetable for the filing of affidavits and the times allowed have now expired.

Following my ruling on 5 June 2001, in the case of *Attorney-General v Saulala anors* [2001] Tonga LR 110, Mr Kefu, for the Attorney-General has applied, in effect, for an extension of time in order to file further affidavits. The reason is to fill a gap in the evidence similar to that which proved fatal to the application in the *Saulala* case.

Counsel for the respondents in each case have objected but I have allowed the application to file further affidavits. I stated I would give brief reasons in writing. I now do so.

These are both allegations of criminal contempt. In every such case the court must bear in mind the need both to protect fair trial and to protect the rights of the defendants who face criminal sanctions.

In the *Saulala* case, I pointed out that the courts in Tonga have not followed the strict rule under the English Order 52 in applications before the Divisional Court by which all evidence the prosecution intends to adduce at the trial must accompany the application for leave. The procedure here has been to allow both sides to file affidavits followed by trial on those affidavits. In *Saulala*'s case that procedure was followed but, at the trial, there was still a fatal lacuna in the prosecution evidence.

Following that ruling, Mr Kefu for the Attorney-General, having no doubt taken the sensible step of checking its effect on other pending cases, realised he was likely to find himself in a similar position in each of the present cases. As a result he applied for leave to file fresh affidavits. He accepts that, if his application is allowed, the defendants must then be given an opportunity to file further affidavits in reply.

Mr Edwards, for the defendants in case 78/01, relies on the fact that the evidence at the close of the time allowed for filing affidavits showed the same fatal flaw. He points out that, as they stand, the proceedings must inevitably fail because it is clear that there is no evidence of an essential element and to allow the prosecution to patch up its case would deny the defendants the right to challenge the validity of the charge and the sufficiency of evidence.

I cannot accept that proposition. These cases are at a different stage to that reached when I made my ruling in *Saulala*'s case. Before the case is listed for hearing, either side should have an opportunity to add further evidence if, in the discretion of the court, there would be no injustice.

These are summary criminal proceedings. The important principle in criminal trials is that the defendant should know clearly the case he will have to answer and be unhindered in his right to make a defence if he so wishes. It has long been the position in indictable offences that amendment to the indictment may be allowed, even at a late stage, as long as it will not cause injustice to the defendant.

In criminal trials the state generally has considerably superior resources with which to prepare its case and so the court will be diligent to ensure the defendant is given a proper opportunity to challenge the prosecution case and to present his defence. However, the procedures are intended in all cases to ensure that the real issue in controversy is brought before the court for determination.

In the present cases the prosecution has already clearly stated the nature of the charge it intends to pursue against the defendants. The evidence it wishes to adduce by the additional affidavits raises no fresh allegation but simply supports the charge already made in the notice of motion and will ensure the court is able to determine the matters in contention.

Had that application been made after the commencement of the trial different considerations may have applied but, made at this stage in the proceedings, I can see no prejudice to the defendants.

The application is granted. Counsel for the Attorney-General is to file further affidavits within 14 days of my original order on 28 June 2001 and the respondents may file affidavits in reply within 14 days thereafter. Upon receipt of those affidavits, I shall set a further chambers hearing in order to set a trial date as soon as possible.

Holameitinga v Holameitonga

Supreme Court, Nuku'alofa
Ford J
C 21/00

28 May 2001; 6 July 2001

Family law – maintenance payments - committal for non-payment – magistrate's discretion

The appellant and the respondent were married on 9 July 1998 and they had one child born on 24 January 1999. The couple separated on 4 November 1998 and were divorced on 8 December 2000. The appellant obtained a maintenance order in the Magistrates' Court against the respondent in the sum of $20 per week. No maintenance was paid under that order. The appellant issued proceedings in the Magistrates' Court to recover the sum of $463 which was claimed to be the amount of maintenance owing for the period 19 July 1999 to 14 February 2000. On 25 August 2000 the appellant issued a summons in the Magistrates' Court against the respondent requiring him to appear and show cause why he should not be committed to prison for non-payment. The respondent made a no case submission on two grounds: first, that the parties had entered into an agreement to stop maintenance payments whilst they attempted a reconciliation; and, secondly, that the wife was living with another man. The magistrate held that even though the parties had not reconciled, the wife had, in breach of this agreement, unilaterally decided not to write the letter to the court and she had failed to advise the husband that she had not done so. The magistrate, therefore, upheld the no case submission and dismissed the committal application. The two main grounds argued on appeal were, first, that only the court has the power to vary a maintenance order and, secondly, if the husband did not pay or satisfy in someway the warrant of distress then the law says that he should be taken to prison.

Held:

1. The statutory provisions that the respondent should be taken to prison for non-payment are discretionary, not mandatory, and the court would not interfere with a magistrate's exercise of his discretion unless it could be shown that the decision was wrong in principle or that there was some other exceptional reason requiring intervention.
2. An order for committal was a very serious step in any proceeding and was a power to be exercised with great care and the power should be exercised only in the clearest of cases. If the facts upon which the committal application was based were in dispute or ambiguous then the court should

not order committal unless it was satisfied to the criminal standard of beyond reasonable doubt that the grounds for committal have been made out. Given the magistrate's factual findings regarding the agreement to stop maintenance payments and the points of principle referred to, the court did not interfere with the exercise of the magistrate's discretion.

3. Although the appeal did not succeed and was dismissed there was no costs order made.

Case considered:

Grocock v Grocock [1920] 1 KB 1

Statute considered:

Maintenance of Deserted Wives Act (Cap 31)

Counsel for appellant	:	Mr Veikoso
Counsel for respondent	:	Mr Tu'utafaiva

Judgment

The appellant and the respondent were married on 9 July 1998 and there was one child of the family born on 24 January 1999. The couple separated on 4 November 1998 and were divorced on 8 December last year.

The appellant obtained a maintenance order in the Magistrates' Court against the respondent in the sum of $20 per week. The order was not produced and the court was not told exactly when it was made but counsel for the respondent did not dispute the fact that the order existed and that no maintenance had been paid under it. The order apparently related to maintenance in respect of the appellant only — not the child.

The appellant issued proceedings in the Magistrates' Court to recover the sum of $463 which was claimed to be the amount of maintenance owing for the period 19 July 1999 to 14 February 2000, although just how the figure of $463 was calculated if the sum owing for the 30 week period between 19 July 1999 and 14 February 2000 was the total of $20 per week, is not clear. In all events, that was the amount the appellant sought to recover in the Magistrates' Court.

In March 2000 the appellant took out a distress warrant in respect of the arrears owing but the bailiff reported back that the respondent had no property which could be distrained. On 25 Aug 2000 the appellant issued a summons in the Magistrates' Court against the respondent requiring him to appear and show cause why he should not be committed to prison for non-payment. The application was made pursuant to the proviso to section 6 of the Maintenance of Deserted Wives Act (Cap 31) which states:

> *"Provided that, if upon the return of a warrant of distress issued for failure to pay money ordered to be paid, it appears that no sufficient distress can be had, or if the magistrate is satisfied that the husband has wilfully failed to comply with an order made under 2 (b) or (c) hereof, then the magistrate may commit the husband to prison for a period not exceeding three month."*

A committal order made pursuant to this proviso is the sanction for non-payment of the sum owing under the maintenance order. The provision may appear to be draconian in that there is no onus on the court before ordering committal to ascertain whether or not the defendant in default has had the means or wherewithal to satisfy the judgment debt. By contrast, in England, the equivalent statutory provision, namely section 4 of the Bastardy Act 1872 was amended by section 74(6) of the Magistrates' Courts Act 1952 and now a husband may be imprisoned only if the default was due to his wilful refusal or culpable neglect.

No such requirement has been introduced into the Tongan legislation but whether or not a magistrate commits the husband to prison pursuant to the proviso to section 6 of the Maintenance of Deserted Wives Act is still a discretionary matter.

In *Grocock v Grocock* [1920] 1 KB 1, a question arose as to the extent of the magistrate's discretion. Could the magistrate order payment of a portion only of the arrears but not of the whole? The court held that the magistrate has no discretion to say that he will make an order to enforce payment of a portion only of the arrears of maintenance; his only discretion was to say either the whole amount is to be paid or that no portion of it is to be paid. As Salter J said (p 15):

> *"With regard to enforcement of the order, the justices may issue a distress warrant, and may imprison the father or hold him to bail pending the result of a levy, and if no sufficient distress is disclosed then they may, if they think fit, commit the father to prison for three months. It is clear that the powers to commit, and to enforce, the order are discretionary. The justices have a discretion as to whether they will make an order and as to whether they will enforce it. But the justices have no discretion enabling them to enforce the order partially. They must either enforce it as it stands or not at all."*

In the Magistrates' Court at the end of the plaintiff's case, counsel for the defendant (respondent) made a no case submission. The application was made on two grounds: first, that the parties had entered into an agreement to stop maintenance payments whilst they attempted a reconciliation and, secondly, that the wife was living with another man. Under section 3 of the Maintenance of Deserted Wives Act a proven act of adultery is sufficient to discharge the maintenance order unless there has been condonation.

The evidence in relation to the "other man" was insufficient to establish adultery but the magistrate found that there had been an agreement entered into between the parties under which the wife undertook to write a letter to the court stopping maintenance payments so that they could get back together again. There was evidence about the various attempts at reconciliation. The magistrate held that even though the parties had not reconciled, the wife had, in breach of this agreement, unilaterally decided not to write the letter to the court and she had failed to advise the husband that she had not done so. The husband, in other words, was proceeding on the basis that pursuant to the agreement, maintenance payments had been stopped. The magistrate, therefore, upheld the no case submission and dismissed the committal application.

The two main grounds argued on appeal were, first, that only the court has the power to vary a maintenance order and, secondly, section 6 is mandatory and if the

husband does not pay or satisfy in someway the warrant of distress then, as counsel submitted, "the law says that he should be taken to prison."

I have already disposed of the second ground. The statutory provisions are discretionary — not mandatory, and this court will not interfere with a magistrate's exercise of his discretion unless it can be shown that the decision is wrong in principle or that there is some other exceptional reason requiring intervention.

In relation to the other ground of appeal, the Maintenance of Deserted Wives Act provides that the court may vary, discharge or suspend a maintenance order at any time on the application of the parties. Indeed, a court must give effect to any agreement reached between the parties to vary or revoke a maintenance agreement if it appears just to do so. In the context of this case, it was certainly open to the Magistrate to hold that the husband was entitled to act on the assumption that, pursuant to the agreement reached with his wife, he was not liable for maintenance payments during the relevant period. The important point, which has particular relevance in relation to the present case, is that an order for committal is a very serious step in any proceeding. It is a power to be exercised with great care and the power should be exercised only in the clearest of cases. If the facts upon which the committal application is based are in dispute or are ambiguous then the court should not order committal unless it is satisfied to the criminal standard of beyond reasonable doubt that the grounds for committal have been made out.

Given the magistrate's factual findings regarding the agreement to stop maintenance payments and the points of principle I have referred to, I am not disposed to interfere with the exercise of the magistrate's discretion and hold that committal to prison should have been ordered.

Although the appeal has not succeeded and is dismissed, I am not persuaded that the justice of the case requires the making of any order as to costs and none is made.

Tukuafu v Police

Supreme Court, Nuku'alofa
Ford J
Cr A 16/2001

12 June 2001; 6 July 2001

Sentencing – criteria for suspending custodial sentence - suspended

The appellant was charged with one count of theft of a ploughshare worth $600. At the end of the preliminary inquiry in the Magistrates' Court on 28 March he pleaded guilty to the charge and was convicted and sentenced to 4 months imprisonment. He appealed against the sentence which was suspended pending the hearing.

Held:

1. A party has a right of appeal to the Supreme Court from a sentence imposed by a Magistrate but that right was qualified to the extent that, apart from certain statutory restrictions that might apply in specific situations, the appropriate sentence in any given case was always a matter for the discretion of the sentencing Magistrate. Before the Supreme Court would intervene it must be satisfied that the sentence in question was manifestly excessive or manifestly inadequate or wrong in principle or there must be some other exceptional circumstances that warrant intervention. It would not interfere simply because it might have inflicted a different or less severe sentence.
2. The appellant satisfied the criteria adopted by the Court of Appeal for determining whether a sentence should be suspended: he was young, he was likely to be rehabilitated, there was a degree of coercion, and he co-operated with the police. However, the fact that he was the breadwinner in his family carried little weight in determining whether he should be sent to prison.
3. The appropriate sentence was the term of 4 months imprisonment imposed by the Magistrate and that sentence was confirmed. The sentence was suspended, however, for a term of 2 years.

Cases considered:

'Eukalite v Police [1994] TLR 80
Lausi'i and Tauki'uvea v R [1991] TLR 55
Mo'unga v R [1998] Tonga LR 154 (CA)
R v Petersen [1994] 2 NZLR 533 (CA)

Statutes considered:
Criminal Offences Act (Cap 18)
Magistrates' Courts Act (Cap 11)

Counsel for appellant : Mr Veikoso
Counsel for defendant : Mr Fusitua

Judgment

The appellant was charged with one count of theft of a ploughshare worth $600. At the end of the preliminary inquiry in the Magistrates' Court on 28 March this year he pleaded guilty to the charge and was convicted and sentenced to 4 months imprisonment. He now appeals against that sentence which has been suspended pending this hearing.

Initially, I proposed to issue an oral decision on the day but during the hearing it became apparent that both counsel were proceeding on the assumption that a Judge hearing an appeal from the Magistrates' Court could simply, at his whim as it were, set aside the sentence imposed in the court below and substitute some other sentence without there being any onus on an appellant to first make out a basis which would allow this Court to intervene. For this reason, I thought that I should take the opportunity to restate the principles that this Court applies in hearing any appeal against sentence.

Section 74(1) of the Magistrates' Courts Act (Cap 11) gives any party a right of appeal to the Supreme Court from a sentence imposed by a Magistrate but that right is qualified to the extent that, apart from certain statutory restrictions that might apply in specific situations, the appropriate sentence in any given case is always, subject to what I am about to say, a matter for the discretion of the sentencing Magistrate. Although in practice there is no statutory bar on this Court substituting its own view of what the sentence should have been for the sentence actually passed, the approach traditionally adopted to appeals against sentence in the Kingdom, which is based on the common law and earlier judgments of the English Court of Criminal Appeal, is that before this Court will intervene, it must be satisfied that the sentence in question is manifestly excessive or manifestly inadequate or wrong in principle or there must be some other exceptional circumstances that warrant intervention. Some assistance can be gained from a comparison of sentences in other cases but, in general, precedent plays a relatively small part in sentencing because the facts of each case vary infinitely and all the circumstances of the particular case and the offender have to be taken into account. The important point for would-be appellants to bear in mind is that this Court will not interfere simply because it might have inflicted a different or less severe sentence.

In the present case, the principal submission advanced by counsel for the appellant was that the sentence of four months imprisonment should have been suspended in whole, pursuant to section 24(3) of the Criminal Offences Act (Cap 18). I am prepared to treat that submission as a plea that the sentence was wrong in principle for the reasons put forward by counsel.

In considering whether or not it is appropriate to suspend a sentence, the principle is that the court, first of all, needs to determine whether the case is a proper

one for a sentence of imprisonment or whether some other course of sentencing is called for.

The article stolen by the appellant was a ploughshare. In *Mo'unga v R* [1998] Tonga LR 154 the Court of Appeal echoed what had been stated in the earlier Court of Appeal decision of *Lausi'i and Tauki'uvea v R* [1991] TLR 55, namely, that imprisonment is inappropriate for first offenders for purely property offences unless the offence is of a particularly serious nature or there are unusual circumstances that render imprisonment necessary.

The Crown argued that imprisonment was appropriate in the present case because the value of the item stolen was significant, namely $600; that the theft was committed in the course of the appellant's employment and, hence, involved a serious breach of trust and, while accepting that the stolen item was recovered, the Crown made the important point that the ploughshare was returned to the complainant, not by the appellant, but, by the person who he had sold it to for $400 and none of the proceeds of sale were recovered from the appellant.

In the *Lausi'i and Tauki'uvea* case the value of the paint stolen by Tauki'uvea from his employer was similar to the value of the ploughshare in the present case. The Court of Appeal held that 4 months imprisonment was an appropriate sentence for Tauki'uvea and, likewise, for the various reasons submitted by the Crown I am satisfied that the sentence of 4 months imprisonment imposed on the appellant in the present case was entirely appropriate.

The issue that then arises is whether this was an appropriate case for the whole of the sentence to be suspended as counsel submits.

In the *Mo'unga* case the Court of Appeal noted that section 24(3) was silent on the criteria to be considered in deciding whether a sentence should be suspended but the Court went on to adopt, as being appropriate to Tonga, the approach suggested by the New Zealand Court of Appeal in *R v Petersen* [1994] 2 NZLR 533, namely, that suspension of sentence may be appropriate in the following situations:

> *"(i) Where the offender is young, has a previous good record, or has had a long period free of criminal activity.*
>
> *(ii) Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.*
>
> *(iii) Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.*
>
> *(iv) Where there has been co-operation with authorities."*

The appellant in the present case is 22 years of age and up to now he has had a completely unblemished record. I would accept that, in the circumstances, rehabilitation from a suspended sentence is likely. It also appears that there was a degree of coercion in that other people were involved and the initial approach to the appellant to carry out the theft in return for a payment of $400 came from a third party. The appellant appears to have co-operated with the police and he pleaded guilty at the end of the preliminary hearing. There has also been an apology and reconciliation. In summary, it appears to me that the appellant does satisfy the criteria adopted by the Court of Appeal for determining whether a sentence should be suspended.

It is apparent from the transcript that in his closing submissions in the court below, the appellant's counsel accepted the inevitability of a prison sentence but argued strongly for a suspended sentence. In addition to the points already referred to, counsel pointed out that the appellant's father had deserted the family home and he, as the eldest child, was now the only breadwinner in the family.

The "breadwinner submission" is one that is constantly raised in the courts in the Kingdom but it carries little weight in determining whether an accused should be sent to prison.

As Ward CJ said in *'Eukalite v Police* [1994] TLR 80:

> *"Imprisonment will fall hard on the family he (the appellant) should be supporting but this Court has commented more than once that such a factor is not the responsibility of the Court."*

The Magistrate obviously, quite correctly, placed considerable weight on the nature of the offending and noted the seriousness of theft as a servant, involving as it does a breach of trust. Theft as a servant will almost invariably involve a sentence of imprisonment but it is not a bar, in an appropriate case, to a suspended sentence.

What is of some concern, however, is that in his decision the Magistrate makes no reference whatsoever to counsel's submissions in support of his strong plea for a suspended sentence. To say nothing at all about counsel's main submission is to run the very real risk that this Court will more readily find that the sentence imposed is wrong in principle.

That is the conclusion I have come to in the present case. Applying the guidelines laid down by the Court of Appeal, I consider that, in all the circumstances of the case, the appropriate sentence was the term of 4 months imprisonment imposed by the Magistrate and that sentence is confirmed. The sentence is suspended, however, in whole for a term of 2 years.

Kaufusi v Tauniuvlau

Supreme Court, Nuku'alofa
Ford J
L 902/99

30 April, 8 May 2001; 9 July 2001

Land law – declaration sought that lease was valid – declaration issued and defendant restrained

In the early 1990s the plaintiff, 'Ana Kaufusi, approached a relative, Tevita Uluilakepa, to see if she could acquire some land from his tax allotment at Haveluloto which could be set aside for her eldest son who was then only eight years old. Uluilakepa suggested that, until such time as her son came of age, the plaintiff should take a lease in her own name of lot 23 which he was prepared to make available. The plaintiff agreed to the proposal and she paid the landholder an agreed consideration of $3000 at the time the arrangement was entered into and a further sum of $2000 later upon registration of the lease. The application to lease was duly approved by the Minister of Lands and by Cabinet and the lease was registered in the plaintiff's name on 10 Sept 1992. The lease was for a term of 20 years from 10 Sept 1992 and the rental was fixed at $50 per annum. Nothing was built on the land but the plaintiff said in evidence that she looked after it and paid the agreed rent and there was no problem until one day in March 1999 when she visited the 'api and noticed that someone had recently cut the grass and carried out some clearing work. She made inquiries as to who had been trespassing on her land and found out it was Sione Tauniuvalu, the defendant. The plaintiff arranged for a solicitor's letter to be written (dated 22 March 1999) to the defendant warning him not to go on to her allotment without permission otherwise she would take him to Court. The defendant ignored the plaintiff's letter and some time later the plaintiff noticed that he had started building a concrete block house on her land. She approached her solicitors again and on 14 June 1999 a further letter was written to the defendant. On 17 June 1999 the defendant's solicitor, Mr Hola, responded to that letter. He said that the allotment belonged to Naitingikeili Kaufusi and he had given it to the defendant. The plaintiff's solicitor responded by letter on the same day stating that "the court case" did not affect the validity of the plaintiff's lease and the defendant was warned again to keep off the property. The defendant did not heed the warnings, however, and the plaintiff issued proceedings to bring matters to a head. The writ and statement of claim were filed in August 1999 and on 3 September 1999 the plaintiff obtained an injunction restraining the defendant from entering the allotment. The plaintiff sought a declaration that her

lease was valid and she sought orders evicting the defendant from her land and restraining him from entering upon or continuing to build upon the land.

Held:

1. The Court found as a fact on the balance of probabilities, that at no time did the plaintiff abandon the allotment or fall into arrears with her rent in the manner alleged but, more importantly, even if she had failed to comply in some way with the terms of her lease, Mr Kaufusi was not a party to the lease and he had no rights to intervene and repossess the allotment. If the lessee had made default under the lease then that would have been a matter for Cabinet to deal with as appropriate and not for Mr Kaufusi as the landholder.
2. A declaration was issued confirming the validity of the plaintiff's lease and an order was made restraining the defendant, his employees and agents from entering upon the allotment unless it was for the purpose of demolishing the partially erected building on the land and/or removing the demolition material from the site. The plaintiff was entitled to costs.

Statute considered:

Land Act (Cap 132)

Counsel for plaintiff	:	Mr Kaufusi
Counsel for defendant	:	Mr Hola

Judgment

In the early 1990s the plaintiff, 'Ana Kaufusi, approached a relative of hers, Tevita Uluilakepa, to see if she could acquire some land from his tax allotment at Haveluloto which could be set aside for her eldest son who was then only eight years of age. The land had been subdivided and Uluilakepa suggested that, until such time as her son came of age, the plaintiff should take a lease in her own name of lot 23 which he was prepared to make available. The plaintiff agreed to the proposal and she paid the landholder an agreed consideration of $3000 at the time the arrangement was entered into and a further sum of $2000 later upon registration of the lease.

The application to lease was duly approved by the Minister of Lands and by Cabinet and the lease was registered in the plaintiff's name on 10 Sept 1992. The lease was for a term of 20 years from 10 Sept 1992 and the rental was fixed at $50 per annum.

Nothing was built on the land but the plaintiff said in evidence that she looked after it and paid the agreed rent and there was no problem until one day in March 1999 when she visited the api and noticed that someone had recently cut the grass and carried out some clearing work. She made inquiries as to who had been trespassing on her land and she found out that it was Sione Tauniuvalu, the defendant in this proceeding.

The plaintiff then arranged for a solicitor's letter to be written to Mr Tauniuvalu warning him not to go on to her allotment without permission otherwise she would take him to Court. The letter was dated 22 March 1999. Mr Tauniuvalu ignored the plaintiff's letter and some time later the plaintiff noticed, no doubt much to her

surprise, that he had started building a concrete block house on her land. She approached her solicitors again and on 14 June 1999 a further letter was written to the defendant in the following terms:

> *"Re 'Ana Kaufusi*
>
> *We represent the above person. Our client has lodged a complaint with us that you have disregarded our letter of warning to you dated 22/3/99. You have trespassed and built on this leased allotment without permission from our client.*
>
> *You should not have started building until your situation in regard to this allotment is clarified.*
>
> *If you do not obey this letter of warning we will take you to Court and that will be costly.*
>
> *Yours etc."*

On 17 June 1999 the defendant's solicitor, Mr Hola, responded to that letter. He said that the allotment belonged to Naitingikeili Kaufusi and he had given it to the defendant. Mr Hola asked the plaintiff to provide proof of the documents which showed that she leased the allotment and he went on to say that if she had obtained the lease from "Mo'ale" then "it is not correct according to the court case".

The plaintiff's solicitor responded by letter on the same day stating that "the court case" did not affect the validity of the plaintiff's lease and the defendant was warned again to keep off the property.

The defendant did not heed the warnings, however, and it was necessary for the plaintiff to issue these proceedings to bring matters to a head. The writ and statement of claim were filed in August 1999 and on 3 September 1999 the plaintiff obtained an injunction restraining the defendant from entering the allotment.

The "court case" referred to in the correspondence was the decision of the Court of Appeal in proceeding No 297/1996, which was delivered on 7 August 1998. The decision was produced as an exhibit in this case and there were a number of references made to it in the course of the hearing because it related to the estate of which the allotment in question forms part.

It appears that the background to proceeding 297/96 is that in about April 1994 the landholder referred to earlier in this judgment, Tevita Uluilakepa, surrendered his tax allotment at Haveluloto in the expectation that his eldest legitimate son by his second marriage, Mo'ale Uluilakepa, would obtain title. The Court of Appeal held, however, that, in terms of the devolution provisions in the Land Act (Cap 132), the lawful landholder was not Mo'ale but Viliami Kaufusi who was Tevita's eldest legitimate son by a prior marriage. By the time of the Court of Appeal hearing Viliami Kaufusi had died and his three sons were appointed his representatives. The eldest of his three sons was Naitingikeili Kaufusi and by agreement with his younger brothers, Naitingikeili succeeded as registered holder of the estate. The estate in

question included the allotment that had been leased to the plaintiff back in 1992 by Tevita.

The Court of Appeal decision can have no effect on the validity of the 20 year lease granted by Tevita to the plaintiff but it is relevant to this present proceeding in that it explains the process by which Tevita's grandson, Naitingikeili Kaufusi, obtained title to the land.

In the present proceeding the plaintiff seeks a declaration that her lease is valid and she seeks orders evicting the defendant from her land and restraining him from entering upon or continuing to build upon the said land.

In his statement of defence filed on 9 February 2000, the defendant, Sione Tauniuvalu, pleaded that he was the lawful occupier of the land in that "he was granted the allotment by the present owner of the land Naitingikeili Kaufusi".

The defendant called Naitingikeili Kaufusi as a witness. He confirmed that following on from the death of his father, the Court of Appeal decision and the agreement he had reached with his brothers, he became the registered holder of the estate which included the allotment leased to the plaintiff. Mr Kaufusi told the court that the defendant was related to him on both sides of the family and that some time after the release of the Court of Appeal decision he received an approach from the defendant who asked him for a piece of land. Mr Kaufusi said that he agreed to the request and he repossessed the allotment that had been leased to the plaintiff and he surrendered it to the defendant for "a gift of some money".

Mr Kaufusi said that he exercised his right to take possession of the land in question because "it had been abandoned" and, after some leading questions from his counsel, he added that another reason he repossessed the land was because the plaintiff had been in arrears with payment of her rent.

It was not clear from his evidence exactly when Mr Kaufusi claimed to have repossessed the land but on 22 March 1999 he wrote a letter to the Minister of Lands which is quite revealing. I set it out in full:

> *22 March, 1999*
>
> *Hon Minister of Lands*
>
> *Survey Office*
>
> *Nuku'alofa*
>
> *Sir,*
>
> *<u>Letter of Surrender for part of Tutitokelau, Haveluloto</u>*
>
> *I hereby respectfully convey in this letter that I NAITINGIKEILI KAUFUSI the holder of the tax allotment TUTITOKELAU at Haveluloto, Tongatapu.*

This api has been allocated and subdivided as a town api and I surrendered LOT 23 so SIONE TAUNIUVALU TU'AVAO of Haveluloto can apply for it.

This api was subject of a dispute in the land Court and in the Court of Appeal as well. If Tevita and Mo'ale Uluilakepa had granted this allotment to anyone I did not consent to that and even if my Father Viliami Kaufusi who claimed this api from Tevita and Mo'ale Kaufusi and won in the Land Court, I wish to cancel all their grants.

Yours respectfully

Naitingikeili Kaufusi

cc. Sione Tauniuvalu Tu'avao "

The contents of that letter are consistent with my analysis of the evidence. I simply do not believe Naitingikeili Kaufusi when he says that he repossessed lot 23 because it had been abandoned and because the lessee was in arrears with her rental payments. The truth of the matter, in my judgment, is that at about the time he purported to repossess the allotment in March 1999 and surrender it to the defendant, he did not know anything about the lease of the land to the plaintiff. Mr Kaufusi's letter to the Minister of Lands of 22 March 1999 makes no mention of the plaintiff having abandoned the land or being in arrears with her rent payments. In fact, it makes no reference whatever to the plaintiff or to her lease.

It is apparent from that same correspondence that Mr Kaufusi suspected that one of the former registered titleholders to the property may have entered into some transaction in relation to the allotment in question but he appears to have adopted the attitude that after the Court of Appeal decision he, as the confirmed registered holder of the allotment, was not bound by any earlier agreements in relation to the land and he simply wanted all occupiers under any such agreements evicted at the earliest opportunity .

I find it disturbing that Mr Kaufusi should have taken such a high-handed attitude as to his perceived legal rights. Virtually every step he has taken in relation to the allotment in question since the Court of Appeal decision appears to have been overbearing and totally in disregard for the rights and feelings of the plaintiff as the lawful occupier of the land.

I am satisfied, and I find as a fact on the balance of probabilities, that at no time did the plaintiff abandon the allotment or fall into arrears with her rent in the manner alleged but, more importantly, even if she had failed to comply in some way with the terms of her lease, Mr Kaufusi was not a party to the lease and he had no rights whatsoever to intervene and repossess the allotment. If the lessee had made default under the lease then that would have been a matter for Cabinet to deal with as appropriate — not for Mr Kaufusi as the landholder.

It is significant in my view that in a subsequent letter to the Minister of Lands dated 30 September 1999, some 27 days after the plaintiff had obtained her injunction against the defendant, Mr Kaufusi acknowledged that at the time he purported to give

the allotment to the defendant back in March 1999, he had no knowledge of the lease to the plaintiff. In that same letter, notwithstanding the fact that court proceedings had by then been issued, he quite brazenly, without reference to the proceedings, asked the Minister to cancel the plaintiff's lease.

When Mr Kaufusi became the registered holder of the allotment following on from his grandfather's surrender of the land and the subsequent Court of Appeal decision, section 59(1)(a) of the Land Act (Cap 132) came into play and that section provides that upon surrender of an allotment over which a lease has been granted, the allotment devolves upon the heir subject to the terms of the lease.

It should never have been necessary for the plaintiff to bring this proceeding. She was entitled under her lease to undisturbed possession of the allotment. She should never have been subjected to the kind of arrogant and outrageous conduct embarked upon by the defendant. I do not blame the defendant entirely for the situation, however, because he was obviously misled by the even more aggressive and offensive behaviour of the landholder.

The defendant's cause was not helped by having the landholder's solicitor acting for him throughout. The defendant should have been advised right from the outset to seek independent legal advice.

The plaintiff has been completely successful in her claim. She is entitled to the remedies she seeks and I, therefore, make the following orders:

1. A declaration is issued confirming the validity of the plaintiff's lease.
2. An order is made restraining the defendant, his employees and agents from entering upon the said allotment unless it is for the purpose of demolishing the partially erected building on the said land and/or removing the demolition material from the site.

The relief sought in the statement of claim does not seek any specific order for disposal of the partly completed concrete block house on the allotment no doubt in recognition of the fact that it is not a matter coming within the jurisdiction of the Land Court. If necessary, however, (and I would not expect it to be) further Orders can be sought in this Court’s civil jurisdiction.

The plaintiff is entitled to costs to be agreed or taxed.

R v Holani

Court of Appeal, Nuku'alofa
Ward CJ, Burchett and Tompkins JJ
CA 6/2001

16 July 2001; 27 July 2001

Sentencing – too lenient – mitigating factors had too much weight – appeal allowed

On 14 December 2000 the respondent drove the family van with a friend to Nuku'alofa. They bought a bottle of over-proof rum which they drank while driving. This was at about 3pm. Later in the afternoon they picked up other companions. Having consumed the rest of the rum they bought another bottle which they also proceeded to consume. They drove towards Kolomotu'a at which stage both passengers noted that the respondent was driving fast and recklessly. He overtook several cars, the drivers of which reacted adversely to his driving. They arrived at the home of an acquaintance. At about 11pm the respondent later left with several passengers in the van. One of them expressed the opinion that the respondent was drunk. As they drove off the passengers noticed the respondent driving too quickly. One of the passengers asked the respondent to stop, but he continued to drive at a fast speed. The respondent tried to overtake two cars when an approaching car appeared. The respondent swerved to the left, went off the road, lost control of the van, and collided with a parked van. One of the passengers, Monu 'Ahokovi, died as a result of the injuries she received. Other passengers also suffered serious but not fatal injuries. The respondent was so intoxicated that he had no recollection of the accident. The respondent pleaded guilty to a charge of manslaughter by negligence. On 27 April 2001 he was sentenced to 18 months imprisonment, that sentence to be suspended for 2 years, subject to conditions that he enrol for and undertake an alcohol education course and that he abstain from consuming alcohol for 2 years from the date of the sentence. His driving licence was cancelled and he was precluded from obtaining a driver's licence for three years. The Crown applied for leave to appeal against the sentence imposed.

Held:

1. The mitigating factors referred to should undoubtedly affect both the term and the nature of the sentence. Some suspension of the sentence was appropriate.
2. The sentencing judge, in suspending the sentence for the whole of the term of imprisonment, imposed a sentence that was inappropriate. He placed

too much weight on the mitigating factors and insufficient weight on the seriousness of the offence, and the need for a sentence to demonstrate clearly and beyond doubt to the community that where serious or fatal injuries are caused by persons driving when intoxicated, a relatively severe penalty must be imposed.

3. The application for leave to appeal was allowed and the appeal was allowed. The sentence imposed in the Supreme Court was quashed. A sentence of eighteen months imprisonment was substituted. Following service of six months of that term of imprisonment, the balance of the term of imprisonment was suspended for two years from the date of his release. The orders requiring the respondent to undertake an alcohol education course and to abstain from alcohol were quashed. The order cancelling the respondent's driver's licence and precluding him from obtaining a driver's licence for three years remained unaltered.

Cases considered:

R v Misinale (Court of Appeal, CA 13/99, 23 July 1999)
R v Tofavaha [2000] Tonga LR 316 (CA)

Statute considered:

Court of Appeal Act (Cap 9)

Counsel for appellant	:	Mr Sisifa
Counsel for respondent	:	Mr Tu'utafaiva

Judgment

Decision of Burchett and Tompkins JJ delivered by Tompkins J

[1] The respondent pleaded guilty to a charge of manslaughter by negligence. On 27 April 2001 he was sentenced to 18 months imprisonment, that sentence to be suspended for 2 years, subject to conditions that he enrol for and undertake an alcohol education course and that he abstain from consuming alcohol for 2 years from the date of the sentence. His driving licence was cancelled and he was precluded from obtaining a driver's licence for three years. The Crown has applied for leave to appeal against the sentence imposed.

The offending

[2] On 14 December 2000 the respondent drove the family van with a friend to Nuku'alofa. They bought a bottle of over-proof rum which they drank while driving. This was at about 3pm. Later in the afternoon they picked up other companions. One of them told the police that when he was picked up between 6 and 7pm the accused and his companion were both drunk. Having consumed the rest of the rum they bought another bottle which they also proceeded to consume. They drove towards Kolomotu'a at which stage both passengers noted that the respondent was driving fast

and recklessly. He overtook several cars, the drivers of which reacted adversely to his driving.

[3] They arrived at the home of an acquaintance. At about 11pm the appellant later left with several passengers in the van. One of them expressed the opinion that the respondent was drunk. As they drove off the passengers noticed the respondent driving too quickly. One of the passengers asked the respondent to stop, but he continued to drive at a fast speed. The respondent tried to overtake two cars when an approaching car appeared. The respondent swerved to the left, went off the road, lost control of the van, and collided with a parked van. One of the passengers, Monu 'Ahokovi, died as a result of the injuries she received. Other passengers also suffered serious but not fatal injuries. The respondent was so intoxicated that he has no recollection of the accident.

[4] The seriously aggravating feature of the offending is the respondent electing to drive over a lengthy period when he was heavily intoxicated, and continuing to drive at a high speed when his passengers were urging him to stop. This was premeditated offending in the sense that he elected to drive in this manner when he must have known that he was in an advanced state of intoxication. The judge was undoubtedly right when he said that his choosing to do so was a recipe for disaster, a disaster that resulted in the taking of a young life.

Mitigating features

[5] The respondent was at the time aged 23. He had no previous convictions. He pleaded guilty to the charge at the earliest opportunity. He was in his second year as a primary school teacher, having obtained his Diploma in Education in 1998. Several favourable references were provided to the Court. They described him as punctual, reliable, with great potential for becoming an excellent teacher, honest and trustworthy. He is an active member of his church.

[6] The probation officer considered that he did not have an alcohol dependency, only drinking twice a month. He described him as a moderate drinker who had never been in trouble with alcohol before.

[7] The respondent apologised in the traditional Tonga manner as did his family, taking goods and food items to the funeral as an apology as well as showing their sympathy towards the deceased's family.

[8] A notable feature was the attitude of the family of the deceased. The judge referred to what he described as a truly magnanimous letter from the parents of the deceased. Part of the letter read:

> "So we ask mercy, Your Honour, in regard to Timote and for him to have a fine in whatever amount and we will willingly pay. We have come to regard Timote as a son. And we wish him to be under our care in exchange for our daughter. We do beg Your Honour for a bail penalty or a fine for Timote so that he could continue on with his job and also his position in the church. We

> have accepted Timote as our own son and we know that he does feel remorseful for what he has done"

[9] However, this can be regarded as a mitigating factor only to a limited extent. The effect of criminal conduct on the victims of a crime is relevant, and in this case, in addition to the deceased, her family are also victims. But we do not consider that the fact that the deceased's family have been so forgiving necessarily reflects to the credit of the respondent.

[10] There is a further aspect to which the judge did not refer. Clause 23 of the Constitution provides that no person having been convicted of a criminal offence punishable by imprisonment for more than two years shall hold any office under the Government. As a consequence, it is inevitable that the respondent either has been or will be discharged from his position as a primary school teacher. This, although not a mitigating factor, is an additional penalty that the respondent will suffer which can properly be taken into account in considering the appropriate sentence. We also note that while this clause will prevent his being employed as a teacher in a government school, it would not necessarily prevent his employment as a teacher otherwise, for example in a church school.

The sentence

[11] The judge referred to the circumstances of the offending, accepting that what occurred was the fault of the respondent, and that it was something he would have to live with for the rest of his life. It was inexplicable that the respondent was not able to see that drinking to the extent that he had; knowing that he was going to drive, was a straight out recipe for disaster.

[12] He accepted that the offence was totally out of character and that the respondent was filled with remorse. The judge was influenced by what he regarded as a remarkable reference from the family. He said that it had swung the pendulum in the favour of the respondent.

[13] The judge observed that the respondent had an enormous amount to offer the community through his teaching. He expressed the hope that the respondent would take the opportunity he was being given to get the message across to the young people he taught and other young people about the dangers of drinking and driving. The judge made these observations apparently unaware that the result of the respondent's conviction for this offence is that his opportunities to do so will be severely limited. He was satisfied that the respondent would learn from what had occurred and that a suspended sentence would have a beneficial effect. It was for those reasons that he decided that it was appropriate to suspend the whole of the sentence for two years.

Submissions on the appeal

[14] Counsel for the appellant accepted that a term of 18 months imprisonment was appropriate, having regard to the circumstances of the offending. But he submitted that the judge erred in suspending the sentence for all of the term of imprisonment. It was his submission that suspending the sentence for this time does not reflect the

serious nature of the offence, nor does it give sufficient weight to the deterrent aspect. He submitted that the mitigating factors do not justify the suspension of the whole term of the sentence. He accepted that a suspension for part of the term was justified, and submitted that it should be suspended for half of the term, or nine months.

[15] Counsel for the respondent submitted that the penalty imposed was appropriate. He submitted that the judge must have taken into account all relevant factors and issues particularly in view of his having referred expressly to the decision of this court in *R v Tofavaha* [2000] Tonga LR 316 (CA). He submitted that the judge did take premeditation into account when deciding the appropriate sentence and that the judge took into account the relevant mitigating factors. He submitted, correctly, that this court should only interfere if it can be satisfied that the sentence imposed is clearly inappropriate or manifestly inadequate.

Decision

[16] In *Tofavaha* this court considered the appropriate approach to sentencing for the offence of manslaughter by negligence in circumstances similar to the present. It said:

> "Whatever sympathy the judge may feel for the offender, he cannot escape the fact that an innocent young woman has lost her life as a result of the respondent's actions. The law has always regarded the killing of another person as extremely serious and the penalty must reflect that. There must be a place for sympathy when a court is passing sentence, but it cannot be allowed to supplant the duty to order a penalty appropriate to the facts of the offence."

[17] In that case the respondent, who was a young prison officer of some distinction, had caused the death of a young woman in a motor accident resulting from the respondent driving a motor vehicle while intoxicated. The judge considered an appropriate sentence to be two years imprisonment but that, because of significant mitigating factors, the sentence should be suspended for the whole of the term. The appeal by the Crown was allowed, the sentence was quashed, and a sentence of two years imprisonment without any suspension was substituted.

[18] Similar considerations apply to the present appeal. The mitigating factors to which we have referred above should undoubtedly affect both the term and the nature of the sentence. We are satisfied that in the present case some suspension of the sentence is appropriate.

[19] This is a Crown appeal. In *R v Misinale* (Court of Appeal, CA 13/99, 23 July 1999) this court considered the principles to be adopted on such an appeal:

> "First, for such an appeal to succeed, clear and compelling grounds for increasing the sentence need to be established. It is not sufficient for the appellate court to consider that a more severe sentence could properly be imposed, or that the sentence imposed is inadequate or inappropriate. For a sentence to be increased on a Crown appeal, the appellate court must be satisfied that the

> sentence is so inadequate or inappropriate that the sentencing judge erred in that he or she must have acted upon a wrong principle, wrongly assessed a relevant circumstance, took into account irrelevant factors, failed to take into account relevant factors, or has imposed a sentence that is inconsistent with sentences the court has imposed for like offending. In such a situation, the appellate court is left with no alternative but to impose a more severe or a different sentence. If the court is so satisfied, the sentence should be increased only to the lower end of the appropriate sentencing range. Indeed, the appellate court, in fixing the proper range for this case, should take into account that it is an added penalty to have to face sentence a second time, and to have hope deferred, and perhaps dashed, in the result."

[20] The Attorney-General, in considering whether to apply for leave to appeal under s 17B of the Court of Appeal Act (Cap 9) should pay proper regard to the principles we have set out above. This court will not entertain an appeal by the Crown unless the circumstances bring the case clearly within those principles.

[21] We have reached the conclusion that the sentencing judge, in suspending the sentence for the whole of the term of imprisonment, imposed a sentence that was clearly inappropriate. He placed too much weight on the mitigating factors and insufficient weight on the seriousness of the offence, and the need for a sentence to demonstrate clearly and beyond doubt to the community that where serious or fatal injuries are caused by persons driving when intoxicated, a relatively severe penalty must be imposed. The order to suspend the sentence for the whole of the term is inconsistent with sentences such as that imposed by this court in *Misinale.*

[22] We can see no reason for the orders the judge made requiring the respondent to undertake an alcohol education course or to abstain from consuming alcoholic liquor for two years. The evidence available to the court does not indicate that the respondent has an alcohol problem. On the contrary, the evidence is that he consumed alcohol moderately. He says that he has consumed no alcohol since these events occurred. Further, we consider an order requiring a person to abstain from consuming alcoholic liquor for a stated period should be made only in exceptional circumstances. It is an order that is impossible to enforce or police. In the case of a person with a real alcohol problem, it is unlikely to be effective.

[23] For these reasons, we are satisfied that the sentence imposed cannot be sustained. In considering the sentence that should be imposed, we have borne in mind that it should be at the lower end of the scale. In circumstances similar to the present and with mitigating factors equally persuasive, a longer sentence or a shorter or no period of suspension may be appropriate when sentencing in the Supreme Court.

The result

[24] The application for leave to appeal is allowed. The appeal is allowed. The sentence imposed in the Supreme Court is quashed. A sentence of eighteen months imprisonment is substituted, to commence from the date of this judgment. Following his serving six months of that term of imprisonment, the balance of the term of

imprisonment is suspended for two years from the date of his release. The orders requiring the respondent to undertake an alcohol education course and to abstain from alcohol are quashed. The order cancelling the respondent's driver's licence and precluding him from obtaining a driver's licence for three years remains unaltered.

Judgment of Ward CJ

[1] I have had the advantage of seeing the judgment of Burchett and Tompkins JJ and I unreservedly endorse their view of the gravity of the offence, the seriousness of the appellant's conduct and the strength of the mitigating factors.

[2] I also respectfully adopt their opinion that the principles relating to Crown appeals against sentence stated by this Court in *R v Misinale* (Court of Appeal, CA 13/99, 23 July 1999) must apply to this case. Bearing those principles in mind, however, I consider that the order suspending this sentence is clearly inappropriate and cannot stand. Any offence of manslaughter by negligence, where death was the result of a deliberate decision to drive when intoxicated, must receive a sentence of immediate imprisonment.

[3] Where I must differ from my learned colleagues is in their conclusion that the penalty in this case should properly fall at the lower end of the scale and thus allow part of it to be suspended.

[4] This was a very serious case both in the manner in which it occurred and in its consequences. The appellant drank a substantial quantity of rum whilst he was driving. When that was consumed, he and his companions purchased more and he continued to drink and drive. Even when asked to stop by his passengers, he did not heed them and continued to drive at a high speed. Almost inevitably, he lost control of the vehicle and a young woman was killed.

[5] This young man clearly had a bright future. His conviction will no doubt have a serious adverse effect on it and I accept that adds to the penalty. There were a number of strong mitigating factors and the sentencing judge properly allowed for those in determining the length of the sentence. The sentence of 18 months imprisonment for an offence of this gravity clearly shows that the mitigation had a very substantial effect on his decision.

[6] As I have said this was a dreadful offence but one that is all too common in Tonga. The courts must make it clear that any person who deliberately drives when he has been drinking and continues to drive when he is plainly intoxicated will receive a severe penalty. When that conduct causes the loss of another person's life, the only appropriate sentence is one of imprisonment and suspension is inappropriate. In the case of *R v Tofavaha* [2000] Tonga LR 316 (CA), one in which the personal circumstances of the appellant were equally remarkable, this Court commented that the sentence of two years imprisonment was lenient and that it should be served in its entirety. To do less in this case would, in my opinion, be unjust.

[7] The appellant is a well educated young man but the very education that enabled him to embark as such a responsible career should have meant that he, more than most people, would appreciate the danger of his conduct. A term of imprisonment is

undoubtedly a heavy penalty but he will be free at the end to continue with his life. The direct result of his selfish and irresponsible conduct has deprived a totally innocent young woman of that opportunity for ever.

290 [8] I consider the sentence of 18 months was the minimum that could properly be passed for an offence such as this. The appeal should be allowed. The sentence of 18 months imprisonment is upheld but the order suspending it is quashed as are the orders that he abstain from drinking alcohol and attend an alcohol education course. The order that he be disqualified from driving for three years should remain unaltered.

R v Tupou

Court of Appeal, Nuku'alofa
Ward CJ, Burchett and Tompkins JJ
CA 23/2000

16 July 2001; 27 July 2001

Costs – made against Crown – slovenly preparation led to delay

The Respondent pleaded not guilty to an indictment containing counts of embezzlement, theft, forgery, obtaining credit by false pretences and knowingly dealing with forged documents. The one sum or value to which all the counts related was just under $3500. For proof of its case, the Crown relied on five witnesses. The date of the trial being fixed for 12 May 2000, the Crown, on 5 May, requested the Registrar to issue and serve subpoenas requiring its witnesses to attend to give evidence. But the witnesses were not served in time. As a consequence, the hearing was adjourned to 1 September 2000, the Respondent's request for an order for his costs being stood over and ultimately refused. On 23 August, at a pre-trial conference, the Crown informed the Court it was ready to proceed; and on the afternoon of 31 August, counsel for the Respondent had a lengthy consultation with his client, followed by a number of hours of work on the case. However, on this second occasion, the Crown left it until barely 8 days before the hearing to request the issue of subpoenas. Only one of the five witnesses could appear in Court on 1 September. Realizing the impending situation, counsel for the Crown advised the judge, in the afternoon of 31 August, that the case might not be proceeding the next day; but he neglected to inform counsel for the Respondent, by that failure allowing his consultation with his client and later work on the case to go ahead. The learned trial judge granted the Crown an adjournment, over the opposition of the Respondent, but ordered that it pay his costs assessed at $150. The Crown sought leave to appeal against the costs order.

Held:

1. Leave was refused for more than one reason. In the first place, it would not generally be appropriate to grant leave to the Crown to appeal against a costs order unless some important questions of principle were at stake.
2. The order was made in the exercise of two wide discretions. One was the discretion, in relation to an application for an adjournment, to determine a fair basis on which it might be granted, compensating the party opposing the adjournment for a consequence of it, namely, the throwing away of costs; and the other was the discretion, under s 15 of the Supreme Court

Act, to determine by whom costs should be paid. The statutory discretion extended to enable a costs order to be made against the Crown in a criminal prosecution.

3. If slovenly preparation led to unreadiness to proceed, any party, including the Crown, may face an order to strike out a proceeding or pleading, or a costs order, or some further or other consequence.

4. The application for leave to appeal was dismissed with costs.

Statute considered:
Supreme Court Act (Cap 10)

Counsel for applicant	:	Mr Pouono
Counsel for respondent	:	Mr Fifita

Judgment

[1] The Respondent pleaded not guilty to an indictment containing counts of embezzlement, theft, forgery, obtaining credit by false pretences and knowing dealing with forged documents. The one sum or value to which all the counts related was just under $3500. For proof of its case, the Crown relied on five witnesses, although there was a suggestion that not all of these were essential.

[2] The date of the trial being fixed for 12 May 2000, the Crown, on 5 May, requested the Registrar to issue and serve subpoenas requiring its witnesses to attend to give evidence. But the witnesses were not served in time. As a consequence, the hearing was adjourned to 1 September 2000, the Respondent's request for an order for his costs being stood over and ultimately refused. On 23 August, at a pre-trial conference, the Crown informed the Court it was ready to proceed; and on the afternoon of 31 August, counsel for the Respondent had a lengthy consultation with his client, followed by a number of hours of work on the case.

[3] However, on this second occasion, the Crown left it until barely 8 days before the hearing to request the issue of subpoenas. No other step seems to have been taken between May and September to ensure the attendance of witnesses. Not surprisingly, in these circumstances, witnesses were unavailable — indeed, only one of the five was got to Court on 1 September. Realizing the impending situation, counsel for the Crown advised the judge, in the afternoon of 31 August, that the case might not be proceeding the next day; but he neglected to inform counsel for the Respondent, by that failure allowing his consultation with his client and later work on the case to go ahead.

[4] Among the witnesses who were unavailable was an essential witness, a Mr Peter Corbett, aged 78. He had undergone total hip replacement surgery in New Zealand some time before 18 August (on that day, he was reviewed by his surgeon, who noted that his "wound is well healed"). As at the day of the hearing, he required a further two months of convalescence before he would be fit to go to Court. Plainly, but for the Crown's neglect, his unavailability could have been ascertained well before 1 September.

[5] It was in this situation that the learned trial judge granted the Crown an adjournment, over the opposition of the Respondent, but ordered that it pay his costs assessed at $150. Against the costs order, the Crown seeks leave to appeal.

[6] Leave should be refused for more than one reason. In the first place, it would not generally be appropriate to grant leave to the Crown to appeal against a costs order unless some important questions of principle were at stake. There is no such question here.

[7] In the next place, the order was made in the exercise of a wide discretion; indeed, two wide discretions were involved. One was the discretion, in relation to an application for an adjournment, to determine a fair basis on which it might be granted, compensating the party opposing the adjournment for a consequence of it, namely, the throwing away of costs; and the other was the discretion, under s 15 of the Supreme Court Act (Cap 10), to determine by whom costs should be paid. It was conceded that the statutory discretion does extend to enable a costs order to be made against the Crown in a criminal prosecution. There would be great difficulty, for an appellate court, in interfering with an exercise of discretion so broadly based, unless no ground at all could be seen for the order made, or a specific error of law were apparent.

[8] In any case, it should be said that there were strong grounds for the judge's decision. Every party, including the Crown, has an obligation, to the Court and to all other parties, to ensure, well in advance, that it is ready for a hearing the date of which has been fixed, or that timely notice is given if some serious difficulty intervenes. There is no excuse for the late attempts to subpoena witnesses which twice occurred here, and still less for the failure even to ascertain by telephone that witnesses would be unavailable. If slovenly preparation leads to unreadiness to proceed, any party, including the Crown, may face an order to strike out a proceeding or pleading, or a costs order, or some further or other consequence.

[9] For all these reasons, the application for leave to appeal should be dismissed with costs.

Kingdom of Tonga v Havea

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 5/2000 and CA 6/2000

17 July 2001; 27 July 2001

Damages – appeal against quantum – appeal allowed and damages reduced
Land law – damages – loss of amenity

The plaintiff (who lived in New Zealand) had been the holder of a tax allotment in Vava'u since 1983. The land shared a common boundary with an allotment held by Sione Tu'i 'Ofa (Sione Tu'i) who had a contract with the defendant (the Ministry of Works) to supply quarried rock for roading. In the course of quarrying the land of Sione Tu'i, the defendant crossed the boundary into the plaintiff's allotment and took away the topsoil and sub-structure. As well, the defendant had stockpiled some of the quarried rock on an adjoining part of the plaintiff's land. In August 1998, as soon as the plaintiff was informed of the situation, he came to Tonga. He was able to negotiate a resolution of his claim with Sione Tu'i which was recorded in writing. The issue of liability of the defendant to the plaintiff was left unresolved. The plaintiff laid a claim in tort against the defendant for damage to his land. The Supreme Court (*Havea v Kingdom of Tonga* [2000] Tonga LR 31) ordered damages of $9,526 in respect of lost surface of the land as the result of removal of road-building material, and damages of $17,500 for what the trial judge called "Damages at large, including trespass onto the land, tree loss and the loss of amenity." The Kingdom of Tonga was also ordered to pay the costs of the plaintiff. The Kingdom of Tonga appealed the liability to pay damages in the sum of $27,026, and the order that the Kingdom pay the whole of the costs of the plaintiff. The cross-appeal by the landholder sought that the quantum of damages awarded be increased in conformity with a valuation report prepared by a land valuer Siope Lomu, who assessed compensation in the order of $112,000.

Held:

1. With respect to the cross-appeal the Court found that the valuation evidence for the cross-appellant was the subject of vigorous challenge, and the trial judge did not accept it, as he was entitled to do. The cross-appeal was dismissed with costs to be agreed or taxed.
2. It was held that it would be wrong to allow both the value of that part of the allotment lost, and the value of the trees lost. An amount of $8,500 for loss of amenity and for those factors subsumed under the heading

"Damages at Large" might be regarded as generous, but the loss of amenity was serious. The amended amount awarded under that heading should not be disturbed.

3. The appeal was allowed and the order made below was varied by ordering that the appellant pay to the respondent the sum of $18,026, made up of damages for the lost surface of the part removed of $9,526, and $8,500 for loss of amenity and damages at large. The respondent should pay the costs of the appellant of the appeal, to be agreed or taxed.

Cases considered:

Darbishire v Warran [1963] 3 All ER 310 (CA)

Havea v Kingdom of Tonga [2000] Tonga LR 31

Mokofisi v The Kingdom of-Tonga (Supreme Court, C 111/88, Webster J, 13 June 1989)

Statute considered:

Constitution of Tonga (Cap 2)

Counsel for appellant and cross-respondent : Mr Taumoepeau

Counsel for respondent and cross-appellant : Ms Tonga

Judgment

[1] This is an appeal and cross-appeal from the judgment and orders of Finnigan J of 31 March 2000 ([2000] Tonga LR 31), in respect of a claim by a landholder against the government for damage to his land. Finnigan J ordered damages of $9,526 in respect of lost surface of the land as the result of removal of road-building material, and damages of $17,500 for what the trial judge called "Damages at large, including trespass onto the land, tree loss and the loss of amenity." Finnigan J also ordered the Kingdom of Tonga to pay the costs of the plaintiff, to be agreed or taxed.

[2] The appeal by the Kingdom of Tonga challenges the liability to pay damages in the sum of $27,026, and the order that the Kingdom pay the whole of the costs of the plaintiff. The cross-appeal by the landholder seeks that the quantum of damages awarded be increased in conformity with a valuation report prepared by a land valuer Siope Lomu, who assessed compensation in the order of $112,000.

[3] The facts are not seriously in dispute. What follows is taken largely from the trial judge's reasons:

[4] The plaintiff, who lives in New Zealand, is the registered holder of a tax allotment situated at 'Afinemata, Vava'u.

> *"He has been the landholder since 1983, but has not made any specific use of the land other than to allow the trees and vegetables on it to grow and he had rented it out for stock grazing at $100 per year. The land shares a common boundary with land owned by Sione Tu'i 'Ofa ('Sione Tu'i'). Sione Tu'i had a contract with the defendant to supply quarried*

coral rock for roading. In the course of quarrying the land of Sione Tu'i, the defendant crossed the boundary into the plaintiff's land and took away the topsoil and sub-structure to a depth of 5 metres, over an area of 147 meters by 40 metres, i.e. 5,880 square meters. As well, it had stockpiled some of the quarried rock on an adjoining part of his land.

As soon as the plaintiff was told of this he came to Tonga. That was in August 1998. The defendant (the Ministry of Works) stopped the work and the plaintiff visited the land with the Minister of Works, who happened to be in Vava'u. There were meetings, at which the plaintiff and/or his lawyer were present, as was Sione Tu'i. The Ministry had paid the latter for all the quarried coral so far delivered. It was suggested by the Minister and generally agreed that Sione Tu'i would pay to the plaintiff half of what he had received. It is accepted that Sione had been paid $16,000. During their discussions, Sione Tu'i told the plaintiff that they were relatives. The plaintiff accepted that, and resolved to do something to help him. So on 4 September 1998, the day the plaintiff left for New Zealand, the two of them entered a written agreement. They had agreed that Sione had paid $3,000 to the plaintiff, and would give the plaintiff the remaining stockpiled rock, so that he could sell it and keep the proceeds. In the agreement the plaintiff allowed that Sione had full authority to remove (and sell) stock from the stockpile on the plaintiffs land, and the money was to be given to the plaintiff's family. They agreed that this arrangement extinguished any liability that Sione might have to the plaintiff from the conversion of the plaintiffs coral rock and the damage to the land, and they promised each other to live in harmony. Sione paid the plaintiff another $500, and the plaintiff was satisfied, because he wanted to help Sione's family in their money difficulties.

In addition, the Ministry of Works was anxious to complete about 2 kilometres of partially constructed road. The Minister explained to the plaintiff and his lawyer at a meeting about the problem that early completion of those 2 kilometres was necessary in order to avoid paying penalties to the Asian Development Bank, which was financing the road. The plaintiff agreed to supply the Ministry with 663 loads of coral rock from the stockpile on his land so the 2 kilometres could be completed. He was paid $3,779.10 for these 663 loads before he left for New Zealand on 4 September 1998."

[5] The trial judge found that there were two meetings at which the plaintiff and his lawyer discussed with the Minister and his advisers resolutions of all the issues that had arisen, but that after the meetings, "any issue of liability of the defendant to the plaintiff was left unresolved."

[6] It is convenient to consider the cross-claim first. The cross claimant says that his valuer's evidence with regard to the damaged area was unchallenged; it was supported by the evidence of the valuer called by the cross respondent; and the valuation

method adopted by the cross-appellant's valuer, Mr Siope Lomu, was "common practice" in Tonga.

[7] Mr Lomu has reached his assessment by a "before and after" method. The "before" value he calculated on the basis that he regarded the highest and best use of the subject allotment was as a subdivision of the property into "commercial accommodation units or smaller residential lots of at least 30 perches (758m^2) per lot." He effected a notional subdivision into 35 lots, applied what he called an "exchange of land to money value" for each lot, being $5,000 for 4 lots, $4,500 for 16 lots, $4,000 for 12 lots, and $3,500 for 3 lots, giving what was asserted to be "fair market value" of $147,000, and "total value to the landholder" of $150,000.

[8] Mr Lomu valued the residue of 5.779 acres after the damage to the property, by applying his "exchange of land to money value" to 4 parcels: 1 acre at $10,000, 1 acre at 8,000, 1 acre at $6,000, and the fourth, 2.779 acres, at $5,000 per acre, giving an after value of $37,895.00, rounded up to $38,000.

[9] The answer to the cross appeal is that the valuation evidence for the cross-appellant was the subject of vigorous challenge, and the trial judge did not accept it, as he was entitled to do.

[10] Mr Lomu agreed in cross examination that "in Tonga, you cannot purchase land," and it was put to him that a method of valuation based on an open market for land could not be used in Tonga. Yet in fact this is what he did. It was further suggested to Mr Lomu, and he agreed, that if the government wished to effect a subdivision on the subject property, it would value the crops and the trees on the allotment, and offer the owner a similar size tax allotment: "the government wouldn't actually pay $150,000" to the owner.

[11] The trial judge declined to accept that land in Tonga can appropriately be valued in a similar way to the valuation of freehold lands as a tradable commodity in an open market.

[12] His Honour said, "Concepts such as market value that assumes a willing but not anxious vendor and purchaser, and free exposure to the market do not fit readily into Tongan land tenure, and it is beyond the mandate of the Court to introduce them." Apart from the question of the theoretical validity of the valuer's approach, on the evidentiary level His Honour noted:

> "There was no evidence that this piece of land 3 kilometres from Neiafu, elevated though it is and with pleasant views, would have attracted in the reasonable future the 35 residential purchases that he postulated."

In this respect, it is relevant that subsequent to the trespass and conversion by the appellant, the respondent authorised the quarrying of further material from his allotment by a contractor, Tomu Fa Paea. The cross-appeal should be dismissed with costs to be agreed or taxed.

[13] The trial judge arrived at his conclusions by following the approach adopted by Webster J in the unreported judgment of 13 June 1989 in *Mokofisi v The Kingdom of-*

Tonga (C111/88). His Honour was not in error in following that approach, but in the process permitted a degree of double compensation, as will be shown below.

[14] On the appeal, the Solicitor-General submitted that the trial judge should have accepted the primary defence of the Kingdom at trial, that the agreement with Sione Tu'i was a three-way agreement which was made in settlement of all that he could claim for the damage caused and that there was no further or other liability of the defendant to the plaintiff.

[15] The trial judge held that the payment by Sione Tu'i was no more than payment from the proceeds of what he had wrongfully received for selling the substance of the plaintiffs land to the defendant, and that the defendant was still liable for the encroachment and the destruction. His Honour ruled that this liability had not been compromised.

[16] The agreement said to constitute a compromise, while having been initiated and encouraged by the Minister, is signed only by the plaintiff and Sione Tu'i. It deals only with the material that was wrongfully removed from the plaintiff's land. The plaintiff denied in evidence that the liability of the defendant in respect of trespass and damage to his property had been compromised by his agreement with Sione Tu'i. For these reasons, the trial judge was right to conclude that the defendant was liable in trespass and loss of amenity to the property of the plaintiff.

[17] The Solicitor General sought to distinguish *Mokofisi*, on the basis that *Mokofisi* related to a town allotment while Havea's was a tax allotment, and that *Mokofisi* related to land located at Nuku'alofa, while the tax allotment in the present case was in the middle of bushland, some 3km from Neiafu in Vava'u.

[18] While those differences may be accepted, as well as the further difference that Havea had been compensated before trial for the loss of road-building material from his allotment, the principles followed in *Mokofisi* were both relevant and appropriate in the present case.

[19] In *Mokofisi*, the Ministry of Works had quarried on the land adjacent to the plaintiff and had encroached on his allotment. The evidence established that 251 cubic metres of rock had been removed from the plaintiff's allotment, as well as 300 cubic metres of topsoil. The surface of the allotment lost to the plaintiff by reason of the encroachment was 150 square metres.

[20] Webster J held:

> "It has according by been proved and accepted that employees of the Defendant did seriously encroach onto the Plaintiff's town allotment by quarrying and removing rock and topsoil. The Defendant is therefore liable to the Plaintiff in damages for the torts of trespass to land and conversion. The measure of damages is the sum necessary to put the Plaintiff in the same position as though the damage had not happened: *Darbishire v Warran* [1963] 3 All ER 310 (CA).

> For trespass to land where there is permanent deprivation of land, as is the case here in the case of the actual rocks quarried away at the boundary, the measure is the value of the land. This was land with a surface area of 150 square metres which was lost, and based on a market value of $15.25 per square metre for land in that area of Ma'ufanga, Mr Lemoto valued this at $2,287.50."

[21] His Honour also held that "the trespass to the plaintiff's land also caused a considerable loss of amenity to the Plaintiff's town allotment", including loss of natural terrain, as well as "the loss of privacy, a better view and outlook and the natural environment due to the loss of rocks." For loss of amenity, His Honour awarded $5000. He awarded $5000 as the defendant's contribution to the cost of a fence to protect his family from the sheer drop created by the removal of the coral, a factor that is not relevant in the present cases. His Honour allowed $925 for the conversion of topsoil from the remaining land, and $2000 for "damage at large", to reflect that damages are not limited to provable specific pecuniary loss, and should recognise the affront caused by the torts of trespass to land and unlawful conversion, as well as the defendant's conduct right up to the conclusion of the trial.

[22] Webster J held that the value of the coral and topsoil, converted from the area whose surface area was the 150 square metres lost, was $1896. In a passage important for present purposes, His Honour said:

> "Next come the damage for unlawful conversion of the coral rock and topsoil removed. The measure of these damages is the value of the thing converted at the date of conversion. This was a separate tort and so separate damages are due. However I accept the submission of Mrs Taumoepeau for the Defendant that there should not be any overlap of these damages with the damages for trespass. In this respect it appears to the Court that it would be unfair to award damages for the conversion of the coral rock in addition to the damages for trespass of $2287.50 for loss of the 150 square meters of land on the south-east boundary. This is because those damages were based on the value of that land and therefore if that is being fully compensated that must be held to include compensation for the things in or on that land. So it would be wrong to give additional compensation for the rocks which made up that land."

[23] *Darbishire v Warran*, on which Webster J relied, was concerned with the measure of damages for a motor vehicle damaged as a result of the defendant's negligence. The vehicle had been repaired by the plaintiff at a cost of $192, and there was evidence that the market value of the car was $85. It was held that the plaintiff was entitled as against the defendant only to the lower figure.

[24] In the present case, Finnigan J assessed the value of that part of the allotment damaged, or indeed destroyed, by the trespass and conversion by the defendant at $9526. We take it that the cost of restoring the allotment to its earlier state (an option not realistically open in any event) is not less than the value of the coral removed, and the trees lost. Because of the way the appellant conducted its case, there was no

challenge to the number and value of the trees claimed by the respondent. He claimed at least 48 coconut trees at $100 each, 24 Nonu trees at $80, 10 Loupata trees at $50, and 8 orange trees at $80. Finnigan J did not dissect the amount of $17,500, but it is likely that at least $9000 was attributed to "tree-loss".

[25] In our opinion, it would be wrong to allow both the value of that part of the allotment lost, and the value of the trees lost, for the reasons outlined by Webster J in *Mokofisi* in the passage set out above. An amount of $8,500 for loss of amenity and for those factors which Webster J subsumed under the heading "Damages at Large" might be regarded as generous, but the loss of amenity in this case was really quite serious. The amended amount awarded under that heading should not be disturbed.

[26] The amount for the value of the lost surface of the allotment is less than the value of the coral taken and the trees lost, but that value is based on the figures given by the respondent's valuer, and consistently with *Darbishire v Warren*, there is no reason why a sum greater than the value of what was damaged should be awarded. It is also to be borne in mind that an allowance of the full value of the trees would risk double compensation in a case in which some amount has already been received in respect of the severed value of the coral the severance of which required the removal of the trees.

[27] The appellant argued that Mr Lomu's valuation constituted a contravention of s 24 of the Constitution of Tonga (Cap 2), and should not have been received and acted upon by Finnigan J. Mr Lomu gave evidence that he "was directed by the Minister's Secretary to attend the Court on behalf of the Ministry." Even if there was a contravention of s 24, a matter it is not necessary to decide, Finnigan J was entitled to have regard to that evidence.

[28] The appellant also argued that the respondent having been awarded below a very much smaller sum than he claimed, the appellant should not have been ordered to pay the whole of his costs. In the absence of any offer before judgement higher than what was awarded, or of payment into court of such an amount, no basis exists to interfere with the costs order made by Finnigan J.

[29] For these reasons, we would allow the appellant's appeal and vary the order made below by ordering that the appellant pay to the respondent the sum of $18,026, made up of damages for the lost surface of the part removed of $9526, and $8,500 for loss of amenity and damages at large. The respondent should pay the costs of the appellant of the appeal, to be agreed or taxed.

Hafoka v Mokofisi

Court of Appeal, Nuku'alofa
Ward CJ, Burchett, Tompkins JJ
CA 15/2000

17 July 2001; 27 July 2001

Land law – agreement to register land in respondent's name – found agreement – appeal dismissed

The appellant was the registered holder of a tax allotment in Tofoa. Earlier, it was the land of his father Fa'aitu, who died in May 1980 after which it was held by his widow 'Akosita, the appellant's mother, until her death. The appellant became the registered owner on 17 March 1997. In 1978, the appellant wanted to go to America with his family. He told the Court that he had money for that, but he needed more. So he asked the respondent (and others) for $200 each, which the respondent (and the others) gave him, and in exchange the appellant gave them the right to occupy parts of the tax allotment. The dispute in this case was over the extent of that right. The respondent claimed it was to be permanent and that he was promised a registered title. The appellant contended that he did not intend to surrender his rights permanently for $200 per allotment. The Land Court found that the agreement to give the respondent the right to occupy parts of the land included the promise to have part of the allotment registered in the name of the respondent for his son to inherit. The main ground of appeal was that the Court erred in law in holding the appellant promised to give up the right to occupy part of his inheritance and took money in return, and that there was nothing in the Land Act to prevent that.

Held:

1. The Land Court found established an agreement that the appellant would, on his return from America, have the land registered in the respondent's name. In anticipation of that, the respondent was permitted to live on the land. There was nothing to suggest the registration of the land would be done other than in accordance with the requirements of the Land Act. Neither sections 6 nor 13 were contravened.
2. The case in the Land Court solely sought the eviction of the respondent and the respondent pleaded estoppel on the basis of the agreement. The appellant could not widen the issues before the Court. The points he raised were not relevant to the issue of whether estoppel was established.
3. The appeal was dismissed and there was no order as to costs.

Case considered:
Matavalea v Uatu [1989] Tonga LR 101 (PC)

Statutes considered:
Evidence Act (Cap 15)
Land Act (Cap 132)

Counsel for appellant : Mr Tu'utafaiva
No appearance for the respondent

Judgment

[1] This is an appeal from the refusal by Mr Justice Finnigan of a claim to evict the respondent from part of the appellant's tax allotment.

[2] The facts are clearly set out in the Judgment:

> "The plaintiff [appellant] is the registered holder of a tax allotment in Tofoa. Earlier, it was the land of his father Fa'aitu, who died in May 1980 after which it was held by his widow 'Akosita, the plaintiff's mother, until her death. The plaintiff became the registered owner on 17 March 1997.
>
> In 1978, the plaintiff wanted to go to America with his family. He told the Court that he had money for that, but he needed more. So he asked the defendant [respondent] (and others) for $200 each, which the defendant (and the others) gave him, and in exchange the plaintiff gave them the right to occupy parts of the tax allotment. The dispute in this case is over the extent of that right. The defendant claims it was to be permanent and that he was promised a registered title. The plaintiff stated in evidence that he did not intend to surrender his rights permanently for $200 per allotment."

[3] The learned Judge found that the agreement to give the respondent the right to occupy parts of the land included the promise to have part of the allotment registered in the name of the respondent for his son to inherit. That finding of fact is not challenged in this appeal.

[4] There were two grounds of appeal:

> "1. His Honour erred in law in holding the appellant promised to give up the right to occupy part of his inheritance and took money in return, and there is nothing in the Land Act to prevent that.
>
> 2. The learned judge erred in law in holding that proof of the agreement that the appellant made in 1978 is a shield against his claim for eviction of the defendant."

[5] In view of the decision of the Privy Council in *Matavalea v Uatu* [1989] Tonga LR 101 that, whilst the principles of equity cannot give any right to title to land, they

may give protection in a case such as this for possession, Mr Tu'utafaiva does not pursue the second ground.

[6] His case on the first ground of appeal is that the agreement was in breach of the provisions of the Land Act (Cap 132), was therefore null and void and could not be relied upon by the respondent as defence. He suggests the agreement breaches sections 6 and 13 and therefore contradicts the passage from the judgment of the learned judge underlined in the first ground.

[7] Section 6 of the Land Act provides that any disposition of any allotment which purports to effect a voluntary conveyance, an out-and-out sale, or a devise by will is null and void. The agreement was, Mr Tu'utafaiva suggests, an attempt to make a voluntary conveyance of the land and, by section 6, it is null and void. Further he points out that, by section 13, any landholder who enters or attempts to enter into any agreement for profit or benefit relating to the use or occupation of his holding or part thereof other than in the manner prescribed by the Land Act or as approved in writing by the Minister of Lands commits an offence. This was, he says, just such an agreement.

[8] We cannot agree. What the learned judge found to be established by the evidence was an agreement that the appellant would, on his return from America, have the land registered in the respondent's name. In anticipation of that, the respondent was permitted to live on the land. There is nothing to suggest the registration of the land would be done other than in accordance with the requirements of the Act. Neither section 6 nor section 13 were contravened and the learned judge found that was the case.

[9] The problem the appellant faces here is that the claim in the court below was not to effect registration of any interest or to prove title. The appellant simply sought an order to evict the respondent and the respondent pleaded estoppel on the basis of the agreement. He relied on the provisions of section 103(3) of the Evidence Act. The trial judge upheld that defence. The other issues advanced by Mr Tu'utafaiva were also raised at the trial. The learned judge considered them but concluded that any other remedy was not available within the limits of the case he was trying. He explained:

> "The legal issue arising is whether the promise to surrender the defendant a registered interest in part of his allotment can be enforced against him without a breach of the Act. That is not an issue raised by the pleadings in the present case."

[10] We must take the same position. The case in the Land Court solely sought the eviction of the respondent. On that, the judge's conclusion is in the passage quoted in part in the first ground of appeal:

> "… the plaintiff's promise, so far as the Act is concerned, is worthless.

[11] By his promise however the plaintiff made a contract, and the law will not lightly release him from it. That is where the principles of estoppel enter into the land code.

He promised to give up the right to occupy part of his inheritance and took money in return and there is nothing in the Land Act to prevent that."

[12] Later he continued:

> "What legal steps [the plaintiff] might have been obliged by his agreement and permitted by the Act, to take are for another time. For the present case, proof of the agreement that he had made in 1978 is a shield against his claim for eviction of the defendant. This is provided by section 103 of the Evidence Act (Cap 15), particularly section 103(3) …
>
> I uphold the defence of estoppel. That defence prevents the plaintiff from overlooking his own promise and asserting his right to occupy the part of his allotment that the defendant occupies."

[13] We agree with the learned judge's finding. This was an action for eviction only. Mr Tu'utafaiva, who was not counsel in the court below and did not draft the claim, seeks understandably to widen the issues before this court. He cannot do so and the points he raises are not relevant to the issue of whether estoppel was established.

[14] The appeal is dismissed.

[15] The respondent's counsel sought to withdraw because he had not been instructed and the respondent did not appear despite being told of the hearing by his erstwhile counsel. In those circumstances we make no order for costs.

Cowley v Tourist Services Ha'pai Ltd and Fund Management Ltd

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 27/2000, 28/2000, 29/2000

18 July 2001; 27 July 2001

Land law – sub-leases contained obvious mistake – true construction valid sub-lease
Land law – buildings not fixtures – personal property

These appeals concerned the validity of two sub-leases of land in Nuku'alofa which formed part of the Royal family Estates. The head lease dated 15 June 1993 from His Majesty the King to one Dr Wang was for a term of 50 years expirying on 14 June 2043. The deed of lease contained a covenant by Dr Wang that he would not grant a sub-lease or transfer of the lease without the consent of Cabinet. On 18 December 1998 pursuant to a consent from Cabinet Dr Wang "by the ANZ Banking Group Limited as mortgagee in possession" granted a sub-lease of part of the land to Fund Management Ltd and a sub-lease of the remaining part of the land to Tourist Services Ha'apai Ltd. The term of each sub-lease was incorrectly expressed to extend "until the fourteenth day of the month of June in the year two thousand nine hundred and forty three"- 900 years beyond the expiry term of the head lease. Having become sub-lessees each respondent entered into a series of short term tenancy agreements requiring the payment of rent in respect of the respective premises. On the basis that the term of the short term tenancy agreents had expired the respondents issued eviction notices. No point was taken on appeal about the eviction notices. The grounds of appeal questioned the validity of the respondents' sub-leases and the tenancy agreements. It was contended that the sub-leases did not satisfy s 10(2) of the Land Act (Cap 132) which requires a lease of Royal Estate land to be for "projects of general public interest and benefit". It was also contended that the sub-leases were invalid because of the reference in each of them to a term of 945 years and other mistakes in the sub-lease forms. It was further contended that the sub-leases breached sections 12 and 13 of the Land Act which forbid respectively any out-and-out sale of land or any agreement for the use or occupation of land for profit other than in the manner prescribed by the Act or as approved in writing by the Minister.

Held:

1. The lease and sub-lease complied with the provisions in the Constitution and in the Land Act, and no evidence was brought by the Appellants to show otherwise.
2. The sub-leases were not rendered invalid by the reference in each of them to a term of 900 years beyond the expiry of the term of the head lease . That was an obvious mistake and the court should give effect to the true intention as it appears from the construction of the documents. The other mistakes were minor and at most they might pose a problem of construction in a case to which an incomplete or inappropriate clause might appear to apply.
3. Registered leases and mortgages remain permissable under sections 12 and 13 of the Land Act.
4. In Tonga buildings are not in general regarded as fixtures and they are treated as detachable from the land.
5. Section 13 of the Land Act has no application to ordinary short term tenancies of houses and shops.

Cases considered:

Bank of Tonga v Kolo (Ward CJ, unreported, 21 April 1995)
Cook v Shoesmith [1951] 1 KB 752
G J Coles & Coy Ltd v Commissioner of Taxation (1975) 132 CLR 242
Kolo v Bank of Tonga (Court of Appeal, Burchett, Tompkins and Beaumont JJ, unreported, 7 August 1998)
Mangisi v Koloamatangi (Court of Appeal, 23 July 1999)

Statutes considered:

Constitution of Tonga (Cap 2)
Land Act (Cap 132)

Counsel for appellants : Mr Tu'utafaiva
Counsel for respondents : Mr Niu

Judgment

[1] These appeals are concerned with the validity of two sub-leases of land in Nuku'alofa, forming part of the Royal Family Estates referred to in s 10 of the Land Act (Cap 132). That issue is raised by the Appellants, who are tenants of the sub-lessees in respect of buildings erected on land comprised within the sub-leases. They are appealing in proceedings brought by the sub-lessees for their eviction, in which orders were made against them.

[2] In the beginning of the matter, His Majesty Taufa'ahau Tupou IV, King of Tonga, as lessor under a deed of lease made 15 June 1993, and with the prior consent of Cabinet given under Clause 114 of the Constitution of Tonga, leased all the relevant land to one Dr Wong for a term to extend until 14 June 2043. The deed, which was registered as lease 5405, contained a covenant by Dr Wong "that he will not grant a

sub-lease of, or transfer this lease without the consent of Cabinet before Land obtained" (that is to say, perhaps, the consent of Cabinet is to be got before the sub-lessee obtains entry onto the land).

[3] Dr Wong then, "by the ANZ Banking Group Limited as Mortgagee in possession", on 18 December 1998, granted a sub-lease to the Respondent Fund Management Limited of part of the land for a term expressed to extend "until the fourteenth day of the month of June in the year two thousand nine hundred and forty three". It will be observed that this is 900 years beyond the expiry of the term of the head lease. But inspection of the document, as the trial judge held, makes the explanation quite apparent. A form was used, containing the printed words "in the year one thousand nine hundred and", followed by a blank. The typist crossed out the words "one thousand" and typed below them the words "two thousand", but failed to continue the crossing out so as to delete the words "nine hundred" before typing in "forty three". It is an obvious conclusion that the words "nine hundred" have been left in the document purely by mistake. The true intention, to which the Court should give effect, was to specify the term that would be expressed if those words were not there, particularly as the written consent of Cabinet, to be mentioned, referred to a term of 45 years, not 945 years.

[4] The next thing to note about the sub-lease is that it bears an endorsement of its registration on 18 December 1998, and the signature of the Minister of Lands. The evidence shows this signature was in conformity with a Court order (made by Lewis CJ on 24 February 1998 in a proceeding brought by the Bank and Dr Wong) requiring the Minister's approval to this and another sub-lease to be mentioned. The sub-lease also received the consent of Cabinet; indeed, that was given in advance, on 11 March 1998, and in writing.

[5] Also on 18 December 1998, in the same terms and pursuant to a consent of Cabinet in the same terms, Dr Wong granted a sub-lease of the remaining part of the land to the Respondent Tourist Services Ha'apai Limited (although its name was mistakenly shown as Tourists Services Ha'apai Limited) to run for the same period (expressed by the same mistake in the same way). This sub-lease, too, bears an endorsement of its registration on 18 December 1998, and the signature of the Minister of Lands; and it was the subject of a corresponding consent of Cabinet.

[6] Having become sub-lessees, each of the Respondents entered into a series of short term tenancy agreements, being sub-lettings to the occupants of buildings that were on the lands. These tenancy agreements were expressed to require the payment of rent "in respect of the Premises", defined as meaning the particular "building and premises operated as" the business of each tenant, although the agreements recited that the "Tenant owns buildings on the Land". The appeals were argued on the footing that the Appellants had all entered into tenancy agreements so expressed.

[7] On the basis that the terms of the short term tenancy agreements had expired, the Respondents issued eviction notices to the Appellants, and to other Defendants in the original proceedings who have not appealed. No point is taken in the appeals about the eviction notices. The grounds of appeal all relate to defences which question the validity of the Respondents' sub-leases or the tenancy agreements. A number of the

defences raised at trial and in the grounds of appeal were ultimately not pursued or were expressly abandoned.

[8] An argument pressed for some time was that the sub-leases required the personal consent of the King. The basis of such a requirement is not to be found in the Constitution or the Land Act, but in any case, it was pointed out that the lease from the King provides, in a clause that has been quoted, for the consent of Cabinet to a sub-lease or transfer. It would sit oddly with that to find an unexpressed obligation to obtain a different consent. In the light of this consideration, the argument was abandoned.

[9] Grounds of appeal suggesting a sub-lease of part could not be valid, or not without the personal consent of the King, were also withdrawn, on the footing that s 124(2) of the Land Act expressly contemplates a sub-lease of part only of the land in the lease, which is permissible upon ordinary principles of law (*Cook v Shoesmith* [1951] 1 KB 752), as is also an assignment of part (*G J Coles & Coy Ltd v Commissioner of Taxation* (1975) 132 CLR 242). No issue was raised as to whether the sub-leases to the Respondents actually took effect as deeds of assignment, no doubt because the provision in the lease for the consent of Cabinet applied to a "transfer", that is to say, an assignment, just as it did to a sub-lease.

[10] A further ground of appeal asserted that s 10(2) of the Land Act was not satisfied by the sub-leases. That subsection provides:

> *"(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."*

It should be pointed out that subs (2) is, by its terms, applicable to the head lease, which falls directly within the words "His Majesty may lease", but the subsection is not expressed to apply to a sub-lease granted, not by His Majesty, but by the lessee. In any case, the submission of counsel for the Respondents, Mr Niu, that a sub-lease given for the purpose of the erection of a commercial building in Nuku'alofa, making services available for utilisation in economic activities there, does come within the provision, is a submission that should be accepted.

[11] Next, counsel for the Appellants submitted that certain minor failures on the part of the parties to the sub-leases to fill in blanks, and delete superfluous printed terms, rendered the documents invalid. It was the trial judge who described these as "minor", but counsel did not point to any respect in which any of them rose above that description. At most, they might pose a problem of construction in a case to which an incomplete or inappropriate clause might appear to apply. The point is without substance.

[12] Then, it was argued that the sub-leases were rendered invalid by the reference in each of them to a term of some 945 years. But, as has been said, that was a mistake. Moreover, it was so obvious a mistake that it can, and should, be corrected upon the true construction of the documents. The alleged invalidity, therefore, falls away. What is more, Mr Niu's submission is correct that the terms of 945 years would,

anyway, be ineffective as to 900 years because unsupported, to that extent, by the term of the head lease.

[13] A contention was also advanced that turned, less on a fine point of language, and more on substantial provisions of the Constitution and the Land Act. Clause 104 of the Constitution provides:

> *"104. All the land is the property of the King and he may at pleasure grant to the nobles and titular chiefs or matabules one or more estates to become their hereditary estates. It is hereby declared by this Constitution that it shall not be lawful for anyone at any time hereafter whether he be the King or any one of the chiefs or the people of this country to sell any land whatever in the Kingdom of Tonga but they may lease it only in accordance with this Constitution and mortgage it in accordance with the Land Act. And this declaration shall become a covenant binding on the King and chiefs of this Kingdom for themselves and their heirs and successors for ever."*

Clause 110 provides for the manner of execution of leases by the Minister of Lands, adding: "and no lease or transfer will be considered valid or recognised by the Government unless registered in the office of the Minister of Lands." Clause 114 then prescribes, with a presently irrelevant proviso, that "[n]o lease, sub-lease, transfer of a lease or of a sub-lease shall be granted -

> (a) without the prior consent of Cabinet where the term is ninety-nine years, or less, or
> (b) without the prior consent of Privy Council where the term is over ninety-nine years, …".

It is in this constitutional framework that sections 12 and 13 of the Land Act must be understood:

> *"12. Any landholder who sells or attempts to sell any land out-and-out to any other person shall be liable on conviction therefor to a term of imprisonment not exceeding 10 years.*
>
> *13. Any landholder who enters or attempts to enter into any agreement for profit or benefit relating to the use or occupation of his holding or a part thereof other than in the manner prescribed by this Act or as approved in writing by the Minister shall be liable on conviction to a fine not exceeding $200 or to imprisonment for any period not exceeding 12 months or both."*

[14] So the Constitution prohibits (in Cl 104) the sale of land (a prohibition supported in the Land Act by criminal sanctions), but (in the same clause) expressly permits a person to enter into a "lease … only in accordance with this Constitution and mortgage … in accordance with the Land Act". It follows that when s 12 of the Land Act forbids the sale of land "out-and-out", and s 13 forbids an agreement for use or occupation of land for profit "other than in the manner prescribed" by the Land Act,

or "as approved in writing by the Minister", a registered lease within clauses 104, 110 and 114 of the Constitution, and a mortgage within cl 104, must remain permissible. And, indeed, the manner in which such a lease is to be granted is "prescribed by this Act" within the language of s 13 of the Land Act, for it is prescribed by ss 124 and 126 et seq (which also apply to sub-leases). In the present case, the lease and the sub-leases appear to comply with these provisions, and no evidence has been brought by the Appellants to show otherwise.

[15] Section 13 of the Land Act is a criminal provision, and it should not be extended by any loose construction. In Tonga, the law of fixtures, as understood in other Common Law countries, has been somewhat modified, so that buildings are not, in general, regarded as fixtures. They are treated rather as "chattel houses" are in Barbados — that is to say, as personal property detachable from the land: *Kolo v Bank of Tonga* (Court of Appeal, Burchett, Tompkins and Beaumont JJ, unreported, 7 August 1998); *Mangisi v Koloamatangi* (Court of Appeal, 23 July 1999); *Bank of Tonga v Kolo* (Ward CJ, unreported, 21 April 1995). It would be inconsistent with this approach (and destructive of ordinary weekly tenancies of houses and shops in Tonga) to treat s 13 as applicable to the short term tenancy agreements in the present case. Accordingly, these, too, although not registered, avoid any offence to s 13. That conclusion is not affected by the ownership by each of the short term tenants of his own shop building; he accepted the obligations of a tenant in respect of it, agreeing to pay rent and acknowledging his landlord's right to receive the rent. Whoever built a shop or house, it may be the subject of a short term tenancy from a lessee or sub-lessee of the land on which it is situated.

[16] For these reasons, the appeals should be dismissed with costs.

To'a v National Pacific Insurance Ltd

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 21/2000

18 July 2001; 27 July 2001

Insurance – exclusion clause – "reckless" and "dangerous" not proved – insurer liable

On 31 January 1998, the appellant was driving the insured vehicle and collided with a van causing considerable damage to the van and writing off the insured vehicle. Following a claim under the policy, the respondent paid $5,500 on the basis that the value of the vehicle written off was $6,000 less an excess of $500. Subsequently the other driver sued the appellant and obtained judgment in the Supreme Court against him for the damage to his vehicle in the sum of $3,114, interest at 10% and costs of $1,000. The appellant was also charged with and pleaded guilty to negligent driving. There was a clause in the policy that excluded liability where the vehicle was being driven in a reckless/dangerous manner. In the Supreme Court it was held that the circumstances were within the exclusion clause, with the result that the claim failed. The appellant appealed against that decision. The appellant also submitted that the contract of insurance was unfair as there was no Tongan version of the contract provided.

Held:

1. In the absence of any evidence of misrepresentation, duress, mistake or other grounds for avoiding the terms of the policy, both the insured and the insurer were bound by those terms. The appellant sought to enforce the policy against the respondent. He could hardly claim an amount under the policy and at the same time seek not to be bound by a term in the policy. The contract of insurance was not unfair so that ground of appeal did not succeed.
2. The words "reckless" and "dangerous" were commonly used in the context of driving giving rise to more serious criminal liability, such as dangerous driving. The use of those words in an exclusion clause in an insurance policy emphasises that they should be applied only to driving with additional elements of culpability, compared to what would otherwise be considered to be negligent or careless driving.
3. The onus was on the respondent to prove that the appellant's motor vehicle was being driven in a reckless/ dangerous manner. The evidence was not

sufficient to discharge that onus. As the respondent did not prove the general exception upon which it relied to deny liability, the respondent was bound to indemnify the appellant for the loss of or damage to his vehicle.

4. The appeal was allowed. The appellant was entitled to judgment against the respondent for the amount of his liability to the driver of the other vehicle, $3,114 plus interest at 10% and costs of $1,000; $1,460 for loss of use; interest on the amounts at 10% interest on the amount payable to the other driver from the date of the judgment against him to the date of payment, plus interest for loss of use of the vehicle from 12 May 1998 to the date of payment; and costs in the proceedings.

Case considered:

Provincial v Morgan [1933] AC 240

Counsel for appellant : Mr Fifita
Counsel for respondent : Mr Etika

Judgment

[1] This appeal concerns a claim under an insurance policy. The appellant, the plaintiff in the Supreme Court, claimed that he was entitled to be indemnified by the respondent for losses following a motor accident on 31 January 1998. The Chief Justice, by a decision delivered on 2 August 2000, held that the circumstances were within an exclusion clause in the policy, with the result that the claim failed. The appellant has appealed against that decision.

The contract of insurance

[2] The contract of insurance is a motor vehicle policy in the name of the appellant as the insured and the Bank of Tonga as the finance company. It insured the appellant's motor vehicle for a period of 12 months commencing on 19 June 1997. The Bank of Tonga was named as the finance company because it had lent the appellant $7,200 to enable him to purchase the vehicle for use as a taxi. The loan was conditional on the appellant arranging insurance. The premium was paid by the bank to the respondent and the amount added to the appellant's loan account.

[3] The motor vehicle policy was in a standard form. Relevant to the principal issue on this appeal is the following general exclusion.

> "You are NOT covered for any loss, damage, injury or liability while any vehicle in connection with which cover benefits are granted under the policy is:
>
> …
>
> (c) being driven in a reckless / dangerous manner."

The claim

[4] On 31 January 1998, the appellant was driving the insured vehicle and collided with a van causing considerable damage to the van and writing off the insured vehicle. Following a claim under the policy, the respondent paid $5,500 on the basis that the value of the vehicle written off was $6,000 less an excess of $500. Subsequently the other driver sued the appellant and obtained judgment in the Supreme Court against him for the damage to his vehicle in the sum of $3,114, interest at 10% and costs of $1,000. The appellant was also charged with and pleaded guilty to negligent driving.

[5] The claim before the Chief Justice was for the balance between the sum paid by the respondent for the damage to the appellant's vehicle and the insured sum of $7,200, for the sum awarded against the appellant for the damage to the third party vehicle, for $3,900 loss of earnings whilst waiting for payment by the insurance company, for $500 for the loss of the use of the vehicle during the same period for his non-commercial use of it and for $300 for inconvenience.

[6] The judgment first dealt with a claim for payment of the balance between the sum paid and the amount insured. The Chief Justice held that the respondent paid the market value of the vehicle at the time, and that there was no liability to make any further payment for the damage to the appellant's vehicle. That finding is not challenged.

Was the contract unfair?

[7] The appellant submitted that the contract of insurance was unfair as there was no Tongan version of the contract provided. It was submitted that the bargaining power of the parties was not in proportion as the appellant was inexperienced with insurance. The respondent should have advised the appellant to seek independent advice before entering into the contract.

[8] The Chief Justice's finding on this issue was:

> "During the trial the plaintiff also sought to allege that the defendant had failed to advise the plaintiff properly about the scope of the policy. That was not pleaded, but I have no hesitation in saying that I accept that the plaintiff was given a sufficient explanation and, in any event, the policy document is clear in its terms. The plaintiff is an educated man and his work at that time required a familiarity with English — the language of the written agreement."

[9] The terms of the policy, including the general exclusions, are the terms of the contract between the insured and the insurer. In the absence of any evidence of misrepresentation, duress, mistake or other grounds for avoiding the terms of the policy, both the insured and the insurer are bound by those terms. Here the appellant is seeking to enforce the policy against the respondent. He can hardly claim an amount under the policy and at the same time seek not to be bound by a term in the

policy. We find no reason to differ from the conclusion the Chief Justice reached. This ground of appeal cannot succeed.

The general exclusion defence

[10] On the defence based on the general exclusion set out above, the Chief Justice said:

> "As the party relying on the exclusion, the burden is on the defence to prove that the driving was reckless or dangerous. It was the plaintiff who called evidence that, when the accident occurred, the other driver was travelling in the opposite direction and saw the plaintiff's vehicle driving towards him in a zigzag manner. He pulled in to the left hand side of the road. The other vehicle went across the road and back three times before it ran head on into his vehicle on the plaintiff's offside of the road at about 40 kph. The plaintiff's evidence was that he could not challenge that account because he was very tired at that time. Anyone who continues to drive when so tired that he is likely to fall asleep at the wheel is clearly driving recklessly. …
>
> However, on the evidence as a whole including that called by the plaintiff, I am satisfied beyond any doubt at all that the plaintiff's driving on that day was reckless and dangerous."

[11] For that reason the Chief Justice held that the respondent was not liable for any claim by the appellant arising out of the accident.

[12] This finding, and the challenge to it, turns on the proper interpretation of the phrase "reckless / dangerous" in the general exception, and whether the driving of the appellant was within that phrase so interpreted.

[13] Where a trial judge has made findings of fact based at least in part on the impression of the witnesses and the overall impression of the evidence, an appellate court will not interfere unless the finding of fact can be shown to be clearly wrong. That principle does not apply to the circumstances of this case. The facts were not in dispute. There was no conflict of evidence, so no issue of credibility arose. The only issue is a question of law, namely whether on the undisputed facts, the driving of the appellant was "reckless / dangerous" within the meaning of that phrase in the general exception. For determining that issue, this court is in as good a position as the Supreme Court.

[14] The general exception is in a contract of insurance. To the extent that it may give rise to an ambiguity, it is to be interpreted *contra proferentes*, that is against the insurer. If the insurer wishes to escape liability under given circumstances, it must use words admitting of no possible doubt: *Provincial v Morgan* [1933] AC 240, Lord Russell of Killowen at 250.

[15] The contract of insurance indemnifies the insured "for sudden unforeseen accidental physical loss or damage to your vehicle". That will include damage caused by a person driving carelessly or negligently. So driving in a manner that is reckless

and dangerous must be intended to be of a different kind of driving than driving in a manner that is careless or negligent. The Shorter Oxford Dictionary includes in the meanings of "reckless" in relation to a person "Careless of the consequences of one's actions, lacking in prudence or caution". However, the word here is coupled with "dangerous", so the driving must not only be reckless, it must also be dangerous. Further, in the context of the exception to the indemnity provided by the policy, the phrase must be intended to apply only to driving that is significantly more blameworthy than carelessness or negligence. The words "reckless" and "dangerous" are commonly used in the context of driving giving rise to more serious criminal liability, such as dangerous driving. The use of those words in an exclusion clause in an insurance policy emphasises that they should be applied only to driving with additional elements of culpability, compared to what would otherwise be considered to be negligent or careless driving.

The evidence of the driving

[16] The evidence about the appellant's driving is sparse. He did not refer to the accident in his evidence in chief. In cross-examination there is the following passage at page 16 of the transcript:

> "Let's go to the accident, is it correct that before you collided with the other vehicle you were zigzagging on the road?
>
> I do not know, at that time I was sleepy.
>
> Were you at the hearing of civil case 748/98 when Fisilau Valikoula gave evidence?
>
> Yes.
>
> Are you calling Fisilau to give evidence?
>
> Yes.
>
> Did you hear Fisilau's evidence that day that you were zigzagging were speeding before colliding with his vehicle?
>
> Yes.
>
> Do you believe that is what happened that morning?
>
> I believe so."

[17] Fisilau Valikoula was called to give evidence by the appellant. Other than referring to having an accident with the appellant's vehicle, he did not describe the accident in his evidence in chief. In cross-examination he gave the following account at page 18 of the transcript:

> "How did the collision occur?
>
> I saw To'a driving towards me on the Hihifo Road heading towards town and I pulled up on the side of the road To'a's vehicle came and hit my vehicle.

Do you recall your case against To'a and the NPI when you said that To'a zigzagged before he hit you?

Yes.

Is that still your evidence?

Yes.

Is that why you pulled up along side the road.

Yes.

When he was zigzagging, many times?

My estimate is three times.

Was he speeding when he was zigzagging?

Was not very fast but was a bit fast."

[18] To the court, he said that when the appellant hit, he was on the left side of the road. In re-examination he estimated the appellant's speed at about 40 plus kmh. No further details of the accident were given in evidence. From the bar, the court was informed that the accident happened about 7.00 or 8.00 am after the appellant had driven a passenger to the west of the island. There is no suggestion that alcohol was involved.

Conclusion on the general exemption defence

[19] The onus was on the respondent to prove that the appellant's motor vehicle was being driven in a reckless/ dangerous manner, as we have interpreted that phrase in [15]. We do not consider that the evidence to which we have referred is sufficient to discharge that onus. The evidence is so limited that it is not possible to determine just what was the nature of the appellant's driving. The description of the appellant's driving as zigzagging came from counsel's question, with which the witness agreed. It is not entirely clear what the witness took the description to mean.

[20] The evidence does not establish the degree of zigzagging, to what extent it may have brought the appellant's vehicle onto its incorrect side, or for how long the witness had the appellant's vehicle under observation. The evidence does not show whether the zigzagging occurred over a relatively lengthy stretch of road, or whether it was momentary. The estimate of speed the witness gave is moderate. As we have stated, no question of alcohol was involved. To the extent that an inference about the cause of the accident can be drawn from this evidence, it appears to have been a momentary lapse of concentration on the part of the appellant, possibly because he was feeling sleepy.

[21] We accept that if a person continues to drive for a significant time when he is aware that he is falling asleep at the wheel, that may, under some circumstances, amount to driving in a reckless and dangerous manner. But the evidence in the present case does not establish such driving. The appellant was not cross-examined about how long he had been feeling sleepy, whether he fell asleep at the wheel, if so

whether on one or more than one occasion, and what were his movements over the preceding 24 hours.

[22] For these reasons we, with respect, differ from the conclusion reached by the Chief Justice. The added element, beyond negligence, necessary to prove driving in a reckless and dangerous manner has not been established. As the respondent has not proved the general exception upon which it relied to deny liability, the respondent is bound to indemnify the appellant for the loss of or damage to his vehicle.

The amount of the indemnity

[23] The appellant claimed that the amount the respondent paid to the appellant for the damage to his vehicle, which was apparently treated as a write-off, was inadequate. The Chief Justice disallowed that claim. He was satisfied that the respondent paid the market value at the time and there is no liability to pay any other figure under the policy for the damage to the appellant's vehicle. There is no reason to disturb that finding.

[24] The appellant also claimed the amount of the judgment in the Supreme Court in favour of the driver of the other vehicle. The judgment was for $3,114 plus interest at 10% and costs of $1,000. The appellant is entitled to be indemnified in respect of this judgment.

[25] The appellant also claimed $3,900 for the loss of use of his vehicle as a taxi between the date of the accident, 31 January 1998, and 12 August 1998 at $150 per week. The proof of this loss is unsatisfactory. The appellant said in evidence in chief that he earned from the taxi "an average of $150 per week." No further detail was given. More importantly, he did not say whether this figure was his gross takings or his net earnings after deducting the cost of petrol, tyres, repairs, maintenance etc. However, there was no cross examination by the respondent's counsel on this claimed figure.

[26] Nor did the evidence establish the terminating date of 12 August 1998. The appellant said in evidence that the payment by the respondent to the Bank of Tonga for the damage to his vehicle was made on 12 May 1998. It appears that there may have been some further delay in his obtaining a replacement vehicle, due to the appellant's difficulty in raising another loan. But that delay cannot, come within the indemnity provided by the policy. It is our conclusion that it will be reasonable to allow the appellant $100 per week for the period from 31 January 1998 to 12 May 1998, 14 weeks and 3 days making a total sum of $1,460.00.

[27] The appellant also claimed $500 for the loss of the private use of the vehicle and $300 for inconvenience. Neither of these claims has been established.

The result

[28] The appeal is allowed. The decision in the Supreme Court is set aside. The appellant is entitled to judgment against the respondent for:

- the amount of his liability to the driver of the other vehicle, $3,114 plus interest at 10% and costs of $1,000;
- $1,460 for loss of use;

- interest on the above amounts at 10% interest on the amount payable to the other driver from the date of the judgment against him to the date of payment, plus interest for loss of use of the vehicle from 12 May 1998 to the
280 date of payment. If the parties are unable to agree on the interest payable, leave is reserved to apply to the Supreme Court;
- costs in the Supreme Court and in this court to be agreed or taxed.

Reisedienst Quick Tours Ltd v Fischer

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 3/2001

19 July 2001; 27 July 2001

Contract law – interpretation of terms of refund – appeal dismissed

In 1998 the individual appellants were operating through the corporate appellant the business of a guesthouse in Tonga, under the name Heilala. They had discussions in June of that year with the respondent, a German experienced as a cook and in the management of hotels. The object was to provide for the establishment by the appellants of a new restaurant, to be associated with their guesthouse and to be managed by the respondent. Ultimately, a Contract of Service and a Memorandum of Agreement of Tenancy, both dated 1 October 1998, were entered into between the first appellant and the respondent, and a sum of DM 200,000 (TOP$162,000) was paid by the respondent as rent prepaid for a period of 15 years. The parties very soon afterwards had a falling out. Proceedings were commenced in the Supreme Court on 8 January 1999, in which the respondent sought repayment of the sum of DM 200,000, together with other moneys. The appellants were only partially successful at trial, being ordered to pay a balance, after an allowance for a counterclaim, of $136,827, over a period of five years at one fifth per year, with interest at 5% per annum, in respect of the claim that arose out of contracts between the parties. The main issue on the appeal was raised by the proposition that the Chief Justice had decided the litigation on a point not argued.

Held:

1. Having considered the new evidence tendered, the Court of Appeal could see nothing to lead it to reverse the conclusions of the Supreme Court. Those conclusions depended on a finding that the contractual terms governing a refund of a portion of the prepaid rent were satisfied. The finding that the appointment of the new chef fulfilled the relevant terms should not be disturbed.
2. The appeal turned on the application of contractual provisions which were probably not written with both delayed completion of the buildings and early termination in mind. However, they were susceptible to the application the Supreme Court gave them, and that decision was upheld. The appeal was dismissed with costs.

Counsel for appellants : Mr Niu
Counsel for respondent : Mr Tu'utafaiva

Judgment

[1] This is an appeal by Defendants who were only partially successful at trial, being ordered to pay a balance, after an allowance for a counterclaim, of $136,827, over a period of five years at one fifth per year, with interest at 5% per annum, in respect of a claim that arose out of contracts between the parties. The respondent Plaintiff had sued in circumstances which are set out in detail, and with care, in the judgment of the learned Chief Justice. It is not necessary now to do more than refer to them briefly, because many issues have been determined by that judgment, and the disputes on the appeal centre upon the terms of written agreements.

[2] The individual Appellants, in 1998, were operating through the corporate Appellant the business of a guesthouse in Tonga, under the name Heilala. They had discussions in June of that year with the Respondent, a German experienced as a cook and in the management of hotels. The object was to provide for the establishment by the Appellants of a new restaurant, to be associated with their guesthouse and to be managed by the Respondent. Ultimately, a Contract of Service and a Memorandum of Agreement of Tenancy, both dated 1 October 1998, were entered into between the first Appellant and the Respondent, and a sum of DM 200,000 (TOP$162,000) was paid by the Respondent as rent prepaid for a period of 15 years.

[3] Unfortunately, the parties very soon afterwards had a falling out. Proceedings were commenced in the Supreme Court on 8 January 1999, in which the Respondent sought repayment of the sum of DM 200,000, together with other moneys. This was before the premises to be rented had even been constructed and made ready for occupation. When the premises were expected to be ready shortly, the Respondent wrote, through his solicitor, a letter dated 14 June 1999 containing the following:

> *"With respect, we wish to convey the instructions from our client in respect of these matters.*
>
> *We understand that the construction of the restaurant and accommodation is still underway and our client still maintains that if he is to return to run the restaurant the relationship between him and your clients is not going to improve.*
>
> *In the circumstances, our client wishes to have his money back and therefore has no objection if your clients can get someone else to pay our client's money and that person may run the restaurant on the basis of new agreement to be signed between him and your clients."*

[4] The references in this letter to the wish "to have his money back" and to a "person [who] may run the restaurant on the basis of new agreement to be signed between him and your clients" are clear reflections of provisions of the agreements. In the Contract of Service, clauses 12 and 13 provide:

> *"12. The Manager may terminate this agreement by giving The Company not less than six months notice in writing of the date upon which he proposes to terminate this agreement. The Manager will not have the right to claim any of his prepaid rent until a new manager (to be agreed by the Company) has been found, who will then take over his responsibilities.*
>
> *13. The Company has the right to terminate this contract immediately only if the Manager violates this agreement. The Manager will not be able to claim any of the prepaid rent until a new manager has been found by The Company, who will then take over his responsibilities. Any damages occurred [sic] due to the violation will be deducted from the rent prepayment."*

And in the Memorandum of Agreement of Tenancy, it is provided:

> *"Termination*
>
> *The Landlord hereby agrees not to terminate this agreement unless for default under this agreement. The Tenant may terminate this agreement provided he gives written notice thereof 6 months in advance. The Tenant does not have any right to claim any of the prepaid rent until a new tenant has been found."*

[5] At the hearing of the action, the Respondent gave evidence suggesting misrepresentation and breach of contract on the part of the Appellants, but he obtained relief only on the basis that the letter of 14 June 1999 was, in the circumstances, sufficient notice to entitle him to the partial refund for which provision was made by the clauses set out above, once a manager was found by the Appellant company. Of course, the fact that the Appellant company did seek, and find, a new manager is an indication that indeed it did understand these provisions to have been involved. Possibly, although the point was not explored in argument, the circumstance that the letter of 14 June 1999 was written before either of the agreements had come into practical operation, the restaurant and accommodation not having yet been made ready, may account for the imprecision of the letter in relation to any statement of the day from which the notice was to be taken to run.

[6] The first issue on the appeal was raised by the proposition that the Chief Justice had decided the litigation on a point not argued, the Respondent having put his case on the basis previously stated, involving misrepresentation and breaches alleged against the Appellants. The Respondent's counsel frankly conceded he had not put his argument in the way the judgment disposes of the matter. However, the Statement of Claim does seek an order for the repayment of the money, making no prayer for damages, and paragraph 30 of it does allege:

> *"30. As a further alternative, the Plaintiff says that the Defendants have provided no consideration for using the Plaintiff's money."*

Moreover, counsel for the Appellants expressly repudiated any suggestion of a new trial; what he sought was to be allowed to tender fresh evidence, consisting of documents, to this Court upon this issue. Counsel for the Respondent consented to this course.

[7] Having considered the evidence tendered, the Court could see nothing to lead it to reverse the Chief Justice's conclusions. Those conclusions depended on a finding that the contractual terms governing a refund of a portion of the prepaid rent were satisfied. That meant a new manager had to be found. The fresh evidence included a letter from the Appellants' solicitor to the Immigration Department seeking a working visa for the new manager the Chief Justice held to have been appointed. The letter stated (inter alia):

> *"Fischer was to manage and operate the restaurant and bar and occupy the private accommodation and keep all profits therefrom and paying no rent therefor for 10 years [sic] in consideration of paying to my client DM 200, 000. 00 [sic] with which my client was to carry out the construction.*
>
> *The money was paid by Fischer to my client and material was bought ... In early 1999, Fischer changed his mind. He wanted his money back and to stop the arrangement made. My client did not agree. ...*
>
> *... [T] he restaurant, bar and private accommodation were duly ready on 2/7/99. Fischer was to occupy ...*
>
> *However, Fischer changed his mind. He did not want to run the restaurant and bar. He agreed that my client should get another chef to run it.*
>
> *For 2 months or so my client has tried to find another chef. It has now found him. He is the abovenamed Andre Helmut Grober. He is also from Germany ... My client has signed up a contract of employment with him for a period of 1 year as from 15/10/99, but renewal annually unless terminated by 3 months prior notice."*

This letter was written on 21 October 1999. The contract signed with Mr Grober in fact provided for a term of 12 months, "renewable automatically at the end *of* *each* [emphasis added] year for a further period of 1 year unless notice is given by the [appellant] Company at least 3 months before the end of the year of service that the contract will not be renewed at the end of that year." There was also a provision allowing Mr Grober to terminate after 4 months by 3 months notice in writing.

[8] Mr Niu, for the Appellants, argued that Mr Grober was not a replacement manager within the contractual provisions. However, he was employed by the Appellants in the requisite capacity under a contract that contemplated its own continuance. The finality of the contract with Mr Grober is indicated by a letter written by the Appellant's solicitor on 6 October 1999 to the Respondent's solicitor concluding with

the statement: "We have … now decided to sign up with the chef in Germany." The finding at trial that the appointment of Mr Grober fulfilled the relevant terms should not be disturbed.

[9] Finally, counsel for the Appellants pointed out that the agreements do not provide for repayment over five years. But the order permitting this is entirely in the Appellants' favour. Had there been a cross-appeal, the Court might have been confronted by the point, but there has been no cross-appeal.

[10] Mr Niu suggested in argument that the Appellants could not have employed a substitute manager within the contract while the litigation was undecided. But the claim made related to money, whether a contractual refund or damages (the counterclaim sought damages); no claim was made for specific performance. Accordingly, this contention lacks substance.

[11] The appeal turns on the application of contractual provisions which were probably not written with both delayed completion of the buildings and early termination in mind. However, they are susceptible of the application the Chief Justice has given them, and his decision should be upheld. The appeal should be dismissed with costs.

Taufa v Police Department

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 9/2000

19 July 2001; 27 July 2001

Criminal procedure – clerk not required to physically write out summons – appeal dismissed
Criminal procedure – no specific dates and months on summons – no prejudice to appellant – appeal dismissed

In February 1997 Moala Taufa delivered his number 12 firearm to the appellant, then armourer for the Police Department, for licence renewal. The appellant told Mr Taufa to leave the firearm with him to be repaired. Mr Taufa on several later occasions sought to collect his firearm from the appellant, but was not successful. Mr Viliami Lapale gave evidence that he took his number 16 firearm to the appellant, because it was broken. The appellant told him it couldn't be repaired, and gave him a number 12 firearm. That firearm was identified as the firearm of Mr Taufa. The appellant was charged and convicted of one count of theft. He was sentenced to probation for six months. The appellant claimed that the summons (and other summonses that had been addressed to him) were "invalid and/or void for uncertainty, as there were no specific dates and month on them". It was said that "the summonses were unfair as they leave no opportunity for defence of alibi for the appellant". The appellant also submitted that Police Officers were not authorised by any statute to make out the summonses in the Magistrates' Court. The appellant issued judicial review proceedings advancing a number of grounds for setting aside his conviction for theft.

Held:

1. Judicial review was seldom appropriate as a mechanism to challenge findings and conclusions in criminal proceedings, and even more so when the challenge was collateral to proceedings by way of appeal.
2. There was no doubt that one specific offence was being charged, that being the offence which arose out of the appellant's dealings with Mr Taufa's firearm. No further particularisation of the time of the offence was sought by counsel for the appellant before the Magistrate, and no possible prejudice or embarrassment to the appellant arose from the allegation that the time of the theft of Mr Taufa's firearm was in 1997.
3. Section 14 did not require that the clerk physically write out the summons in Form 1, and the adoption by the clerk in presenting the summons to the

Magistrate was sufficient compliance with the requirement that the clerk shall make out the summons in Form 1 contained in the Schedule.

4. If the record was silent as to whether the witnesses were sworn, then affidavit evidence of what in fact occurred should be supplied. There was no evidence to suggest that the witnesses were not sworn. In the absence of such evidence it was not to be supposed, or assumed, that the requirements of s 71 of the Magistrates Court Act were not complied with. However, both the record of the Magistrates Court in Tongan, and its English translation clearly show that each witness, including the appellant, was sworn before giving evidence.

5. The appeal from the dismissal by the Supreme Court of the appellant's appeal against his conviction was dismissed, with costs.

Cases considered:

Fakatele Taufa v 'One Ma'u (Supreme Court, 349/99, 5 September 1994)

R v Epping and Harlow General Commissioners ex p Goldstraw [1983] 3 All ER 257

R v Kwatepena (High Court of the Solomon Islands, 29/83, 28 April 1983)

Statute considered:

Magistrates Court Act (Cap 11)

Mr Taufa in person
Counsel for respondents : Mr Kefu

Judgment

[1] In the circumstances detailed below, the Court of Appeal granted Mr Taufa ('the appellant') an extension of time within which to appeal from the dismissal by Justice Finnigan on 4 February 1999 of the appeal against the appellant's conviction by Police Magistrate P. Tatafu in the Magistrates Court at Lopaukamea on 3 November 1998 on one count of theft. The appellant was sentenced to probation for six months.

The summons leading to that conviction was No. 453/98, which translated, is in the following terms:

> Because of the charge brought against you on what you did in 1997 at Kolofo'ou you did [commit] theft contrary to Sec 145(A) of the CDA in which you stole one (1) shotgun number 12 worth $400 but that is Moala Taufa's property. You are, therefore, summoned to appear before me at Lopaukamea Hall on the 20th day of October 1998 at the hour of 10:00am.
>
> Sgd. P. TATAFU
>
> Magistrate for the above mentioned district.

[2] At the outset of the hearing in the Magistrates Court, counsel for the appellant sought to have the summons struck out, on the ground that the summons was

"incomplete", in that it omitted the date and month of the commission of the offence. It was said that the omission "makes it difficult for the accused to defend". It was submitted that the summons should be struck out on the further ground of non-compliance with s 13 and s 14 of the Magistrates Court Act. It was said that s 13 directs the clerk of the Court to "write the summons", or "fill in the form 1 of the Court", and "the Police are not allowed to do it". The submission was that the clerk did not make out the summons, with the consequence that the summons was unlawful.

[3] These objections were overruled.

[4] Moala Taufa gave evidence that he had, in February 1997, delivered his number 12 firearm to the appellant, then armourer for the Police Department, for licence renewal. The appellant told Mr Taufa to leave the firearm with him to be repaired. Mr Taufa on several later occasions sought to collect his firearm from the appellant, but was not successful. Mr Viliami Lapale gave evidence that he took his number 16 firearm to the appellant, because it was broken. The appellant told him it couldn't be repaired, and gave him a number 12 firearm. That firearm was identified as the firearm of Mr Taufa.

[5] The magistrate rejected a defence submission that the respondent "had no criminal intention when he gave the gun of Moala Taufa to Viliami Lapale". The magistrate in convicting the appellant said to him: "Moala Taufa came many times but you lied to him. Why didn't you tell him that you've already given the arms to Viliami Lapale." While the respondent has on various occasions advanced a number of grounds for challenging this conviction, no challenge had ever been directed to the correctness of the findings by the magistrate about the elements of the charge of theft of Moala Taufa's firearm.

[6] The appellant appealed to the Supreme Court against his conviction. The appeal was heard by Justice Finnigan on 4 February 1999, when his Honour dismissed the appeal and gave oral reasons for that dismissal. Both the appellant and the respondent to that appeal were represented by counsel.

[7] On 15 March 1999, the appellant filed an application for judicial review of the magistrate's decision, to relying on O27 of the Supreme Court Rules. In that application, the appellant sought:

> *"Declaration that the summons issued against the Applicant are null and void.*
>
> *Writ of Certiorari to quash the decision of the Learned Magistrate.*
>
> *Declaration that the summons were unfair and uncertain.*
>
> *Declaration that the accused arrest was unlawful.*
>
> *Costs."*

That application was given number C306/99.

[8] The file shows that on 1 December 1999, Justice Finnigan, after hearing Mr Fifita for the appellant and Mr Tapueluelu for the Crown, made the following orders in chambers:

1. Leave is granted.
2. Mr Fifita is directed to take the proper steps and have all the challenged proceedings removed into Supreme Court for hearing.
3. Direction hearing is fixed for Friday, 10 December, 1999 to set a hearing date and timetable.

[9] A Writ of Summons in that application was issued on behalf of the appellant on 3 January 2000. A statement of claim dated 8 December 1999 seeks:

> "Declaration that (specified summonses) were unfair and uncertain. Writ of Certiorari to quash the decision the finding of the Learned Magistrate in appeal of Criminal Case No. 53/98 and his decision to entertain the proceedings.
>
> Declaration that section 16 of the Magistrate Court Act is Unconstitutional.
>
> Declaration that the Arrest (second arrest of the Plaintiff) was unlawful and in fact an unlawful imprisonment.
>
> Damages for unlawful imprisonment $5000.00.
>
> Writ of Prohibition against the Defendants for they acted ultra vires.
>
> Declaration that the Magistrate clerks are unlawfully holding their office;
>
> and costs."

[10] A Statement of Defence in that application refers to the Statement of Claim being filed on 18 December 1999.

[11] On 12 April 2000, Justice Finnigan heard counsel for the parties in proceedings C306/99, and gave judgment on 28 April 2000. That judgment commences

> *"The applicant has filed an application for leave to bring a claim against a Magistrate and against the Ministry of Police. Against those defendants he claims four separate prerogative remedies and damages. He claims also a declaration that s 16 of the Magistrates' Courts Act cap 11 is unconstitutional and a further declaration that the clerks in the Magistrates' Courts are not validly appointed. It must be said that these extensive claims are not well drafted."*

His Honour referred to his dismissal of the appeal against conviction of the charge laid in the Summons 453/98, and to the fact that he gave reasons for that dismissal.

Finnigan J said in his reasons published on 28 April 2000: "The record of my reasons is not on the file of that appeal, so I shall state them briefly here". His Honour then proceeded to give reasons rejecting the contentions that a precise date is a necessary precondition to a valid summons or a valid charge, and that the summons had been prepared by a police officer and not by clerk as set out in s 14 of Cap 11. His Honour then said:

> *"From these rulings there was no appeal. Instead, the present application was filed for a variety of administrative remedies. Counsel has placed some fine distinctions before me to justify re-litigating the subject matter of the appeal and for avoiding the effect of that appeal on the other similar summonses.*
>
> *I have not found anything new in the argument which would justify accepting counsel's invitation to rehear the matters that I have already decided. Those are the decisions of the Court on those two issues. I could only re-state them, in the present case as the decisions of the Court and I must refuse leave for the application, insofar as it relates to the two issues I decided in the appeal."*

[12] His Honour then addressed the other issues, rejected the appellant's counsel's submissions, and concluded that "leave therefore must be refused for the other aspects of the application as well."

[13] A notice of appeal from the orders of Finnigan J of 28 April 2000 dated 8 June 2000 was filed. On 15 August 2000, the Chief Justice ordered:

> *"1. Appellant to decide whether he is appealing the dismissal of his appeal from the Magistrate or the refusal of leave to seek judicial review or both.*
> *2. If the former he must file clear grounds. If latter, he must seek leave and file clear grounds with it.*
> *3. All to be filed within 2 months. I shall then fix another chamber hearing."*

[14] On 13th October 2000, the appellant filed a document advising "that he is appealing both the 1) Dismissal of his appeal from the Magistrate and the 2) Refusal of leave to seek judicial review. Further grounds of appeal for the former is filed herewith and also appeal on refusal of leave and its ground."

Two documents setting out grounds of appeal, and grounds on the refusal of leave to seek judicial review, each dated 13th October 2000 were filed, as referred to by the appellant in that advice.

[15] On 1 June 2001, the Chief Justice in Chambers refused leave to appeal against Finnigan J's refusal of leave to apply for judicial review. The Chief Justice noted in the Chambers Minute Book that he told the appellant:

> *"You have a right to appeal against his finding on a matter of law. I shall advise Crown Law the appeal is to proceed and arrange for the*

magistrates' court record to be typed and copied and both of Finnigan J's judgments."

[16] Finnigan J appears to have granted leave to apply for judicial review on 1 December 1999, and refused leave on 28 April 2000. Leave to appeal from that refusal was refused by the Chief Justice on 1 June 2001. Having regard to the history of the matter, the Court granted an extension of time within which to appeal the decision of Finnigan J of 4 February 1999 refusing the appellant's appeal against conviction. The court permitted him to argue all of the grounds of challenge he had sought to rely on in all of the various proceedings.

[17] This course is preferable, as a matter of principle. Judicial Review is seldom appropriate as a mechanism to challenge findings and conclusions in criminal proceedings, and even more so when the challenge is collateral to proceedings by way of appeal. Sir John Donaldson MR said in *R v Epping and Harlow General Commissioners ex p Goldstraw* [1983] 3 All ER 257 at 262:

"It is a cardinal principle that, save in the most exceptional circumstances [the jurisdiction to grant judicial review] will not be exercised where other remedies were available and have not been used."

[18] Further, the learned authors of the 1997 White Practice observe at par 1 - 14/ 13 in the annotations to O53, r 14, at page 856:

"Where there is an avenue of appeal from an inferior court or tribunal to the Court of Appeal ... or to the High Court ... and the applicant has already followed that avenue, but his appeal has been dismissed or he has been refused leave to appeal, he will not be permitted to re-litigate the matter by way of an application for judicial review because that would be an abuse of the process of the court. Aliter*, if the point is one which he could not (rather than merely did not) take on the appeal."*

[19] We turn now to consider the appellant's grounds of appeal, as set out in his document of 13 October 2000, and the further grounds referred to in a document dated 17 July 2001.

[20] The appellant has repeatedly argued that the summons 453/98, (and other summonses that have been addressed to him) are "invalid and/or void for uncertainty, as there were no specific dates and month on them". It was said that "the summonses were unfair as they leave no opportunity for defence of alibi for the appellant."

Section 13 of the Magistrates Court Act (Cap 11), provides:

"13. Every person desiring to institute a prosecution in a Magistrate's Court for any offence which such Court has jurisdiction to try shall apply in person to the clerk for a summons and shall at the time of such application state clearly the nature of the offence complained of and the time and place at which it was committed."

Section 14 of that Act relevantly provides:

> *"14. Whenever upon any application to the clerk for a summons it appears that any person has committed or is reasonably suspected to have committed within the district of the magistrate any offence triable by such magistrate, the clerk shall make out a summons in Form 1 contained in the Schedule hereto. Such summons shall state concisely the offences with which the defendant is charged and the time and place at which it was committed and shall require the defendant to appear at a specified time before the Magistrate's Court to answer the charge in the summons and to be dealt with according to law..."*

[21] It is thus a requirement that the time of the commission of the offence be stated. It would be a sufficient compliance with that requirement, if the Summons stated that the offence was committed in 1997, provided that one specific offence was alleged, and no prejudice was caused to the appellant. If time is of the essence of the offence, or if the conduct of the trial (including any particularisation of the time of the offence) makes it plain that the offence is alleged to have been committed at that time and no other, then the time of the offence becomes a material element of the offence. Ordinarily, however, neither the time nor the place of the commission of the offence is material to the charge.

[22] Here, there can be no doubt that one specific offence was being charged, that being the offence which arose out of the appellant's dealings with Mr Taufa's firearm. No further particularisation of the time of the offence was sought by counsel for the appellant before the magistrate, and no possible prejudice or embarrassment to the appellant arose from the allegation that the time of the theft of Mr Taufa's firearm was in 1997.

[23] The materiality of an averment as to time and place is dealt with generally at Para 1-136 to Para 1-141, in Volume 1 of the 1993 edition of Archbold.

[24] The next ground of appeal alleges that "Police Officers are not authorised by any statute to make out the Summonses in the Magistrates Court." Section 14 of the Magistrates Courts Act, set out above, provides that "the clerk shall make out a summons in Form 1 contained in the Schedule …"

[25] Evidence was given by Fa'one Halapua, Assistant Chief Inspector of Police of the Tonga Police Force as to the usual procedure used when a summons is obtained. That procedure was followed in respect of the summonses issued to the appellant. The Police Prosecutor fills out in duplicate the summons form in the Magistrates Court Summons Book, by filling in the Magistrates Court district, the name of the accused, his residence, the date of the alleged offence, the place where the alleged offence took place, the alleged offence charged and its particulars. He also fills out which Magistrate's Court the accused must appear before, and at what time and date. Each summons and its duplicate in the book has a printed number on it, the numbers in the Summons Book being sequential. Assistant Chief Inspector Halapua swears: "The usual procedure is that the Police Prosecutor gives the summons to the clerk to pass on to the Magistrate to sign and stamp with the Magistrates' Court Seal."

[26] S 16 of the Magistrates Court Act provides:

> "Every summons before being issued for service shall be read by the magistrate who shall affix his signature and seal thereto."

[27] While it is true that the clerk does not insert the details in the Summons form when the usual procedure is followed, the Summons book is under his control and is his responsibility. In our view, when the clerk takes the filled-in Summons form to the Magistrate to sign, he or she is adopting as his or her own form the form which has been "written up" by another. That clerk provides the Summons book to the Police Prosecutor so that the details of the Summons can be filled in in order to be so adopted by the clerk.

[28] S14 does not, in our opinion, require that the clerk physically write out the summons in Form 1, and the adoption by the clerk in presenting the summons to the Magistrate is sufficient compliance with the requirement that "the clerk shall make out the summons in Form 1 contained in the Schedule."

[29] The appellant next complains that "the witnesses for the prosecution were not put under oath as clearly stated in the record of the proceedings from the Magistrates Court." If the record is silent as to whether the witnesses were sworn, then affidavit evidence of what in fact occurred should be supplied. In this case, there is no such evidence to suggest that in fact the witnesses were not sworn. In the absence of such evidence, in our opinion it is not to be supposed, or assumed, that the requirements of s 71 of the Magistrates Court Act have not been complied with. We respectfully disagree with observations to the contrary in *Fakatele Taufa v 'One Ma'u* 349/99 a judgment of the Supreme Court of Tonga of 5 September 1994, and in *R v Kwatepena* 29/83, a judgment of the High Court of the Solomon Islands of 28 April 1983.

[30] In this case however, both the record of the Magistrates Court in Tongan, and its English translation clearly show that each witness, including the appellant, was sworn before giving evidence.

[31] The final matter of complaint by the appellant is that Finnigan J "gave no reasons why the appeal was dismissed at the time of judgment", and "at the hearing of the judicial review Case No C 306/99 the learned judge cannot give reasons for another case. He can only give reasons for the case at hand."

[32] The position is that Finnigan J on 4 February 1999 gave oral reasons for dismissing the appellant's appeal. Whether the statement by Finnigan J on 28 April 2000 of what those reasons were is an accurate statement is not a relevant matter on this appeal. This appeal is concerned with whether any of the grounds advanced by the appellant for setting aside his conviction for theft, being grounds argued before Finnigan J or otherwise, has been made out.

[33] For the reasons given above, none of those grounds has been made out. The appeal from the dismissal by Finnigan J of the appellant's appeal against his conviction is dismissed, with costs.

Piukala v Bank of Tonga

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 26/1999 and CA 14/2000

23 July 2001; 27 July 2001

Practice and procedure – doctor's affidavit late – valid attempt – order set aside

The appellant, Kelepi Piukala, filed a notice of appeal, and sought to appeal an order of the Supreme Court of 24 November 1998 that summary judgment be entered on a claim of the Bank of Tonga against the appellant. Summary judgment had been sought pursuant to O 14 R 6 of the Supreme Court Rules. On 28 July 1999, the Chief Justice ordered that an application to set aside that order be refused with costs. The appellant's Statement of Defence had admitted the existence of the debt, but sought to contend that the debt was unenforceable having regard to the Limitation of Action provision in Tonga. However, this was not further pursued when it was pointed out that the acknowledgement of the debt defeated any possible reliance on the Limitation of Action provision. There was no obstacle preventing the Bank of Tonga from proceeding with action to enforce its judgment against the appellant. The appellant also sought to appeal the dismissal by the Chief Justice on 16 May 2000 at Vava'u of his counter claim against the Bank of Tonga. The affidavit in support of that application acknowledged that, at least by 8 May 2000, the appellant was aware that the hearing of his counter claim was set down for 15 and 16 May 2000 in Vava'u. The appellant was unable to attend due to illness but had trouble obtaining an affidavit from the doctor confirming the illness.

Held:

1. The time-frame within which to process and provide an affidavit from the doctor who wrote the medical certificate of 13 May 2000 was quite compressed particularly having regard to the different geographical locations involved. The evidence before showed that there was an attempt made to comply with the Court's requirements as to a verifying affidavit. The fairest and most efficient course to adopt was to set aside the order of the Chief Justice of 16 May 2000 dismissing the counter claim with costs.
2. The appellant should prosecute his counter claim with expedition.
3. There was no order as to the costs of the appeal concerning the counter claim.

Case considered:
Taylor v Taylor (1978-9) 143 CLR 1

Statute considered:
Supreme Court Act (Cap 10)

Rules considered:
Supreme Court Rules

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Ms Tapueluelu

Judgment

[1] Kelepi Piukala, the appellant, filed a notice of appeal, seeking to appeal the order by Finnigan J of 24 November 1998 that summary judgment be entered on the claim of the Bank of Tonga against the appellant. Summary judgment had been sought pursuant to O 14 R 6 of the Supreme Court Rules. On 28 July 1999, the Chief Justice ordered that an application to set aside that order be refused with costs.

[2] The Statement of Defence of the appellant to the Statement of Claim by the Bank of Tonga had admitted the existence of the debt, but sought to contend that the debt was unenforceable having regard to the Limitation of Action provision in Tonga, being s 16 of the Supreme Court Act (Cap 10). Section 16(1) relevantly provides:

> "16. (1) It shall not be lawful to sue any person for debt or damages after the expiration of 5 years from the date on which such liability was incurred nor to sue for property which has been in the undisputed possession of any person for more than 5 years. But if any part of such liability or claim has been paid, or the claim or liability has been admitted in writing within such time the 5 years shall commence to run from the time, of such payment or admission …"

[3] On its being pointed out to counsel for the appellant that the acknowledgement of the debt defeated any possible reliance on the Limitation of Action provision, the appeal from the order giving summary judgment was not further pursued. The appellant should pay the costs of the respondent of that appeal, to be taxed or agreed.

[4] Whether or not the appellant is able to prosecute his counter claim in proceedings 1232/98, (a question which is considered later in these reasons), these is no reason in justice why the Bank should not be permitted to enforce the admitted debt. For the avoidance of doubt, having regard to the orders of the Supreme Court of 28 June 2000, and the orders of the Supreme Court of 20 November 2000 in proceedings C 1232/98, and the concession by counsel for the appellant that there is no basis to challenge the grant of summary judgment, we state expressly that there is now no obstacle preventing the Bank of Tonga from proceeding forthwith with action to enforce its judgment against the appellant.

[5] The appellant also seeks to appeal the dismissal by the Chief Justice on 16 May 2000 at Vava'u of his counter claim against the Bank of Tonga. The circumstances leading to that dismissal appear from the formal orders made:

> "THIS CASE having been listed for trial of the counter claim on 15th May 2000 and the Court having received a letter from the defendant dated 13 May 2000 seeking an adjournment accompanied by a medical certificate written on 13 May 2000
>
> AND HAVING adjourned the matter to this day for trial unless the defendant sooner file an affidavit sworn by the doctor who wrote the medical certificate of 13 May 2000 and no affidavit or explanation by the defendant having been filed
>
> AND BEING SATISFIED that the notice requiring the said affidavit was served upon the defendant in person at 12.57 pm on 15 May 2000
>
> AND NO EVIDENCE having been called to prosecute the counter claim and the defendant to the counter claim being present and ready to proceed
>
> **IT IS ORDERED that:**
>
> 1. The counter claim be dismissed with costs to the defendant in that action, the Bank of Tonga, to be taxed if not agreed.
>
> 2. The stay of execution of the judgment to the plaintiff, the Bank of Tonga, in the original claim ordered by the Honourable Mr Justice Finnigan on 24 November 2000 be lifted forthwith.
>
> 3. The Bank of Tonga have leave to apply to the Honourable Mr Justice Finnigan for clarification of his Judgment and Order given and made on 24 November 1998.
>
> 4. A copy of this Order be served on the defendant, Kelepi Piukala, within 14 days."

[6] On 29 May 2000 the appellant applied for an order recalling the orders of 16 May 2000, and for the hearing of his counter claim, asserting:

> "1. There is a good ground for the Counter-Claim.
>
> 2. It is in the Interest of Justice that this Counter Claim be heard by the Court.
>
> 3. There are reasonable grounds for the Defendant/ Counter Claimant not being able to be present for the hearing.
>
> 4. There is no prejudice to the Bank interest if the counter - claim is heard."

[7] The affidavit in support of that application acknowledges that, at least by 8 May 2000, the appellant was aware that the hearing of his counter - claim was set down for

15 and 16 May 2000 in Vava'u. Because of his plans to attend a church conference from 9 to 16 May, the appellant sought a later hearing date but was told by the Registrar that the hearing date could not be changed. The appellant acknowledges receiving the Registrar's letter requiring an affidavit from the doctor, whose certificate accompanied the appellant's letter of 13 May 2000. His affidavit continues:

> 14. I received the Registrar's letter at about 1 pm on 15 May 2000 and my health conditions got worse when it was clear that the hearing will be proceed next day but I have not enough time to comply with the requirement of the Court.
>
> 15. On receipt of the Registrar's letter I directed my daughter to take it to the doctor concerned on the same afternoon. However the doctor could not contacted due to her duties on that after noon.
>
> 16. On 16 May 2000 my daughter went again to give the Registrar's letter to the doctor but she was off duty that day, and could not be contacted until late afternoon then she prepared her report of l6 May 2000 and received by me on the morning of 17 May 2000. Annexed Marked "E" is her report and affidavit Marked "F".

The report is dated 16 May 2000, addressed "To Whom it may concern" and relevantly states:

> Re: Kelepi PIUKALA of Ha'ateiho
>
> The above mentioned patient consulted to the outpatient department on the 13 May 2000 at around 10.00 am.
>
> His complaints were of:
> a. headache
> b. rhinorrhoea/cough
> c. body aches/chills
>
> Examination resulted in the diagnosis of flu like illness with acute bronchitis. He was prescribed Amoxycillin and paracetamol and advised to rest at least a week thus the sick leave.

The affidavit is dated 19 May and "confirm(s) on oath that the facts in (her) report of 16 May 2000 are true and correct."

[8] On 9 June 2000, the Registrar wrote to Mr Tu'utafaiva, the appellant's counsel, concerning the Application to Recall Court Order dated 29 May 2000, saying "I write to inform you that your client must lodge an Appeal in the normal way." No doubt this information was conveyed pursuant to judicial direction. The orders of the Chief Justice of 16 May 2000 were interlocutory, and were made in default of appearance. There seems no reason why the procedure seeking to recall the Chief Justice's orders of 16 May 2000 could not have been followed, particularly having regard to the time likely to elapse before an appeal could be heard. It has been held that a court has implied or inherent power to recall or correct an order made by it in the absence of a party: *Taylor v Taylor* (1978-9) 143 CLR 1, where Mason J said at 16:

> "A jurisdiction to set aside its orders is inherent in every court unless displaced by statute,"

and Murphy J said at 20:

> "… There is a long standing principle that an order made against an absent party may be set aside where the absence is not the fault of the other party or the court (even where the absence was the absent party's fault), or where the absence is excusable, and consideration of delay, acquiescence or prejudice are not countervailing."

[9] As a result of the Registrar's letter, a notice of appeal was filed on 2 August 2000, which contained as the first three grounds:

> d. There are reasonable grounds for the Appellant not being able to attend the hearing of the counterclaim on 16 May 2000.
> e. In the circumstances of this matter there was insufficient time given to the Appellant to obtain the affidavit from the Doctor as required by the Court.
> f. There are reasonable grounds for the Appellant's counterclaim.

[10] We have had regard to the events set out above. We note that there has as yet been no consideration of the merits of the appellant's counter claim (but which, as presently formulated, lacks specificity of what cause or causes of action are sought to be relied on, and lacks the allegation of sufficient and precise facts to found those claims). If the strike out order stands, the appellant could bring a fresh proceeding on the same matters that are imprecisely referred to in the counter claim, but such a proceeding might run into limitation difficulties over and above those which might presently exist. The time-frame within which to process and provide an affidavit from the doctor who wrote the medical certificate of 13 May 2000 was quite compressed particularly having regard to the different geographical locations involved. The evidence before this court shows that there was an attempt made to comply with the Court's requirements as to a verifying affidavit. We think the fairest and most efficient course to adopt is to set aside the order of the Chief Justice of 16 May 2000 dismissing the counter claim with costs.

[11] The appellant should prosecute his counter claim with expedition. The Bank of Tonga will no doubt consider its position with regard to the counter claim.

[12] There should be no order as to the costs of the appeal concerning the counter claim.

Tuaimei'uta v Prema

Court of Appeal, Nuku'alofa
Ward CJ, Tompkins, Spender JJ
CA 26/2000

23 July 2001; 27 July 2001

Misrepresentation and fraud – independent evidence to decide – appeal allowed
Practice and procedure – application to call fresh evidence – knew at time of trial – application refused

The respondent operated a retail store in Nuku'alofa in which she sold a variety of goods including clothing and, in April 1999, she displayed some jeans which bore a label marked "Nike". The appellant bought 70 pairs of these jeans and then took 50 pairs of the jeans back to Australia with the intention of selling them at a profit. However, on arrival in Australia, the goods were seized by the Customs Service on the grounds that they were not genuine Nike products and were not marked with the country of manufacture. In an attempt to prove they were genuine, the appellant telephoned the respondent and asked her to verify their authenticity. She declined and the authorised agent for Nike in Australia eventually had the garments destroyed. He sued the defendant for the costs of the jeans plus expenses. At the trial, there was a dispute over how the jeans were labelled. The respondent maintained that they were marked with a label only bearing the word Nike whilst the appellant insisted they were also marked with the well known symbol or logo of Nike, referred to in the correspondence as their Swoosh mark. The resolution of that issue was clearly likely to be critical to the question of whether or not the respondent had held out these jeans to be genuine and the burden was on the appellant to prove that the label was as he claimed. However, he produced no garment in evidence and sought the leave of the Court of Appeal to adduce further evidence about the label on the jeans.

Held:

1. The application to call fresh evidence was refused. The appellant was unable to show that the evidence in question could not have been obtained with reasonable diligence for use at the trial
2. In relation to the substantive ground of appeal the Judge's conclusion that there had been no misrepresentation had been based on his finding that there had been no Nike logo on the jeans sold to the appellant. However, the independent evidence which the judge appeared to have overlooked all supported the appellant's case.
3. The appeal was allowed and judgment was given to the appellant.

4. Damages of $1,621 were awarded with interest at 10% from 20 August 1999 and costs.

Case considered:
Ladd v Marshall [1954] 1 WLR 1489

Rules considered:
Court of Appeal Rules
Rules of the Supreme Court (UK)

Counsel for appellant : Mr Niu
Counsel for respondent : Mr 'Etika

Judgment

[1] The appellant was the plaintiff in a claim for damages for misrepresentation of goods sold. The respondent operates a retail store in Nuku'alofa in which she sells a variety of goods including clothing and, in April 1999, she displayed some jeans which bore a label marked "Nike".

[2] The appellant purchased a total of 70 pairs and took 50 of those to Australia to resell at what he hoped would be a profit. However, on arrival in Australia, the goods were seized by the Customs Service on the grounds that they were not genuine Nike products and were not marked with the country of manufacture. In an attempt to prove they were genuine, the appellant telephoned the respondent and asked her to verify their authenticity. She declined and the authorised agent for Nike in Australia eventually had the garments destroyed.

[3] At the trial, there was a dispute over how the jeans were labelled. The respondent maintained that they were marked with a label only bearing the word Nike whilst the appellant insisted they were also marked with the well known symbol or logo of Nike, referred to in the correspondence as their Swoosh mark. The resolution of that issue was clearly likely to be critical to the question of whether or not the respondent had held out these jeans to be genuine and the burden was on the appellant to prove that the label was as he claimed. However, he produced no garment in evidence and now seeks the leave of this Court to adduce further evidence about the label on the jeans.

[4] The Court of Appeal Rules (Order 8 rule 1(3)) allow this Court only to receive further evidence on "special grounds" but there is no further guidance as to what would amount to such grounds.

[5] Order 59 rule 10(2) of the English Rules of the Supreme Court has a similar provision but the courts in England are reluctant to allow fresh evidence after the conclusion of a trial of the facts and will only do so in very limited circumstances. In the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 Denning LJ re-stated the law as it then stood in relation to the reception of new evidence:

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

[6] Mr Niu, for the appellant, cannot suggest that the evidence he seeks to introduce satisfies the first condition as it was clearly known to him at the time of the trial. He bases his application on the fact that the wording of the statement of defence and the manner in which the trial was conducted misled him into believing, until after he had closed his case, that there was no dispute about the appellant's claim that the jeans bore both the Nike name and symbol.

[7] We have some sympathy for that position. Paragraph 3 of the statement of claim refers to garments being displayed *"with labels* attached to them *with the word and mark of "Nike"* which is a well known brand name of the products of an American company called Nike International Ltd. The defendant thereby represented that the garments so labelled in her store were genuine products of the company."

[8] The defence denied the whole of that paragraph "save that the defendant displayed various garments at her store *with "Nike" labels* attached." Later in the defence when denying the allegation of misrepresentation, it is pleaded in paragraph 15:

> "The defendant is not an agent for "Nike International Limited" and has never at any time represented or endeavoured to do so to anyone including the plaintiff that by selling garments with *the logo "Nike"* attached to it made her an authorized agent of the said company." (Our italics)

[9] In his judgment, the learned judge referred to the appellant's assertion that the label included the logo and the respondent's denial of that fact. He points out that the plaintiff was not cross-examined on his assertion and that the defendant did not raise the issue in her evidence in chief. It only surfaced during her cross-examination.

[10] However counsel's duty is to prove his client's case. If there is any ambiguity about his opponent's admissions he is wise to ascertain the position before closing his case. If, later, a dispute unexpectedly arises about a matter he had assumed was admitted, he should seek leave to re open his case. It does not satisfy the requirements of the first condition in *Ladd v Marshall* now to say that he did nothing to prove such a vital part of his case and seek to fill that gap before this Court by adducing evidence of which he knew at the time of the trial.

[11] The application to call fresh evidence is refused.

[12] The grounds of appeal still relate to the same issue of the labelling of the garments.

[13] At the trial, the learned judge considered that the evidence of the respondent was generally more reliable than that of the appellant and concluded that she had made no direct representation to the appellant about the provenance of the jeans.

[14] He described the issue as being whether the existence of the word "Nike" on the label on the back pocket was sufficient in itself to amount to an express or implied representation that the jeans were genuine products of Nike International. He correctly stated that the contents of a label can give rise to a sale by description even without further representation and he clearly regarded the determination of the issue over the symbol as central to the determination of the case. It was not in dispute that, in the respondent's store, the jeans were displayed in such a way that the label (in whichever form it took) on the back pocket was clearly visible to customers.

[15] He referred to the appellant's evidence that he had given twenty pairs of the jeans to relatives in Tonga. Having pointed out the burden that rested on the plaintiff, the judge continued:

> "It surely would have been possible for him to acquire and formally produce to the court a pair of the jeans he had left in Tonga to establish one way or the other whether they carried the Nike logo. He did not. He has not satisfied me, therefore, to the required standard, that the jeans carried the logo and I am not prepared to accept that they did."

[16] Clearly, in the absence of that evidence, he decided the question of the presence of the logo on the oral evidence of the parties alone but, as Mr Niu points out, there was other evidence before the court that the jeans did bear the logo but to which the judge made no reference.

[17] There was no transcript before us and so this Court relied on the judge's notes of the evidence. They confirm there was no challenge to the appellant's evidence that the jeans bore both name and logo. In his note of the respondent's evidence in chief, the judge records:

> "These were just ordinary jeans with writing on them at the back of the jeans."

Mr Niu, in his note, recorded the passage as:

> "The jeans had writing and logo — red and silver on back pocket "Nike"."

[18] Whether that is accurate or not, it is clear that, when she was cross-examined by Mr Niu, the respondent firmly denied the logo was on the jeans — "only big writing NIKE". As we have said, it was on that evidence, having preferred the version of the respondent, that the judge found there was no Nike symbol.

[19] However, in the documents produced during the trial was the Australian Customs Service Notice of Seizure which describes the goods as:

> "Fifty (50) pairs of jeans bearing designs, labels and/or markings that appear to infringe the Nike trade mark"

[20] More significantly, Nike's solicitors sent a letter to the appellant in which they referred to the "seizure of 50 pairs of jeans bearing our client's "NIKE" and "SWOOSH Device" trade marks, or a trade mark which is substantially identical with or deceptively similar thereto…"

[21] The learned judge stated that the goods had been seized because they did not bear the country of manufacture. He made no reference to the more significant fact that seizure was also because the jeans appeared to infringe the Nike trade mark although he did refer to the solicitor's threat to sue "because the garments were not genuine Nike products".

[22] When an issue depends on the conflicting accounts of two witnesses, any evidence from an independent source can be helpful in deciding the conflict. The independent evidence in this case all went to support the appellant's account but was not dealt with in the judgment.

[23] A similar omission occurred in his finding that the respondent did not make any representation beyond displaying the goods with the Nike label. In fact, the first of the respondent's two invoices for the jeans describes them as "Nike jeans".

[24] On the basis of the parties' testimony alone, he concluded:

> "In the present case, I have found that the jeans did not carry the Nike logo *and for that reason* it should have been apparent to the Plaintiff upon inspection that they were not the genuine product of the Nike International company.
>
> The fact that the store was a general merchandise store; and not a specialist store dealing in brand labels and the obvious cheap price of the jeans [the evidence had been that they were offered to the public at $25 a pair] should have alerted the plaintiff and put him on inquiry…" (Our emphasis)

[25] Counsel confirm that there was no evidence before the trial court of the price of genuine Nike jeans or that they are sold only from specialist stores or whether there are any such stores in Tonga. We consider the deciding fact in the case was the judge's conclusion about the absence of the Nike logo and the words we have placed in italics support that view that it was the principal or only reason for his conclusion that there had been no misrepresentation.

[26] An appellate court will only rarely interfere with a trial judge's finding of fact. He saw and heard the parties in the witness box and is better able to assess their credibility and accuracy. In this case, as we have stated, he based his conclusion on their direct evidence alone. Had that been the only evidence we would not have interfered but the independent evidence which the judge appears to have overlooked all supports the appellant's case.

[27] In the result, we do not consider it safe to allow the judgment to stand. The appeal is allowed and judgment is given to the appellant.

[28] The appellant claimed $2,201.22 but he gave evidence of a loss of only $2,050.00. Of that $1,500.00 was stated to be the value of the jeans and was the total

200 sum paid. However, his case is that only 50 pairs were seized and destroyed. That would reduce the sum by $429 leaving a total of $1,621 damages with interest at 10% p.a. from 20 August 1999, and costs.

[29] He must also have the costs of this appeal to be taxed if not agreed.

Minister of Lands v Finau

Court of Appeal, Nuku'alofa
Ward CJ, Burchett, and Tompkins JJ
CA 13/2000 and CA 13A/2000

24 July 2001; 27 July 2001

Land law – lack of prior consultation by Minister – does not make grant invalid

In 1971 land was required by the Government for a Police College at Kolofo'ou. Those who were living on that land were moved on to land in Ma'ufanga. The estate holder of that land was Hon Fakafanua. A new village came into being at Houmakelikao. The first people to be given the allotment were Sione and Valamotu Vi. They did not register as the land holders, but were known to the estate holder, who accepted them as the occupiers. The respondent was another of those who moved to Houmakelikao. Valamotu Vi, who with her husband Sione had never lived on the allotment, agreed to the respondent occupying it. The respondent had lived on the allotment ever since 1971. In 1988 Valamotu Vi went to Australia and authorised her nephew Lupeti to look after the allotment. Later, as the result of discussions within the Vi family, it was agreed that the appellant Henele Nai should have the allotment. Pita Vi, the son of Valamotu Vi, signed a letter as heir which was taken to the estate holder who signed the consent on their application and said the land would be registered as Henele Nai's. In the intervening time the respondent had carried out his village obligations and visited the estate holder's home on several occasions for the purpose of obtaining registered title to the allotment but the estate holder did not sign the form. The respondent claimed that each time the estate holder told him to stay on the land because it was he who was taking care of it. On one occasion the estate holder told the respondent to go to the town officer, and that whoever was named by the town officer would be the person to whom the estate holder would give the allotment. The respondent went to the town officer with the form which the town officer signed but the Hon Fakafanua still failed to sign. The respondent claimed that he took the form to the Minister and told the Minister what had occurred and the Minister said that he would see Hon Fakafanua. Later the respondent was told the Minister had approved the application for registration. On 14 September 1994 a deed of grant issued to the respondent. Lupeti Vi and the appellant Henele Nai then lodged their application form, which the estate holder had signed on the same day that the respondent's deed of grant was issued. The Minister accepted their application. He cancelled the registration of the respondent and on 22 September 1994 issued a new deed of grant to the appellant Henele Nai. The Supreme Court set aside the registration of the appellant in favour of the registration of the respondent for three

reasons: inequitable breach by the estate holder of his assurance to the respondent; inequitable breach of assurance by the Minister; and subsequent error of law by the Minister when he purported to cancel the respondent's registration. The central issue on the appeal was whether the approval by the Minister of the respondent's application, the registration of the respondent and the issue of the grant of the allotment to the respondent were valid.

Held:

1. Section 8 did not expressly state that it was the Minister who must consult with the holder of the hereditary estate prior to the grant of a tax or town allotment. However, as it was only the Minister with the power to grant an allotment, the proviso should be interpreted to mean that it was the Minister who was directed to carry out the prior consultation.
2. It was not the intention of Parliament when enacting s 8 that a lack of prior consultation by the Minister would render invalid and void the grant of a tax or town allotment.
3. The grant of the allotment to the respondent on 14 September 1994 was valid. The purported revocation of that grant by the Minister was of no effect. The purported grant of the allotment to the appellant was also of no effect. The orders made by the judge were confirmed.
4. The appeal was dismissed. The respondent was entitled to costs on the appeal against the Minister as the appellant in CA 13/2000 and against Henele Nai as the appellant in CA 13A/2000.

Statute considered:

Land Act (Cap 132)

Counsel for first appellant	:	Mr Kefu
Counsel for second appellant	:	Ms Tonga
Counsel for respondent	:	Mrs Vaihu

Judgment

[1] These two appeals concern a town allotment in Ma'ufanga being lot 1 on plan 109 (the allotment). The action was heard by Finnigan J, sitting with an assessor Honourable Lasike. By a judgment issued on 29 May 2000 Finnigan J directed that the registration of the appellant Henele Nai to the allotment be set aside, that the first appellant the Minister of Lands cancel the deed of grant issued on 23 September 1994 in the name of the appellant Henele Nai, and that the Minister re-issue the deed of grant issued on 14 September 1994 in the name of the respondent Tevita Finau. The first and second appellants have appealed against that judgment.

[2] At the commencement of the hearing, Mr Kefu for the Minister of Lands sought and was granted leave to withdraw the appeal by the Minister. It is accordingly dismissed.

The sequence of events

[3] The events that occurred are set out in considerable detail in the judgment under appeal. The following is an outline of the events as found by the judge, relevant to the issues raised on the appeal.

[4] In or about 1971 land was required by the Government for a Police College at Kolofo'ou. Those who were living on that land were moved on to land in Ma'ufanga. The estate holder of that land was and is Hon Fakafanua. A new village came into being at Houmakelikao. The first people to be given the allotment were Sione and Valamotu Vi. They did not register as the land holders, but were known to the estate holder, who accepted them as the occupiers.

[5] The respondent was another of those who moved to Houmakelikao. Valamotu Vi, who with her husband Sione had never lived on the allotment, agreed to the respondent occupying it. That was in 1971. The respondent has lived on the allotment ever since.

[6] When Valamotu Vi went to Australia in 1988 she authorised her nephew Lupeti to look after the allotment. Later, as the result of discussions within the Vi family, it was agreed that the appellant Henele Nai should have the allotment. Pita Vi, the son of Valamotu Vi, signed a letter as heir which was taken to the estate holder who signed the consent on their application and said the land would be registered as Henele Nai's.

[7] In the intervening time the judge found that the respondent had carried out his village obligations and in particular had been a frequent visitor to the home of the estate holder Hon Fakafanua. The respondent is a relative of the estate holder's wife. The respondent said that he visited the estate holder's home on several occasions for the purpose of obtaining registered title to the allotment. He took with him the application form which required the signature of the estate holder. The estate holder did not sign the form. Instead he told the respondent each time to stay on the land because it was he who was taking care of it. On one occasion the estate holder told the respondent to go to the town officer, and that whoever was named by the town officer would be the person to whom the estate holder would give the allotment. The estate holder Hon Fakafanua said that he had no memory of any visits by the respondent, but the judge accepted the respondent's evidence about these visits and what the respondent was told.

[8] The respondent went to the town officer with the form which the town officer signed. The town officer and the respondent went about three times to see Hon Fakafanua. The respondent came away with the form unsigned but told the town officer that Hon Fakafanua had again advised him to return and stay on the allotment.

[9] The respondent took the form to the Minister. He told the Minister what had occurred. The Minister said that he would see Hon Fakafanua. Later the respondent was told the Minister had approved the application for registration. On 14 September 1994 a deed of grant issued to the respondent.

[10] Lupeti Vi and the appellant Henele Nai then lodged their application form, which the estate holder had signed on the same day that the respondent's deed of grant was

issued. The Minister accepted their application. He cancelled the registration of the respondent and on 22 September 1994 issued a new deed of grant to the appellant Henele Nai.

[11] The judge made a further finding relating to the appellant. He comes from Fua'amotu which is on Tungi's estate. He lives there, on an allotment that belongs to his uncle. In 1994 he asked Hon 'Ahome'e, the Tungi's agent, whether there was an allotment available. However, the judge was not prepared to accept for the purpose of his decision that was so, because he was not satisfied that the appellant's inquiry extended to the whole estate of Tungi.

The judge's findings

[12] After a detailed review of the submissions and making further factual findings which we need not to detail, the judge gave three reasons for settings aside the registration in favour of the appellant Henele Nai.

[13] First, in applying the equity principle, he directed that the registration of the appellant be set aside in favour of registration of the respondent on the ground of an inequitable breach by the estate holder of his assurance to the respondent.

[14] Secondly, he set it aside because of an inequitable breach of assurance by the Minister. Having been told by the respondent of his dealings with the estate holder, the Minister said that he would see Hon Fakafanua. The Minister registered the respondent and issued a deed of grant to him. These actions, the judge considered, included an assurance to the respondent that the Minister had carried out his duties, and had lawfully granted the allotment to him.

[15] Thirdly, the judge found there to be a subsequent error of law by the Minister when he purported to cancel the respondent's registration. Before granting the allotment to the appellant Henele Nai, he failed to ascertain whether there was other land available for the appellant on the estate of Tungi, which he was bound by s 50 to do. This failure was an error of law. Equity allows the court to intervene and correct that error.

[16] The judge made further findings. He held that the respondent was lawfully residing on the allotment, not because of permission from the Vi family, but rather because of permission given by the estate holder Hon Fakafanua. He also held that if, as the estate holder said, the Minister made no contact with him so that there was a failure to consult, that would not make the registration invalid. He rejected a submission by Ms Tonga for the appellant that the Minister made a valid grant to the appellant on 15 April 1997 when he decided that the appellant should hold the allotment after the court remitted the matter to him for his consideration. The then Minister was the Hon Fakafanua. He also did not accept that a second decision, also in the appellant's favour, was a valid and binding decision. Those decisions could only be effective if the court were to hold that the initial grant to the respondent was invalid.

[17] It was for these reasons that the judge directed that the Minister reissue the deed of grant of the allotment to the respondent that was initially issued on 14 September

1994 and cancel the deed of grant to the appellant Henele Nai that was issued on 22 September 1994.

The issue on the appeal

[18] The central issue on the appeal is whether the approval by the Minister of the respondent's application, the registration of the respondent and the issue of the grant of the allotment to the respondent were valid. If they were, they must stand. Any purported revocation of the registration and grant by the Minister is invalid as made without jurisdiction. If they were not valid, the later grant to the appellant is effective.

[19] This issue turns on the interpretation of the relevant provisions in the Land Act (Cap 132), and in particular what Parliament intended to be the consequence if the Minister did not consult the estate holder as required by the proviso to s 8. Is it the intention that the requirement to consult is mandatory, with the result that a failure to consult renders the grant invalid as made without jurisdiction? Or is it directive or permissive, with the result that a failure to consult leaves what was done, the approval of the application and the issue of the grant, unaffected?

[20] To resolve this issue, the task of the court is to scrutinise the Act, and determine, in the light of its particular provisions, the legal consequence most likely to have been intended for breach of the duty: Bennion, Statutory Interpretation, 2nd edition, 30.

The relevant provisions in the Act

[21] The power of the Minister to make the grant is contained in subss 19(1) and (2):

> **19**. (1) The Minister of Lands is the representative of the Crown in all matters concerning the land of the Kingdom.
>
> (2) He shall grant allotments to Tongan subjects duly entitled thereto by law.

[22] The appellant relies on s 8, relating to the provision of allotments:

> **8.** Subject to the provisions of this Act relating to surrender, the grant, if the applicant be lawfully residing on an hereditary estate, shall be made from the lands in such hereditary estate; and if the applicant is lawfully residing upon Crown Land shall be made from Crown Land:
>
> Provided always that land comprised in an hereditary estate shall not be granted as a tax or town allotment without prior consultation with the holder of the hereditary estate.

[23] Also relevant is s 34, providing that an estate holder is not to refuse land for allotments:

> **34**. (1) The holder of an hereditary estate shall admit into possession any person who has been granted an allotment upon his estate by the Minister:

> Provided that a holder shall be permitted to reserve a portion of the hereditary estate, being of such area as may be determined by regulation, for the sole use of himself and his successors in title.
>
> (2) Before making a grant of a tax allotment out of an hereditary estate the Minister shall consult the holder thereof and hear any objections he may make to the grant and where the Minster and the holder of the hereditary estate fail to agree, the Minister shall nevertheless grant the land as a tax allotment but such grant shall within 3 months of the making thereof be liable to review by the Court, the decision of which on the matter shall be final.

[24] Finally, we refer to s 43, providing that a male Tongan subject may apply for an allotment, and prescribing the procedures:

> **43**. (1) Every male Tongan subject by birth of 16 years of age not being in possession of a tax or town allotment shall be entitled to the grant of a tax or town allotment or if in possession of neither to the grant of a tax and town allotment.
>
> (2) The grant shall be subject to the provisions of this Act and shall be made in accordance with the following rules-
>
> (a) The applicant shall make an application on the prescribed form to the Minister;
>
> (b) …
>
> (c) …

Did the Minister consult the estate holder?

[25] Ms Tonga submitted that the grant to the respondent was invalid because the Minister did not have any prior consultation with the holder of the hereditary estate, and because the form of application prescribed by s 43(2)(a), which provided for the consent of the estate holder to be endorsed, did not have such consent endorsed.

[26] As to the facts, the Minister at the relevant time was deceased by the time of the trial. The estate holder Hon Fakafanua gave evidence that he was not contacted by the Minister concerning the grant of the allotment to the respondent. The judge referred to a letter from the Minister dated 19 September 1994 addressed to the Secretary of Land and Survey requesting the Secretary to cancel the registration of the allotment to the respondent, stating the reason for this cancellation to be "… because the estate holder did not offer this allotment." The judge expressed residual doubts about the claim by the estate holder that he had not been consulted by the Minister. But he did not need to resolve that factual issue.

[27] It is apparent from the Minister's letter of 19 September 1994 that he had by that date consulted with the estate holder, who had apparently claimed to the Minister that he had not offered the allotment to the respondent. The letter does not state that he did not consult with the estate holder before the issue of the deed of grant to the respondent on 14 September 1994. Also we note that the letter appears to be at odds

with the unqualified denial by the estate holder that he was contacted by the Minister concerning the grant of the allotment to the respondent.

[28] However, since no express factual finding was ;made by the judge, and having regard to the evidence given by the estate holder, we will now consider the legal consequences if, as a matter of fact, there had been no consultation by the Minister with the estate holder prior to the grant of the allotment to the respondent.

Conclusion

[29] Section 8 does not expressly state that it is the Minister who must consult with the holder of the hereditary estate prior to the grant of a tax or town allotment. However, as it is only the Minister who has the power to grant an allotment, the proviso should be interpreted to mean that it is the Minister who is directed to carry out the prior consultation.

[30] We have reached the conclusion that it was not the intention of Parliament when enacting s 8 that a lack of prior consultation by the Minister would render invalid and void the grant of a tax or town allotment. The following are our reasons for reaching this conclusion.

[31] First, all land in Tonga is the property of the King: the Constitution, clause 104. Subsections 19(1) and (2) appoint the Minister as the representative of the Crown to grant allotments to Tongan subjects. It is inconsistent with such an unqualified appointment to hold that non-compliance with the proviso to s 8 renders any grant he has made on behalf of the King invalid.

[32] Secondly, the broad policy of the statutory provisions is that it is the Minister who is given the sole statutory authority to issue a grant of an allotment. The requirement to consult is in the nature of a procedural step to enable the Minister to be informed of the attitude of the estate holder. That attitude may well be relevant to how the Minister exercises his discretion on an application for the issue of a grant. But there are no reasons for finding that the requirement to consult was intended to be a fetter on the Minister's power to make the grant.

[33] Thirdly, the phrase "prior consultation" in the proviso to s8 is lacking in the degree of certainty to be expected if non-compliance were intended to invalidate a grant. Had that been the intention it could be expected, for example, that the provision would specify the nature of the consultation with a requirement that the record of the consultation and the consequences of it be in writing signed by the Minister. The absence of specific provisions of this kind supports the view that the proviso is a direction to the Minister on the steps he should take, but is not intended to invalidate the grant if he fails to do so.

[34] Fourthly, subs 34(2) contains a more detailed direction to the Minister of the course he should adopt before making a grant of a tax allotment. It will be noted that this provision does not apply to a town allotment, which the allotment in this case was. If the proviso to s 8 were intended to be a condition precedent to the Minister having jurisdiction to grant an allotment, there would be little point in enacting subs 34(2).

[35] This conclusion is not affected by subs 43(2). It is correct, as Ms Tonga submitted that the prescribed form of application for an allotment referred to in the subsection contains a section to be signed by the estate holder, recording his agreement to the grant of the allotment and declaring that there is no impediment to prejudice the grant. But such a provision in a prescribed form cannot be interpreted to mean that the validity of a grant is conditional upon the estate holder signing the agreement in the application. Such an interpretation would be directly contrary to the proviso in s 8, requiring only consultation with the estate holder.

290 **The result**

[36] The grant of the allotment to the respondent on 14 September 1994 was valid. The purported revocation of that grant by the Minister is of no effect. The purported grant of the allotment to the appellant is also of no effect. The orders made by the judge are confirmed.

[37] The appeal is dismissed. The respondent is entitled to costs on the appeal against the Minister as the appellant in CA 13/2000 and against Henele Nai as the appellant in CA 13A/2000, to be agreed or taxed.

R v Naidu

Court of Appeal, Nuku'alofa
Ward CJ, Tompkins, Spender JJ
CA 24/2001

25 July 2001; 27 July 2001

Sentencing – Crown appeal against fine imposed – forgery – non-custodial sentence
Misrepresentation and fraud – sentencing – Crown appeal against fine – fine upheld

The respondent, Surendra Naidu, was convicted on 29 August 2000 on one count of Forgery, contrary to section 170 of the Criminal Offences Act (Cap 18), and one count of Knowingly Dealing with a Forged Document, contrary to section 172 of that Act. A fine of $4000 was imposed on the Forgery count, and a fine of $3000 on the count of Knowingly Dealing with a Forged Document. The $7000 was ordered to be paid by 12 September 2000, in default three months imprisonment. The fines were paid on 7 September 2000. On 28 September 2001 the Crown filed an application for leave to appeal the sentences. The Crown claimed that the sentences were inadequate, did not reflect the level of criminality of the respondent, nor the abuse of trust the offences involved, and failed to give sufficient consideration to the need for general deterrence, particularly in respect of offences that were difficult to detect.

Held:

1. Ordinarily, offences of this kind involving abuse of trust warrant a custodial sentence. The maximum penalty for forgery was 7 years imprisonment, and for knowingly dealing with a forged document 5 years imprisonment. However because this was a Crown application, and because the fines imposed had been paid, there was the risk of injustice in undoing, what had occurred and imposing a custodial sentence.
2. Leave to appeal was granted, the sentences imposed were confirmed, and the respondent was ordered to pay compensation of $14,100 to South Pac Builders Supplies Limited, by 4 pm on 27 August 2001, in default six months imprisonment.

Case considered:

R v Misinale (Court of Appeal, CA 13/99, 23 July 1999)

Counsel for appellant : Mr Havea
Counsel for respondent : Mr 'Etika

Judgment

[1] After a three day trial before Justice Ford, Surendra Naidu ('the respondent') was convicted on 29 August 2000 on one count of Forgery, contrary to section 170 of the Criminal Offences Act (Cap 18), and one count of Knowingly Dealing with a Forged Document, contrary to section 172 of that Act.

[2] On 29 August 2000, Justice Ford imposed a fine of $4000 on the Forgery count, and a fine of $3000 on the count of Knowingly Dealing with a Forged Document. His Honour ordered the $7000 to be paid by 12 September 2000, in default three months imprisonment. The fines were paid on 7 September 2000.

[3] On 28 September 2001, pursuant to section 2 of the Court of Appeal (Amendment) Act 1997, the Crown filed an application, for leave to appeal the sentences imposed by Justice Ford.

[4] The Crown claims that the sentences are inadequate, do not reflect the level of criminality of the respondent, nor the abuse of trust the offences involved, and fail to give sufficient consideration to the need for general deterrence, particularly in respect of offences that are difficult to detect.

[6] The respondent, a Fijian, established a hardware business from about October 1996 with Sione Kiteau Topui in Nuku'alofa, under the name South Pac Builders Supplies Limited. In support of his application for a Tongan work permit, the respondent filed with the Immigration Department a four-page employment contract which he had prepared. This document was signed by the accused as "the employee", and by Mr Topui on behalf of South Pac Builders Supplies Limited as chairman of the company. Both signatures were witnessed by Mr Topui's daughter, Pilisita Topui.

[7] The respondent was managing director of the company. The sentencing judge found that he "obviously did a good job establishing the business". Initially there was a close and friendly relationship between Mr Topui and the respondent, which began to deteriorate in about August 1997 when Mr Topui's eldest son returned from the USA, and became involved in the running of the company. Mr Topui began to question the trust he had reposed in the respondent, while the respondent, for his part, suspected that Mr Topui and his family were trying to take over the company.

[8] In late March 1998, Mr Topui invited his nephew, Sebastian Hurrell, an experienced accountant and businessman, to come to Tonga from New Zealand to try and sort matters out. The result was an agreement that the respondent would leave the company.

[9] At a board meeting of the directors on 30 March, a hand written note was tabled which contained the respondent's entitlement to the severance package under his contract of employment.

[9A] On that same day Mr Hurrell asked the accused for a copy of the contract because he had not been able to find a copy around the office. Next day the accused produced a copy of the contract. That contract was a five page document. Mr Hurrell went through it and confirmed that his entitlement under it equalled the figure of $37,000 that had been calculated previously by the respondent. The accused had

already had the $37,000 withdrawn from the company's bank account and placed in a solicitor's trust account.

[9B] That same day, 31 March 1998, Mr Howell drafted a letter for Mr Topui to sign addressed to the respondent confirming the settlement package. When Mr Topui signed the letter he was concerned about the proposed payment of $37,000 because he did not think that the accused was entitled to that sort of figure under the employment contract he had signed but Mr Hurrell told him that the figure matched up with his entitlement under the contract. Mr Topui, nevertheless, could not accept that the contract Mr Hurrell had been shown was the same document he had signed back in October 1996 and nor could his daughter, Pilisita, to whom he showed it.

[10] The trial judge rejected the respondent's account of how and when the five page document had come into existence. His Honour found that "there was only one genuine contract, and that was the contract given to the Immigration Department. The second contract was made up by [the respondent] alone without the knowledge or consent of the company or Mr Topui and it was made to deceive the company." The second contract consisted of four pages of terms and condition (which were more favourable to the respondent than the terms and conditions in the first contract), and a fifth page, which was the final page of the first contract.

[11] In respect of the second count, the trial judge found that the respondent "knew that the second contract was a forgery but he acted upon it in his capacity as general manager/ managing director of the company and he caused other people to act upon it as if it were genuine."

[12] In imposing sentence, the trial judge observed:

> "Had you approached the directors and asked for the salary increase and other benefits provided for in the second contract, then I am sure you would have been able to work it through and they would have agreed."

[13] The production and use of the second contract must be seen as a brazen and criminal attempt at self-help in respect of the respondent's severance entitlements.

[14] We were told that the respondent has a judgment against his former solicitor for the $37,000 which was placed in that solicitor's trust account. That judgment might prove to be an empty one, but as between the company and the respondent, the company is out of pocket by the difference between what was in fact paid in reliance on the forged contract, and what was the respondent's proper severance entitlement under the genuine contract of employment. This factor was not the subject of express reference by the trial judge when he imposed the sentences he did. The Crown did not quantify before the trial judge or on the application for leave to appeal the amount obtained by the appellant as a result of his forgery. We were also told from the bar that the entitlement of the respondent in respect of his shareholding in the company is unresolved.

[15] S 25 of the Criminal Offences Act (Cap 18) relevantly provides:

> (1) Any person who is tried and convicted in the Supreme Court of an offence may be adjudged by the Court to make compensation to any person injured or suffering loss by his offence …
>
> (3) Any such compensation may be either in addition to or in substitution for any other punishment and in default of payment thereof the convicted person is liable to imprisonment for any period not exceeding 12 months.

[16] Having regard to the terms of the first and second contracts, and the contents of the hand written note put before the board meeting on 30 March, doing the best we can, the amount properly due on termination is as follows:

4 months salary after tax (2/3 of $20,264.79)	13,509.53
4 months housing allowance (2/3 of 6,000)	4,000.00
4 months vehicle allowance (2/3 of 4,800)	3,200.00
Passage fare for 4	1,156.00
Freight to Fiji	1,050.00
Total	22,915.53

The amount actually paid seems to have been $37,010.79. The extra amount paid by the company as a result of the respondent's forgery, rounded up, is therefore $14,100.

[17] Ordinarily, offences of this kind involving abuse of trust warrant a custodial sentence. The maximum penalty for forgery is 7 years imprisonment, and for knowingly dealing with a forged document 5 years imprisonment.

[18] This however is a Crown application for leave to appeal against sentence. The nature of such an application was considered by the Court of Appeal in *Rex v Hanisi Misinale* (Court of Appeal, CA 13/99, 23 July 1999). The Court there said at pp 4 - 5:

> "… for such an appeal to succeed, clear and compelling grounds for increasing the sentence need to be established. It is not sufficient for the appellate court to consider that a more severe sentence could properly be imposed, or that the sentence imposed is inadequate or inappropriate. For a sentence to be increased on a Crown appeal, the appellate court must be satisfied that the sentence is so inadequate or inappropriate that the sentencing judge erred in that he or she must have acted upon a wrong principle, wrongly assessed a relevant circumstance, took into account irrelevant factors, failed to take into account relevant factors, or has imposed a sentence that is inconsistent with sentences the court has imposed for like offending. In such a

> situation, the appellate court is left with no alternative but to impose a more severe or a different sentence. If the court is so satisfied, the sentence should be increased only to the lower end of the appropriate sentencing range. Indeed, the appellate court, in
> 160 fixing the proper range for this case, should take into account that it is an added penalty to have to face sentence a second time, and to have hope deferred, and perhaps dashed, in the result."

[19] Because this is a Crown application, and because the fines imposed have been paid, that there is the risk of injustice in undoing, what has occurred and imposing a custodial sentence at this stage.

[20] We think that in the light of events, justice will be served if leave to appeal be granted, the sentences imposed below be confirmed, and the respondent be ordered to pay compensation of $14,100 to South Pac Builders Supplies Limited, by 4 pm on 27 August 2001, in default six months imprisonment.

Jagroop v Sokai and the Kingdom of Tonga

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 7/2001

25 July 2001; 27 July 2001

Practice and procedure – appeal against strike out – cause of action may succeed – appeal allowed
Negligence – breach of duty of care – proximity and liability of police

The Appellant asserted that he was induced by a man Teg Rajan, who had arrived in Tonga on a Fijian passport, to lend him the sum of $1500. The Appellant discovered the next day that he had been duped, and so procured Mr Rajan's passport from him and went to the police. A few days later, the police arrested Mr Rajan on a charge of obtaining the sum of $1500 by false pretences, and got possession of the passport from the Appellant. The police told him that the charge against Mr Rajan would be prosecuted. There was some discussion between the Appellant and a police officer about whether the Appellant would bring civil proceedings. The police officer told him the police "would proceed and prosecute Rajan for obtaining by false pretences and to leave everything for them to do". But the police did not proceed with the prosecution; instead, they returned Mr Rajan's passport and ticket to him, and allowed him to leave Tonga. The Appellant lost any opportunity of proceeding against Mr Rajan before his departure, and was unable to recover the money lost. The Appellant sued the police officer, the first respondent, and the Kingdom of Tonga. He claimed that they were in breach of a duty of care owed to him and so were liable in negligence. The Respondents moved to strike out the claim on the grounds that the relationship between the parties lacked the proximity necessary for the existence of a duty of care and that, in any event, public policy would deny the plaintiff any cause of action, in the circumstances, for breach of a duty of care. The Supreme Court struck out the claim; the Appellant appealed.

Held:

1. It was alleged that the police officer "told the Plaintiff that they, the police, would proceed and prosecute Rajan … and to leave everything for them to do". Evidence to that effect could have lead to a finding, at a trial, of an "assumption of responsibility by the police" which induced the Appellant to refrain from taking steps himself to ensure a recovery of the money. Even if the success of any of the steps open to him, had it been taken, were doubtful, it could be said he had now lost a chance of success.

2. If the Appellant had a cause of action which may possibly succeed, he was entitled to pursue it.
3. The appeal was allowed with costs. The orders under appeal were set aside and, in lieu of those orders, it was ordered that the application to strike out the statement of claim be dismissed with costs.

Cases considered:

Alexandrou v Oxford [1993] 4 All ER 328
Barrett v Enfield London Borough Council [1993] 3 All ER 193
Elguzouli-Daf v Commissioner of Police of the Metropolis [1995] 1 All ER 833
Hill v Chief Constable of West Yorkshire [1989] AC 53
Osman v Ferguson [1993] 4 All ER 344
Ramanlal & Sons Company Ltd v Cater [1999] Tonga LR 45
Swinney v Chief Constable [1996] 3 All ER 449
Yuen Kun-ueu v Attorney-General of Hong Kong [1987] 2 All ER 705

Counsel for appellant : Mr Niu
Counsel for respondent : Miss Tupou

Judgment

[1] The Appellant asserts that he was induced by a man Teg Rajan, who had arrived in Tonga on a Fijian passport, to lend him the sum of $1500. The pretence which persuaded the Appellant to part with his money was that it was needed to pay customs duty in respect of a container of goods then on the wharf. In fact, according to the Appellant's account, the goods did not exist, and when he discovered the next day that he had been, as he alleged, duped, the Appellant procured Mr Rajan's passport from him and went to the police. A few days later, the police arrested Mr Rajan on a charge of obtaining the sum of $1500 by false pretences, and got possession of the passport from the Appellant. He was told by the police that the charge against Mr Rajan would be prosecuted.

[2] There was some discussion between the Appellant and a police officer about whether the Appellant would bring civil proceedings. The upshot was that the police officer told him the police "would proceed and prosecute Rajan for obtaining by false pretences and to leave everything for them to do". But in reality the police did not proceed with the prosecution; instead, they returned Mr Rajan's passport and ticket to him, and allowed him to leave Tonga. That happened a little over a week after the assurance was given. No warning or information was provided to the Appellant, who lost any opportunity of proceeding against Mr Rajan before his departure, and has been unable to recover the money lost.

[3] Upon these facts, the Appellant sued the police officer, the first respondent, and the Kingdom of Tonga. Although the Statement of Claim is less than precise, he claims that they are in breach of a duty of care owed to him - in short, that they are liable in negligence. The issues have come before this Court because the Respondents moved to strike out the claim on the grounds that the relationship between the parties lacked the proximity necessary for the existence of a duty of care and that, in any

event, public policy would deny the plaintiff any cause of action, in the circumstances, for breach of a duty of care. The learned judge below having acceded to these submissions and struck out his claim, the Appellant appeals to this Court.

[4] The principle upon which an application to strike out a claim may be entertained by the Court is clear. No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it cannot possibly succeed.

[5] In the present case, the learned judge thought the Appellant's claim was in conflict with the principle which protects from the imposition of a duty of care the function of the police in the investigation and prosecution of crime: see *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Alexandrou v Oxford* [1993] 4 All ER 328; *Yuen Kun-ueu v Attorney-General of Hong Kong* [1987] 2 All ER 705. Even if a relationship of proximity sufficient to give rise to a duty of care could otherwise be established, his Honour considered the claim would be excluded upon grounds of public policy: *Swinney v Chief Constable* [1996] 3 All ER 449; *Osman v Ferguson* [1993] 4 All ER 344; *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] 1 All ER 833 at 840-841, per Steyn LJ, as Lord Steyn then was.

[6] It is not to be doubted that these principles apply, in general, to the investigation of crime by the police, and to their decisions concerning prosecution, in Tonga. But an important qualification was stated by Steyn LJ in *Elguzouli-Daf* at 841:

> "Putting the decision in Hill in perspective I would only add that it does not follow that the police may not be held liable in a case where there is some form of assumption, of responsibility by the police."

[7] This dictum of Steyn LJ is reflected in the pleading in the present case, which specifically alleges that the police officer "told the Plaintiff that they, the police, would proceed and prosecute Rajan … and to leave everything for them to do". Evidence to that effect could well lead to a finding, at a trial, of an "assumption of responsibility by the police" which induced the Appellant to refrain from taking steps himself to ensure a recovery of the money. Even if the success of any of the steps open to him, had it been taken, may be doubtful, it could be said he has now lost a chance of success. Perhaps he could have obtained the issue of a writ of *ne exeat reano* or some other relief, such as arrest on mesne process (if available in Tonga). It has been held that a writ of *ne exeat regno* is available, although it may be hard to establish a case for it: *Ramanlal & Sons Company Ltd v Cater* [1999] Tonga LR 45. Or, if told of the change of mind on the part of the police officer, the Appellant might have been able, before it became too late, to make successful representations to a superior officer.

[8] If the Appellant has a cause of action which may possibly succeed, he is entitled to pursue it. In *Barrett v Enfield London Borough Council* [1993] 3 All ER 193, which was concerned with the question whether a claim for negligence in the taking of a decision to exercise a statutory discretion, relating to the taking of a child into care, was or was not justiciable, Lord Browne-Wilkinson said (at 197), referring to an earlier speech of his own:

> "I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found
130 at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

[9] Applying the same approach to the present case, this Court should allow the appeal with costs; set aside the orders under appeal; and, in lieu of those orders, order that the application to strike out the statement of claim be dismissed with costs.

Wall v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Spender JJ
CA 31/2000

25 July 2001; 27 July 2001

Sentencing – appeal against embezzlement sentence – plea of guilty – sentence reduced
Misrepresentation and fraud – embezzlement – sentencing

The appellant was the Tongan representative for MMI Services Pty Ltd, an Australian insurance company. In that position, he had authority to sign cheques to withdraw money from the company's claims account at the Bank of Tonga to pay company expenses and claims. These cheques were required to be signed by the appellant and an officer of the Insurance Corporation of Tonga, the agent for MMI in Tonga. In January 2000, the appellant requested Mr Natu Lui, the manager of ICT, to sign blank cheques in order, he claimed, to pay some claims of policyholders. Mr Lui did so. The appellant personally attended at the bank, signed each cheque on the reverse side, and withdrew the amount of each cheque in cash. The appellant adopted this procedure on 11 occasions and the amount of each cheque varied from $8,970 to $35,750. The total amount embezzled was $181,008. The appellant used this money for trips overseas, gifts and shopping, the importation of an Alfa Romeo sports car he owned in Australia, transferring amounts to his sister in Australia, and buying assets such as a tractor, tractor implements, ride-on lawnmower, television, video, camera, and other items. Some of the items purchased had been recovered by the police. The appellant pleaded guilty to 11 counts of embezzlement. On 23 October 2000 he was sentenced to five years imprisonment on each count concurrently, the last 12 months to be suspended for two years from date of release. He appealed against those sentences.

Held:

1. The maximum penalty was seven years imprisonment. Looking at the offending alone, particularly having regard to the amount, the period over which it occurred, and the appellant's senior position of trust, a sentence not too far from the maximum was considered appropriate. Taking into account all the circumstances of the offending, and the mitigating factors, but for the plea of guilty, a sentence of five years imprisonment would be within the sentencing judge's discretion.

2. Where a reduction was made for a guilty plea, the amount of that reduction should be stated by the sentencing judge. Then the accused would be aware that a real reduction in the sentence for the guilty plea occurred. Also counsel would be able to advise an accused person that if he or she pleads guilty there would be imposed a shorter sentence than if found guilty. A reduction of one year for the guilty plea was appropriate; this resulted in a sentence of four years. In recognition of the appellant's age, his character, apart from this offending, and that it was unlikely that he would ever re-offend, a suspension of the sentence for 12 months was warranted.
3. The Court concluded that the sentence imposed by the Chief Justice was excessive. The appeal against sentence was allowed and the sentence imposed in the Supreme Court was quashed. In lieu thereof, the appellant was sentenced to four years imprisonment on each count to be served concurrently, the last 12 months of the sentence to be suspended for two years from the date of release.

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)

Counsel for appellant	:	Mr Niu
Counsel for respondent	:	Mr Fusitu'a

Judgment

[1] The appellant pleaded guilty to 11 counts of embezzlement. On 23 October 2000 he was sentenced to five years imprisonment on each count concurrently, the last 12 months to be suspended for two years from date of release. He has appealed against those sentences.

The offending

[2] The appellant was the Tongan representative for MMI Services Pty Ltd, an Australian insurance company. In that position, he had authority to sign cheques to withdraw money from the company's claims account at the Bank of Tonga to pay company expenses and claims. These cheques were required to be signed by the appellant and an officer of the Insurance Corporation of Tonga, the agent for MMI in Tonga.

[3] Commencing in January 2000, the appellant requested Mr Natu Lui, the manager of ICT, to sign blank cheques in order, he claimed, to pay some claims of policyholders. Mr Lui did so. The appellant personally attended at the bank, signed each cheque on the reverse side, and withdrew the amount of each cheque in cash.

[4] The 11 counts relate to 11 occasions when the appellant adopted this procedure. The amount of each cheque varied from $8,970 to $35,750. The total amount thus embezzled was $181,008.

[5] The appellant used this money for trips overseas, gifts and shopping, the importation of an Alfa Romeo sports car he owned in Australia, transferring amounts to his sister in Australia, and buying assets such as a tractor, tractor implements, ride-on lawnmower, television, video, camera, and other items. Some of the items purchased have been recovered by the police.

The appellant

[6] The appellant was born and brought up in Queensland, Australia. He was aged 31 at the time of the offending. He has tertiary qualifications and is an associate of the Insurance Institute of Australia. He worked for insurance companies in Australia until he was appointed Commercial Manager and representative of MMI in Tonga in 1998. He is in good health. On 1 July 2000, after the disclosure of the offending, he married a Tongan woman whom he had met at his church. He is an active member of his church here in Tonga. She has supported him in prison, visiting regularly and taking him food and clothing. He has stated that, when his sentence and any other litigation arising out of these events are completed, he intends to return to Australia with his wife.

[7] Affidavits filed in support of the appellant describe him as compassionate, loving, and willing to help others. The affidavits from his wife and the Minister of his church confirm the sincerity of his religious beliefs and the extent of his activities in his church. The Chief Justice when sentencing accepted that he was a caring and kind person, fortunate to have such loyal friends. These are excellent references, although strangely at variance with his conduct resulting in these offences.

[8] He made a full statement to the court in which he expressed his remorse for what he had done. He said, by way of explanation not excuse, that the thefts occurred because he was completely infatuated with another person. Most of the money taken was spent with her and others on a trip to Hong Kong. Some of the articles purchased, such as the tractor and lawnmower, were for this person's family. He speaks of his determination to make full restitution.

Aggravating features

[9] For the commercial community to function effectively employers must be able to trust their employees. This is particularly so where the employee is in a senior responsible position. For this reason, the courts have always regarded theft as a servant as a serious offence requiring a deterrent penalty. The appellant deliberately breached that trust not once, but 11 times, spread over a period of four months. The proceeds of his embezzlement he used for what can only be described as high living.

[10] The amount involved, $181,008, is very large. Indeed, this is the largest embezzlement ever discovered in Tonga.

Mitigating features

[11] The appellant has no previous criminal record. Evidence was produced of an impressive work record. We have already referred to his otherwise good character.

[12] He admitted and confessed to the offences as soon as he was confronted by his employer. He co-operated fully with the police, and pleaded guilty in the Supreme Court. Some of the property purchased with the embezzled funds has been recovered to the value of approximately $30,000.

[13] We accept, as did the Chief Justice, that there is little if any likelihood of his offending again. Accordingly, the rehabilitative aspect of sentencing is not particularly relevant in the appellant's case.

[14] The probation officer considered, and we agree, that the appellant is genuinely remorseful for what he has done. He has recognised the harm he has done to his family, and the damage to his employer, to whom he wrote a letter apologising for his conduct.

[15] There are two other factors relevant to the sentence to be imposed. The appellant as an Australian will be in prison with persons of a different culture and language. There can be no doubt that this aspect makes the sentence more onerous than would otherwise be the case. However, the impact of this aspect is lessened to some extent by the assistance he will receive from his wife.

[16] The appellant, in a relatively short time, had made very considerable progress in his chosen profession of insurance, having reached a senior position. All that is now lost. If he is ever again employed in a position requiring trust and integrity, that is unlikely to be for a very long time.

Comparable sentences

[17] The Crown referred to two other sentences for embezzlement. The first is the decision of this court in *R v Misinale* (Court of Appeal, CA 13/99, 23 July 1999). It was an appeal by the Crown against the sentence imposed. The respondent had been found guilty, following a trial by a jury, of embezzlement of $47,310.23. At that time, it was the largest embezzlement discovered in Tonga. There were similar elements. He was in a senior position of trust and had no previous convictions. The sentence imposed by the judge in the Supreme Court was three years imprisonment of which he was ordered to serve eight months with the balance suspended for two years from the date of his release. This court increased the sentence to three years imprisonment, the last 12 months of the sentence to be suspended for two years from the date of his release. As a Crown appeal, the sentence should be regarded as at the lower end of the appropriate sentencing range.

[18] In *R v Tangata'iloa* (Supreme Court, Cr 99/00, 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.

Decision

[19] We have considered the aggravating and mitigating factors to which we have referred, and the deterrent element that is important in sentencing for offending of this

kind. We accept the submission on behalf of the Crown that thefts carried out by persons in a position of trust can be difficult to detect. When they are detected, a sentence calculated to discourage others from behaving in a like manner should be imposed. We also take into account the sentences in the other two cases of embezzlement.

[20] The maximum penalty for this offence is seven years imprisonment. Looking at the offending alone, particularly having regard to the amount, the period over which it occurred, and the appellant's senior position of trust, a sentence not too far from the maximum may well be considered appropriate. Taking into account all the circumstances of the offending, and the mitigating factors, but for the plea of guilty, we consider that a sentence of five years imprisonment would be within the sentencing judge's discretion.

[21] Mr Niu submitted that the Chief Justice should have applied what he described as the normal reduction of one-third for the guilty plea. We do not consider that there should be any normal reduction for a guilty plea. Whilst undoubtedly what would otherwise be an appropriate sentence should be reduced to recognise that pleas of guilty should be encouraged, the amount of that reduction must depend on the individual circumstances of each case. Where, for example, a plea of guilty will avoid a long expensive trial, or avoid the need for the victim of a sexual offence to give evidence, a larger reduction would be justified. Where a not guilty plea is changed to guilty only on the eve of the trial, or the accused is obviously going to be found guilty, a little reduction may be appropriate. A guilty plea entered early can also be evidence of genuine remorse.

[22] Where a reduction is made for a guilty plea, we consider it desirable for the amount of that reduction to be stated by the sentencing judge. If this is done, the accused will be aware that a real reduction in the sentence for the guilty plea has occurred. Also counsel will be able to advise an accused person that if he or she pleads guilty there will be imposed a shorter sentence than if found guilty. In this case, we consider that a reduction of one year for the guilty plea is appropriate, resulting in a sentence of four years.

[23] We also agree with the Chief Justice that, in recognition of the appellant's age, his character, apart from this offending, and that it is unlikely that he will ever re-offend, a suspension of the sentence for 12 months is warranted.

The result

[24] For these reasons we conclude that the sentence imposed by the Chief Justice was excessive. The appeal against sentence is allowed. The sentence imposed in the Supreme Court is quashed. In lieu thereof, the appellant is sentenced to four years imprisonment on each count to be served concurrently, the last 12 months of the sentence to be suspended for two years from the date of release.

Fe'ao v Fe'ao

Family Court, Nuku'alofa
Ford J
F 38/01

6 August 2001; 8 August 2001

Dissolution of marriage – unreasonable behaviour – ordinary wear and tear of married life

The petitioner and the respondent were married at Tongatapu on 7 January 1999. There was one child of the family — a daughter Lesly Viven Tina Fe'ao born on 31 May 1999. The husband petitioned for divorce on the grounds that the respondent behaved in such a way that he could not reasonably be expected to live with her. He also sought custody of the child. The wife opposed the petition and sought custody and an increase in the maintenance payments. The matter proceeded to trial.

Held:

1. The legal test for the type of behaviour needed to establish unreasonable conduct is whether the behaviour is such that a right thinking person would come to the conclusion that the (respondent) had behaved in such a way that (the petitioner) could not reasonably be expected to live with the (respondent) taking into account the whole of the circumstances and the characters and personalities of the parties "in all cases the totality of the evidence of the matrimonial history must be considered, and the conclusion will depend on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view, after a consideration of any excuse or explanation which this respondent might have in the circumstances, the conduct is such that this petitioner or not to be called upon to endure it".
2. The behaviour of the respondent was not conduct that would fall within the definition of unreasonable behaviour but would be part of the ordinary wear and tear of married life. The petitioner failed to satisfy the court on the balance of probabilities that the respondent's conduct was so unreasonable that he could no longer be expected to live with her. The petition was dismissed.
3. The Court made an order for custody in favour of the respondent with reasonable rights of access reserved to the petitioner. The Court also ordered that as from Monday 13 Aug 2001 the maintenance payments were to increase to $60 per week.

Case considered:

Stevens v Stevens [1979] WLR 887

Statute considered:

Maintenance of Deserted Wives Act (Cap 31)

Counsel for petitioner	:	Mr Tuavai
Counsel for respondent	:	Mr Fakahua

Judgment

Seldom can a divorce petition have been filed as rapidly as the present one after the happening of the incident which allegedly triggered off the action. The petition in this case was filed on the same day.

The petitioner and the respondent were married at Tongatapu on 7 January 1999. There is one child of the family — a daughter Lesly Viven Tina Fe'ao born on 31 May 1999.

The husband has petitioned for divorce on the grounds that the respondent has behaved in such a way that he cannot reasonably be expected to live with her. He also seeks custody of the child. The wife opposes the petition and seeks custody and an increase in the maintenance payments. The matter proceeded to trial.

The conduct which the husband complains about is described in paragraph 7 of the petition as follows:

> *"(i) That the respondent always acts in an abusive manner towards the petitioner's mother and sisters.*
>
> *(ii) That the respondent is always provoking verbal arguments between them and it always extends towards the petitioner's family whom they were not involved in any way with their family private arguments.*
>
> *(iii) That the respondent is a person of uncontrolled temper and has frequently used violence and obscene language towards the petitioner and his family."*

In evidence the husband said that prior to the marriage he had been going out with the respondent for several months and he found her "very obedient" and that is why he considered marrying her. He said that he also thought that she "would come to love the rest of my family especially my mother." He went on to say that a few months after their marriage her behaviour was not what he would have expected from her. He said that she would swear at him and she told him that his mother and sister were whores. He said that at other times she attacked him with a chair or a stick.

That was about the extent of what I will refer to as the "generalised evidence" which the husband gave before he went on to describe the specific incident that caused him to leave the home. Other similar generalised evidence was given by a witness, 'Amoni Ngaue, who plays in the same band as the petitioner. He said that he could tell that some nights 'Aho and Diana had had an argument because 'Aho would arrive late and did not concentrate on what he was playing. He said that Diana often swore at 'Aho and abused his mother.

The husband did not make any reference in his petition to the incident that he says caused him to leave the matrimonial home, which occurred on Thursday 3 May 2001 but his wife mentioned it in her reply. She said that:

> *"... the petitioner is doing what ever his mother namely Lesila Fe'ao wishes him to do as she repeated(ly) spoke abusive language to the respondent and she tried to run down and spoil the reputation of the respondent and her family and argument occurred on 3/5/01 and the petitioner's mother step(ped) in and created this problem and convinced the petitioner to file the petition."*

The evidence was that on the night of 2 May 2001 the wife had had an argument with the husband's mother. The evidence relating to this incident and its aftermath was in many respects confusing and vague but piecing it together as best as one could, it seems that later the wife apologised to the mother-in-law for telling her to take a good hard look at herself but the mother-in-law did not apologise to the wife for the things that she had said about her.

Later again, and I gather that it was in the early morning of 3 May, the husband picked his wife up from the house where she had had the argument with his mother and he proceeded to drive her to their home. He had not been present during the argument. At that stage the husband was teaching at Mo'unga 'Olive College at Kolonga and the couple lived in a house in the college compound. The husband had heard his mother's account of the argument and as he drove his wife home he began to express considerable anger over the way in which she had allegedly talked to his mother and he threatened to kill his wife by running her over with the car. The tension obviously continued after they arrived home. The child urinated on the kitchen floor and the wife asked the husband to clean it up. He refused and went to the bathroom to have a shower before going off to his teaching job. The wife followed him into the bathroom and struck him across the shoulder with the mop handle. She told the court that she did that because she was still angry at her husband over the way he had threatened to kill her. The husband then attacked the wife, pulled her hair and chased her outside. He saw the school Head Tutor and resigned from his teaching job; he took the child and went to the house where his mother was.

The wife stayed in the schoolhouse at Kolonga for the remainder of the day waiting for her husband to return home but he never showed up. That night she tried to persuade a relative to take her to the house where she suspected her husband was staying in Tatakamotonga but it was not until the following morning that she was able to arrange for an uncle to drive her out in his car. On arrival she was unable to see her husband because she was immediately confronted by his mother who told her that her husband had filed for divorce on the previous day. Upon hearing this both the wife and her uncle apologised but the mother-in-law would still not let them into the house and chased them away. The petitioner told the court that she could see her husband in the background and she could hear her daughter crying. She said that she wanted to talk to her husband and ask him why he was angry with her and why he had left home but his mother prevented her from saying anything to her husband or her child.

Most of the trial was taken up with evidence about the 3rd of May incident. Neither the mother-in-law nor the sister gave evidence. The court was told that the mother-in-law had, in fact, returned to the USA in June. Apparently, she is a United

States citizen but she had arrived back in Tonga in 1997 and had lived in the Kingdom throughout the period of the couple's courtship and marriage.

The respondent said in evidence that her mother-in-law was the cause of all the problems in the marriage. She believed that she had wanted 'Aho to get his divorce so that he would be free to go to America with her. She said that she believed that if the mother-in-law had gone back to America earlier then the marriage would have been a happy one.

The legal test for the type of behaviour that would make it unreasonable for the petitioner to live with the respondent is stated in *Halsbury*, 4th edition, vol 13, para 574, as follows:

> *"The matter has been approached by considering whether any right-thinking person would come to the conclusion that the (respondent) had behaved in such a way that (the petitioner) could not reasonably be expected to live with the (respondent) taking into account the whole of the circumstances and the characters and personalities of the parties."*

In *Stevens v Stevens* [1979] WLR 887, Sheldon J adopted the following passage from *Rayden on Divorce*:

> *"In all these cases the totality of the evidence of the matrimonial history must be considered, and the conclusion will depend on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view, after a consideration of any excuse or explanation which this respondent might have in the circumstances, the conduct is such that this petitioner or not to be called upon to endure it."*

The "generalised evidence" of the petitioner and his witness which I described earlier was denied by the wife and it was so vague and uncertain that I place no reliance on it. In any event, it is not conduct that would in my view fall within the scope of the definitions I have just referred to but it is more the type of conduct encompassed by the well known phrase *"the ordinary wear and tear of married life"* which on the authorities, has no legal significance.

I found the petitioner's behaviour following the incident on 3 May quite extraordinary. It was obviously a most unpleasant incident all round and no one comes out of it with any credit but the petitioner's reaction, particularly given the extent of his provocation, in resigning from his teaching career and immediately filing for divorce was, in colloquial terms, "completely over the top".

Given the almost indecent haste in which the divorce petition was filed following the incident, and the involvement of the petitioner's mother in the incident itself, I am inclined to the view that there is probably substance in the wife's belief that the mother-in-law was the manipulator behind the scenes actively encouraging her son to obtain a divorce.

In all events, the petitioner has failed to satisfy the court on the balance of probabilities that the respondent's conduct was so unreasonable that he could no longer be expected to live with her. The petition is, therefore, dismissed. The respondent is entitled to costs to be agreed or taxed.

The respondent seeks orders under the Maintenance of Deserted Wives Act (Cap 31) for custody and maintenance. Turning first to custody, the wife is presently looking after the two-year-old daughter at her parents' home. The husband very fairly conceded in evidence that the wife's parent's home is better than the house he lives in with his uncle and that his wife's parents are better able to provide for the child.

I make an order for custody in favour of the respondent with reasonable rights of access reserved to the petitioner. In doing so, I record that during the hearing the child was in court and her equal love and affection for both parents was very obvious. That was something that was not "stage managed".

Turning now to the question of maintenance, the respondent seeks $100 per week. In addition to his income from the Band, which can vary each week depending upon the number of performances, the petitioner said in evidence that he receives payments of $120 per week from his mother in the States. At present the petitioner is paying maintenance of $35 per week pursuant to a consent order made in the Magistrates' Court, but having heard all the relevant evidence I am satisfied that the amount is inadequate. No detailed budget figures were produced and I am not prepared to allow the full amount the respondent seeks but I make an order that as from Monday 13 Aug 2001 the maintenance payments are to increase to $60 per week.

I conclude this judgment by expressing the fervent hope that the parties may see fit to attempt a reconciliation. They both seem decent young people. They have gone through a very difficult period in their lives but they must surely be able to see that for their daughter's sake at least, they should give the marriage another chance. I would hope that their very experienced counsel could be instrumental in trying to achieve such a reconciliation. If further assistance is required from the court in this regard then they should feel free to make the appropriate approach to the Registrar.

R v Sole

Supreme Court, Nuku'alofa
Ward CJ
Cr 229/00

7, 8 August 2001; 8 August 2001

Criminal law – rape – must prove lack of consent beyond reasonable doubt – not guilty

On Friday 22 September 2000, the accused, a 26 year old man, and the complainant, a 46 year old married woman whose husband had been abroad for four years, took part with others in a drinking party. It went through that evening and into the early hours of the next morning. A considerable quantity of alcohol was consumed and they were drunk. The complainant was so drunk that she remembers nothing after they left the road to Hufangalupe beach until she woke at about 7:00am to find the accused in the middle of sexual intercourse with her in her bed at home. She immediately moved away and told him to 'Fuck off' and that is effectively what he did. He made no further attempt to continue or restart the sexual intercourse and left the house. The complainant was still, it would appear, sufficiently affected by the drink to go back to sleep for some time until she was woken by a friend to go to town. It was only then that she realised that she was naked. The accused was seen by the police two days later and, in a very brief interview, was asked about the incident. He was asked if he knew why he was there and replied that he knew he was charged with rape. He said that she blacked out and he raped her. The accused was charged with rape contrary to section 118 of the Criminal Offences Act.

Held:

1. The Court was not satisfied that the acceptance of the word "rape" in a police interview was sufficient evidence that the accused understood he was admitting an offence of rape rather that simply fornication or adulterous sexual intercourse. The police should have asked sufficient questions to establish that the accused understood the full implication of what he was admitting.
2. The prosecution must prove beyond reasonable doubt that the complainant did not consent and that the accused knew or was reckless whether she did or did not consent. The Court accepted the accused may have taken advantage of the complainant's drunkenness but that was far from proof that, in the state she then was, she was unwilling.

3. The prosecution did not prove lack of consent and so the accused was acquitted.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for prosecution : Mr Pouono
Counsel for accused : Mr Tu'utafaiva

Judgment

The Accused is charged with rape contrary to section 118 of the Criminal Offences Act (Cap 18).

In the evening of Friday 22 September 2000, the accused, a 26 year old man, and the complainant, a 46 year old married woman whose husband has been abroad for four years, took part with others in a drinking party. It went through that evening and into the early hours of the next morning. Having started in Lapaha where both of them live, it moved to town and back to the road to Hufangalupe Beach. From there it is clear they went to two places in Lapaha and to the Hufangalupe Night Club and then back to the complainant's home.

It is equally clear that a considerable quantity of alcohol was consumed and they were drunk. The complainant was so drunk that she remembers nothing after they left the road to Hufangalupe beach until she woke at about 7:00am to find the accused in the middle of sexual intercourse with her in her bed at home. She immediately moved away and told him to 'Fuck off' and that is effectively what he did. He made no further attempt to continue or restart the sexual intercourse and left the house. The complainant was still, it would appear, sufficiently affected by the drink to go back to sleep for some time until she was woken by a friend to go to town. It was only then that she realised that she was naked.

The accused was seen by the police two days later and, in a very brief interview, was asked about the incident. He was asked if he knew why he was there and replied that he knew he was charged with rape. He said that she blacked out and he raped her. He then made a short statement saying:

> *"I admit raping 'Akanete when I had sexual intercourse with her but it was because I was so horny and also I was drunk."*

I am not satisfied that the acceptance of the word rape in such an interview is sufficient evidence, in itself, that the accused understood he was admitting an offence of rape rather that simply fornication or adulterous sexual intercourse. In all such cases the police should ask sufficient questions to establish that the accused understands the full implication of what he is admitting.

In evidence the accused explained that, when they returned finally to Lapaha, he helped take the complainant to her house and up the stairs because she was drunk. The other person helping was a woman friend of the complainant named Kaola. She, Kaola, eventually left the other two in the house and the first move was made by the complainant. He told the court they had consensual sexual intercourse then and later when they awoke later in the morning.

Kaola was a prosecution witness and told how the complainant was so drunk that she kept going to sleep in the van but that, at other times, she was apparently perfectly conscious. On three occasions she had to get out to relieve herself once involving crossing the road to avoid being seen, she was conscious enough to decline the suggestion they go to the dance because she knew her brother was there and, back in the house, she thanked Kaola for helping her.

I do not need to go into the evidence further. It is clear there is no dispute that the accused did have sexual intercourse with the complainant. The whole issue is whether or not there was consent.

I formed the firm impression that the complainant was a totally truthful witness. I was not satisfied that the defendant was speaking the truth in much of what he said in the witness box. In any matter where there is a conflict between his account and that of the complainant, I accept the complainant's account. There is a stark conflict in their accounts of what happened after the complainant became aware of the accused having sexual intercourse with her in the morning. I am also satisfied beyond reasonable doubt that she did not intend, in any of the time she recalls, to have sexual intercourse with the accused.

The problem for the prosecution is that it must prove beyond reasonable doubt that the complainant did not consent and that the accused knew or was reckless whether she did or did not consent. I accept the accused may have taken advantage of her drunkenness but that is far from proof that, in the state she then was, she was unwilling.

Throughout her evidence and in the face of a detailed cross-examination, the complainant never tried to resile from the fact that she knew nothing of the events between the departure from the road to the beach and her waking at home at about 7:00am. If the prosecution evidence had been that, throughout that time, she had been unconscious in the sense of being immobile and incapable of doing anything, the fact of the sexual intercourse would be evidence of a clear lack of consent or of a reckless disregard of whether it had been given or not.

However, the prosecution evidence shows that the complainant was not so affected. Her lack of memory is more amnesia of those events than the result of being unconscious during that period. The evidence shows that, for much of that time, she was capable of acting in a conscious, if drunken, way.

In those circumstances, the prosecution must produce evidence that she was not willing to have sexual intercourse with the accused and that, when it occurred, she had not consented. There is no such evidence. There must be a possibility on the evidence as a whole, that, whatever her sober inclinations, under the effect of a considerable amount of alcohol she did want and agree to sexual intercourse. Without that being disproved, the court cannot be satisfied there was no consent. The prosecution evidence demonstrates that, whatever her subsequent memory of her actions, she may have been capable of giving consent and the accused could have felt it was given by a person acting rationally in the circumstances

The defence called two witnesses who told the court that, at about 8:00 to 9:00am on the Saturday, they remarked on the fact that the accused had a 'love bite' on his neck. I accept their evidence. There is no evidence that he had such a love bite before the party or that he had been with anyone else since. It points, therefore, to the possibility of consensual sexual intercourse with the complainant.

The only evidence of lack of consent was when she was aware of the accused having sexual intercourse and immediately indicated she did not consent. However, as I have stated, the accused immediately desisted. I am not able, in view of her previous amnesia, to accept beyond reasonable doubt that she actually woke up at that time rather than simply becoming conscious in such a way that she now remembers it.

Mr Pouono for the prosecution suggests that the court could convict the accused on the basis of the accused's evidence. He told the court that he did ask and received her consent when they first had sexual intercourse but did not repeat his request before they had it the second time even though he knew she was a married woman. This, Mr Pouono suggests, shows he was reckless whether she consented or not to the second incident. I cannot accept that. It is unreasonable to assume that because a couple are not married to each other, the man must check his partner consents every time he has sexual intercourse even when, as his evidence had it, she is still in the same bed and actively taking part in the whole act.

It is also not acceptable because Mr Pouono must now say that he accepts the truth of the accused's account even where, in relation to the second incident, it directly conflicts with his own witness. If he is abandoning the complainant as a credible witness, how is the court ever to find rape proved? I have already stated that I do not accept the truth of the accused's account where it conflicts with that of the complainant.

It leaves the court in the position that, despite accepting the truth of the complainant's evidence, it must inevitably find that the prosecution has not proved lack of consent and so he is acquitted.

Fatongiatau v Hausia

Supreme Court, Nuku'alofa
Ward CJ
C 198/2000

3 August 2001; 9 August 2001

Damages – assault by police - assessment

In March 1999 the plaintiff was serving a sentence of imprisonment. One morning he was taken from where he was serving his sentence to the Central Police Station for questioning about his alleged involvement in some offences. While there, he was beaten by the first defendant, Hausia. He was then taken to the cells and, once there, made a complaint to another officer. That officer said nothing to the plaintiff but must have told Hausia because, shortly afterwards, Hausia again appeared and said that if the plaintiff ever complained again, he would kill him. He punched the plaintiff, knocking him to the ground and then punched him on the jaw whilst he lay there. The officer then threatened the plaintiff with a knife repeating his earlier threat. The plaintiff was extremely frightened and, as a direct result, made an untrue confession on the basis of which he was charged. However, the prosecution offered no evidence before the trial court. The plaintiff saw a doctor the next day and he found that there were a number of soft tissue injuries consistent with beating and/or punches and he also noted tenderness and bruising to the right buttock and lateral thigh, a tender spot on the left elbow, tender muscles and soft tissues overlying the left and right jaws and some bruises to the mid two fingers of the right hand. These injuries were the result of a nasty attack but were not in themselves serious and would not have a long-lasting effect. The defendants admitted liability. However, the parties failed to come to an acceptable settlement. The plaintiff claimed damages as compensation for assaults, $7500; discomfort and emotional distress, $2000; and exemplary damages, $7000.

Held:

1. In assessing the compensatory damages, the Court did not consider this was a case where there should be a separate award for discomfort and emotional suffering. They were all part of the same overall incident and were taken into account as part of the seriousness of the assaults.
2. The fact the injuries were relatively minor reduces the damages but it was not the most important consideration in the assessment. For the assault, the pain and the suffering, the award was $3000.
3. Through exemplary damages the Court could express its feelings on the seriousness of the conduct rather than compensation for the harm caused.

The first defendant acted with blatant disregard for the law and rules of police conduct and did it in the presence of other officers clearly confident that they would not intervene. He then used extra threats to try and ensure his actions would not be reported. The Court awarded $4000 exemplary damages.

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

Judgment

This is a claim for damages for assault for which the defendants have admitted liability. However, the parties have failed to come to an acceptable settlement and so the court has now to determine the appropriate quantum of damages.

The plaintiff was, at the relevant time, serving a sentence of imprisonment and the first defendant was, and apparently still is, a serving police officer.

In March 1999, the plaintiff was taken one morning from the Fire Station where he was serving his sentence to the Central Police Station for questioning about his alleged involvement in some offences.

Once at the police station, he was taken to a room where he was beaten by the first defendant, Hausia, with a stick about a metre long and some 10 centimetres in diameter. Other officers were present and did nothing to stop what was clearly an unlawful assault. The plaintiff told the court that he was struck about 10 times with some force.

He was then taken to the cells and, once there, made a complaint to another officer. That officer said nothing to the plaintiff but must have told Hausia because, shortly afterwards, Hausia again appeared and said that if the plaintiff ever complained again, he would kill him. He punched the plaintiff, knocking him to the ground and then punched him on the jaw whilst he lay there. The officer then threatened the plaintiff with a knife repeating his earlier threat.

During all this time, the plaintiff was extremely frightened and, as a direct result, made an untrue confession on the basis of which he was charged. However, the prosecution offered no evidence before the trial court.

Very late the next day the plaintiff was taken to see a doctor. His findings were that there were a number of soft tissue injuries consistent with beating and/or punches. He noted tenderness and bruising to the right buttock and lateral thigh, a tender spot on the left elbow, tender muscles and soft tissues overlying the left and right jaws and some bruises to the mid two fingers of the right hand.

It is clear these injuries were the result of a nasty attack but were not in themselves serious and they will have no long lasting effect.

The plaintiff has claimed damages as follows:

Compensation for assaults	$7500.00
Discomfort and emotional distress	$2000.00
Exemplary damages	$7000.00

A further claim for unlawful imprisonment was, very sensibly, not pursued.

I note with gratitude the high standard of submissions and research by both counsel. There is no unusual principle involved in this case but it is always important

to consider previous awards by this Court in similar cases. Counsel have supplied me with a very helpful selection of earlier cases. I do not cite them but I have considered each and, it must be said, distinguished many.

In assessing the compensatory damages, I do not consider this is a case where there should be a separate award for discomfort and emotional suffering. They are all part of the same overall incident and I take them into account as part of the seriousness of the assaults.

As I have stated the assaults were nasty but did not cause particularly serious injury. What makes them serious is the fact that they were carried out by a police officer whilst the plaintiff was in custody and, as a result, entirely at his mercy. It is an extremely sad reflection on the police as a whole that there have been so many similar cases over the last few years — a point that is reinforced by the obvious way the other officers present must have felt it so commonplace that they did not consider it necessary to intervene. When the plaintiff tried to complain to another officer that man, instead of taking action over the complaint, reported it to the plaintiff's assailant so further violence was added.

Counsel for the defendants has pointed out that the accused was a serving prisoner with previous convictions and so there can be less consideration of the damage to his feelings and reputation than would have been the case if he had been of good character. I accept that principle but I do not consider it applies in this case. There was no claim by the plaintiff for such damage to his reputation. He claims for his injuries and the fear and emotional injury that inevitably accompanies an attack whilst the victim is in the custody of the attacker.

Both counsel have, very properly, emphasised that they do not in any way condone such conduct. This was a case of totally improper conduct by a police officer. It was effectively authoritative bullying and it showed a total lack of regard both of the law and decency. It was committed on a man who, because he was in their custody, was effectively defenceless. That is the seriousness of the case.

The fact the injuries were relatively minor reduces the damages but it is not the most important consideration in the assessment. For the assault, the pain and the suffering, I consider an appropriate award in this case is $3000.00.

The plaintiff also claims exemplary damages on the basis that the defendant's actions were oppressive, arbitrary or unconstitutional conduct by a police officer. There can be no doubt that exemplary damages are called for in such a case. It is in those that the court can express its feelings on the seriousness of the conduct rather than compensation for the harm caused.

As I have stated, the first defendant acted with blatant disregard for the law and rules of police conduct. He did it in the presence of other officers clearly confident that they would not intervene. He then used extra threats to try and ensure his actions would not be reported.

This was totally unjustified and exactly the sort of conduct this Court has been condemning in increasingly stern terms over the last decade. Yet it still continues and, each time it does, the reputation of what should be a proud police force becomes more tarnished. I consider an appropriate measure of that is demonstrated by an award of $4000.00 exemplary damages.

The plaintiff shall have his costs to be taxed if not agreed.

I direct that a copy of this judgment be sent to the Police Commander so he may consider whether a man such as this should continue to serve in the Police.

Fetu'u'aho v Vete

Supreme Court, Nuku'alofa
Ward CJ
C 902 & 954/00

21 September 2001; 26 September 2001

Damages – assault by police - assessment

On 11 October 2000 the plaintiff, despite having no driving licence, was driving a vehicle belonging to his employer. As he overtook another vehicle, he struck two children and did not stop. He fled the scene, abandoned the vehicle, and ran away. The plaintiff was arrested. The officer (the first defendant) attacked him. He admitted to eight punches or slaps to the plaintiff's head and chest. The plaintiff was then taken to the police station. On his arrival, the third defendant admitted that he used angry and threatening words to the plaintiff. Shortly after this, the second defendant (the senior officer present in the police station) entered the charge room and told the plaintiff to stand up and, as he was doing so, slapped him on the side of his head. There were no lasting physical results. The plaintiff claimed a total of $9,800 general damages, $2,000 aggravated damages and $7,000 exemplary damages.

Held:

1. The Court did not accept that the assault by the first defendant was the result of provocation by the plaintiff. It was the result of the first defendant's anger at the plaintiff's earlier behaviour. As a police officer, he should not have allowed such feelings to interfere with his duty. Compensatory damages against the first defendant for that assault was an award of $500.
2. The angry and threatening words of the third defendant in the already hostile atmosphere in the police station at that time added to the plaintiff's fear. However, there was no suggestion that he did anything to give effect to his threat. The third defendant was ordered to pay $200.
3. The part of the second defendant was more serious despite the minimal force of a single blow. He was the senior officer and his appearance should have given the plaintiff reason to hope that the violence and threats would cease. His despair, when instead of stopping it, that senior officer added to it, must have been profound. The second defendant was ordered to pay $500 compensatory damages.

4. In the case of the exemplary damages, the first and third defendants were already fined in the Magistrates' Court for the same incident therefore the Court would not punish them a second time for the same offence.
5. With respect to the second defendant an award of exemplary damages of $2000 would appropriately condemn his conduct. However, the Court must be entitled to refuse or reduce such an award if the result of the Court's condemnation of the defendant's conduct was the enrichment of an undeserving plaintiff. The damages were reduced to $500.
6. The plaintiff should normally have his costs. However, the unreasonably inflated claim led to the hearing. A more realistic figure may well have achieved a satisfactory settlement. The plaintiff was to have his costs incurred only up to the first admission of liability by the defendants.

Cases considered:

'Akau'ola v Fungalei [1991] Tonga LR 22

Rookes v Barnard [1964] AC 1129

Counsel for plaintiff	:	Mr Fifita
Counsel for defendants	:	Miss Tupou

Judgment

This is a claim for damages for assault and false imprisonment. The defendants have admitted liability for assault and the plaintiff has abandoned the claim for false imprisonment. The parties were unable to reach agreement on the appropriate level of damages and there has been a hearing to ascertain the appropriate award.

The first three defendants are serving police officers and the claim arises from an assault that occurred on 11 October 2000 after the plaintiff had been arrested following a traffic accident.

That evening, the plaintiff, despite having no driving licence, had been driving a vehicle belonging to his employer. As he overtook another vehicle, he struck two children. He did not stop. He told the court he was scared he might be attacked by the people around but he did not attempt to go to the police. Instead, after fleeing the scene, he abandoned the vehicle and ran away. He told the Court he realised the children were injured (he stated in evidence that he had run over them) but he did not attempt to assist them nor to report it nor, subsequently, to visit them in the hospital or to try and find out how badly injured they were or, indeed, whether they were even alive.

What he did take the time and trouble to do, subsequently, was to instruct a lawyer to bring a private prosecution against the officers who assaulted him and then, following the conviction of two of them, to bring this claim for damages.

Shortly after he had run away from the accident, the plaintiff heard that the first defendant was looking for him. He went to him and the officer, no doubt incensed by the plaintiff's conduct, attacked him. He admits to eight punches or slaps to the plaintiff's head and chest. Understandable though his anger may be, the use of violence was totally wrong.

Afterwards, the plaintiff was taken to the police station. On his arrival, the third defendant admits that he angrily asked the plaintiff whether he would like it if

someone ran over him until the faeces came out and then drove away not stopping to help. He then suggested "I should hit you until the faeces comes out".

Shortly after this, the second defendant arrived at the police station and entered the charge room where the plaintiff was being detained. This defendant was the senior officer present in the police station. He told the plaintiff to stand up and, as he was doing so, slapped him on the side of his head.

The attack by the first defendant had left the plaintiff with a sore mouth, headache, dizzy and aching over his whole body. The blow by the second defendant aggravated the headache. Three days later, the plaintiff saw a doctor who noted superficial injuries only. The plaintiff told the court he was unable to do his usual work for a week and was unable to eat hard food for one and a half weeks. There are no lasting physical results.

The assault was nasty but it was not particularly serious in terms of the degree of violence found in many cases of assault. What makes it serious is that it was inflicted by police officers on a man in their custody. This was a blatant disregard of the law and of their duty as police officers. However slight the injuries caused, however understandable their anger at the plaintiff's conduct, the officers had no right to resort to any violence either physical or verbal on a person they had arrested and were holding in their custody. The nature of police powers of arrest and detention mean that they have considerable power and it is up to every officer to ensure that it is not abused. It is hard to overstate the fear and helplessness felt by anyone in such a position.

Although the violence used by the second defendant was slight, his position as the senior officer present meant he should have stopped any improper conduct by the other officers. Whatever had occurred before he arrived, his arrival should have ensured no further impropriety occurred. Instead, he added his own violence. I regard his conduct as the most serious for that reason.

Apart from the abandoned claim of unlawful imprisonment, the plaintiff claimed a total of $9,800.00 general damages, $2,000.00 aggravated damages and $7,000.00 exemplary damages. Such figures are out of all proportion to the facts of this case and bear no relationship to awards in previous cases in this jurisdiction. This court has stated before that claims for vastly inflated sums make it less likely any settlement will be reached and result in unnecessary court hearings. It is counsel's duty to his client and to the court to give realistic advice about the likely level of damages his client might receive. In his final submission, counsel for the plaintiff reduced his total claim for general damages by $3,800.00 on the basis of the limited admissions by the defendants but otherwise stood by his claim.

Both counsel have cited a number of earlier cases of police violence. They suggest a somewhat inconsistent tariff in such cases but consistently acknowledge the impropriety of such conduct. Ten years ago the court's attitude was stated by Martin CJ in *'Akau'ola v Fungalei* [1991] Tonga LR 22:

> "A number of police officers still appear to believe that they have the right to exercise discipline over the public as a parent would over a child — by physical beating. By now the message from this court should be loud and clear. Such abuse of authority will not be tolerated and where it is proved to have occurred it will be

> stamped on with increasing severity until the bully boy in uniform no longer roams our streets."

That principle, frequently repeated in the courts, remains unchanged.

I pass now to the appropriate level of compensatory damages. Although there was a separate claim for mental anguish, fear, pain, distress and inconvenience, they form part of the total harm and I include them in that consideration. As I have stated, the actual injuries were minor but the element of fear that arose from the fact that the plaintiff was in police custody adds considerably to the harm suffered.

The physical injuries were all the result of the attack by the first defendant. It is easy to understand his feelings following the plaintiff's lack of concern for the children he had struck but it is no justification for the violence. Counsel for the defendants has suggested that the damages should be reduced on the grounds of provocation. I am not sure I can accept that in cases of police violence against persons in their custody, provocation is ever a reason for reducing the award but, even if I am wrong about that, I do not consider there was provocation in this case.

Provocation is conduct by the plaintiff that causes the defendant to lose his self-control; conduct that could be said to suggest he has "asked for" the violence he suffers. It must in some way be directed at or directly involve the person claiming to have been provoked. In this case, the suggested provocation was the original offence, the plaintiff's attitude to it and his conduct prior to his arrest. I do not accept that the assault by the first defendant was the result of provocation by the plaintiff. It was the result of the first defendant's anger at the plaintiff's earlier behaviour. As a police officer, he should not have allowed such feelings to interfere with his duty. Sadly, he did.

I consider a proper award of compensatory damages against the first defendant for that assault is one of $500.00.

The angry and threatening words of the third defendant stated, as they were, in the already hostile atmosphere in the police station at that time clearly added to the plaintiff's fear as I am satisfied was the third defendant's intention. However, there is no suggestion that he did anything to give effect to his threat. I order that he shall pay $200.00.

The part of the second defendant is, as I have stated, more serious despite the minimal force of a single blow. He was the senior officer and his appearance should have given the plaintiff reason to hope that the violence and threats he had already received would cease. His despair, when instead of stopping it, that senior officer added to it, must have been profound. The second defendant must pay $500.00 compensatory damages.

There is a separate claim for aggravated damages. Such damages may be awarded in actions for assault where the manner in which the assault was committed was such that it involved an additional injury to the victim's dignity and pride. There is no such separate element in this case and that part of the claim fails.

The claim for exemplary damages has a firmer foundation. This clearly falls within the first of the two categories stated by Devlin LJ in *Rookes v Barnard* [1964] AC 1129, namely that it was oppressive, arbitrary or unconstitutional conduct by servants of the government. Any assault by a police officer on a man in his custody must fall into that category and this case is no exception. The purpose of exemplary

damages is to punish the defendant for his bad conduct rather than to compensate the plaintiff for the harm he has suffered.

They are clearly called for in this case but Miss Tupou for the defendants suggests they would not be an appropriate order against the first and third defendants because they have already been ordered to pay a fine for the same incident as a result of the private prosecution brought by the plaintiff in the magistrates' court. I accept that is correct. If the purpose of exemplary damages is to punish, to make such an award now would effectively be to punish these defendants twice for the same offence. Miss Tupou cites the case of *Archer v Brown* [1984] 2 All ER 267 in which exemplary damages were sought against a defendant who had already been punished in the criminal courts. Peter Pain J explained at 281:

> "But what seems to put the claim under this head out of court is the fact that exemplary damages are meant to punish and the defendant has been punished … I rest my decision on the basic principle that a man should not be punished twice for the same offence. Since he has undoubtedly been punished, I should not enrich the plaintiff by punishing the defendant again."

These two defendants were punished for the exact matters over which they are now sued. It must be said that the fines imposed by the magistrate are woefully inadequate for officers who have acted in this way. I cannot avoid the suggestion that the magistrate has failed to mark the true seriousness of these assaults but, adequate or not, they have received their punishment and I will not punish them a second time for the same offence.

In the case of the second defendant, however, he has not been punished. In the magistrates' court he was acquitted. In this court he has admitted the assault. I have already made reference to his special position as the senior officer present at the time and I consider that an award of exemplary damages of $2000.00 would appropriately condemn his conduct. However, there is a further consideration

In the passage from Archer's case quoted above, the final sentence does not follow the logic of that preceding it but it does raise a point of relevance to the present case.

As I have stated, the purpose of exemplary damages is to punish the defendant. In a criminal case, any fine ordered as a punishment is paid to the State but, in a civil claim, exemplary damages are paid to the plaintiff.

I consider that the court must be entitled to refuse or reduce such an award if the result of the court's condemnation of the defendant's conduct is the enrichment of an undeserving plaintiff. This is just such a case. I have awarded the sum I consider appropriate to compensate the plaintiff for the injury he has suffered at the hands of this defendant but the shameful manner in which the plaintiff acted to try and escape the consequences of his earlier actions makes it unconscionable to enrich him to the extent of such an award. As a result, I reduce the award of exemplary damages against the second defendant to one of $500.00.

The plaintiff having succeeded in his claim should normally have his costs. However, this hearing has been necessitated by the unreasonably inflated claim. A more realistic figure may well have achieved a satisfactory settlement. The plaintiff shall have his costs incurred only up to the first admission of liability by the defendants.

Tonga Development Bank v Carafa

Supreme Court, Nuku'alofa
Ford J
C 732/00

16, 17 October 2001; 24 October 2001

Commercial law – security for loan – security did not belong to defendant
Practice and procedure – interpleader proceedings to set aside default judgment – upheld
Land law – dwellinghouse – did not form part of the land on which it stood

On 11 February 1998 the Tongan Development Bank ("the TDB", the plaintiff), granted a loan of $13,209 to the three defendants to establish a poultry farm. The venture failed and in August 2000 the TDB issued a writ and statement of claim and sought to recover the loan monies together with interest. No statement of defence was filed and on 7 August 2001 the TDB obtained an order for judgment in default. The default judgment included an order requiring the defendants to deliver up to the TDB the assets pledged by them as security for the loan. One of the assets listed in the loan agreement was a "storey dwellinghouse of 'Eneasi situate at Toula together with all materials and contents thereof". 'Eneasi was the second defendant. When the TDB endeavoured to take enforcement action against the "storey dwellinghouse" it was confronted with a claim by the interpleader, Vakalaiti Kaita'eifo, that the house did not, in fact, belong to 'Eneasi. Vakalaiti was 'Eneasi's second eldest son and he claimed that the dwellinghouse in question belonged to himself and his elder brother, Sione 'Amanaki Kaita'eifo, ("'Amanaki"). Vakalaiti issued interpleader proceedings for an order setting aside that part of the default judgment requiring delivery of the dwellinghouse to the TDB.

Held:

1. A dwellinghouse did not form part of the land on which it stood.
2. The interpleader made out his case and he established that the dwellinghouse did not and never did belong to 'Eneasi. The interpleader's evidence that it had never been explained to 'Eneasi that the documentation he was signing included a pledge of the dwellinghouse was left unchallenged by the TDB.
3. The interpleader's claim was upheld and the Court order of 7 August 2001 was varied by deleting from paragraph 2 the reference to the "storey dwellinghouse of 'Eneasi situate at Toula".

Case considered:
Kolo v Bank of Tonga (unreported) No 20/97

Statute considered:
Land Act (Cap 132)

Counsel for interpleader : Mr Taufaeteau
Counsel for plaintiff : Mrs Vaihu

Judgment

On 11 February 1998 the plaintiff in this proceeding, the Tongan Development Bank ("the TDB"), granted a loan of $13,209 to the three defendants for the purposes of establishing a poultry farm. The venture apparently failed and in August 2000 the TDB issued a writ and statement of claim seeking to recover the loan monies together with interest. No statement of defence was filed and on 7 August 2001 the TDB obtained an order for judgment in default. The default judgment included an order requiring the defendants to deliver up to the TDB the assets pledged by them as security for the loan. One of the assets listed in the loan agreement was a, "storey dwellinghouse of 'Eneasi situate at Toula together with all materials and contents thereof."

'Eneasi is the second defendant. He is now 82 years of age. The first defendant, Vika Carafa, is his married daughter. The third defendant, Vilisoni Tokoma'ata, who was apparently the driving force behind the poultry farm business, is 'Eneasi's stepson. Vilisoni's present whereabouts was not disclosed to the court but the evidence indicated that he is now probably overseas.

When the TDB endeavoured to take enforcement action against the "storey dwellinghouse" it was confronted with a claim by the interpleader, Vakalaiti Kaita'eifo, that the house did not, in fact, belong to 'Eneasi. Vakalaiti is 'Eneasi's second eldest son. He is a schoolteacher. He claimed that the dwellinghouse in question belonged to himself and his elder brother, Sione 'Amanaki Kaita'eifo, ("'Amanaki"). 'Amanaki is also a schoolteacher. He is currently residing in New Zealand.

Vakalaiti issued interpleader proceedings for an order setting aside that part of the default judgment requiring delivery of the dwellinghouse to the TDB. The matter proceeded to a hearing during the recent circuit in Vava'u. Some issues were agreed to between the parties prior to the hearing in the form of an Agreed Statement of Facts but the bulk of the evidence was given orally. In relation to the dwelling house, paragraphs 6 and 7 of the Agreed Statement of Facts record the following:

> *"6. The house is built on the registered town allotment of 'Eneasi Mahe (second defendant).*
>
> *7. That the dwellinghouse in question was built through 2 loans of the Interpleader Vakalaiti Kaita'eifo and Sione A ('Amanaki) Kaita'eifo his brother from the Bank of Tonga. The first loan was for $16,700.00 on the 17/5/1989 between the Bank of Tonga and Vakalaiti and Sione Kaita'eifo and the second loan for $12,780.00 to complete the house was on 19 May*

1994 between Bank of Tonga and Vakalaiti Kaita'eifo, Sione Kaita'eifo and 'Eneasi Mahe (the second defendant). On the second loan the town allotment of 'Eneasi Mahe was used as a mortgage to the said loan. The Bank of Tonga debt was fully repaid in April 1998."

Vakalaiti gave evidence. The thrust of what he told the court was that in 1989 he and his brother, 'Amanaki, took out a loan from the Bank of Tonga ("BOT") to build a dwelling house on their father's ('Eneasi's) town allotment. It was a large house with a ground floor and a first floor, containing three bedrooms on the first floor and one bedroom on the ground floor. The new house replaced a dilapidated wooden building which the family had lived in up until then. Vakalaiti said that the brothers knew that the father could not afford to build a house so as they were both working they decided to take out the loan and build it themselves. Vakalaiti arranged the building contractors and he bought all the building materials and supplied the labour.

Vakalaiti said that the house was completed in two stages, under two different contractors, because the brothers ran out of money. Nothing was done for almost five years and then in May 1994 the BOT advanced a second loan to enable construction to be completed. The Agreed Statement of Facts states that the second loan was for $12,780.00. The first loan had been to Vakalaiti and 'Amanaki only. In the second loan the father, 'Eneasi, was included as a party because the BOT, according to evidence given on its behalf, wanted the added security of a mortgage over the town allotment on which the house was constructed. Both loans from the BOT were paid off in full by the two brothers by automatic deductions from their respective salaries. The loans were repaid in April 1998.

The evidence was that after completion, the dwellinghouse was used as a family home. The parents lived there up until early this year when they moved into the home of their married daughter, Vika. 'Amanaki lived in the house until he left for New Zealand and, apart from a two-year period when he was stationed as a teacher on Matamoka Island, Vakalaiti has resided in the dwellinghouse throughout. He is unmarried but he continues to live in the house with other siblings.

Vakalaiti's 69 year-old mother gave evidence. She confirmed that the dwellinghouse was built by the two brothers with loans they took out with the BOT. She said that it was just Vakalaiti and 'Amanaki who had paid off the loans and there was no doubt in her mind that the dwellinghouse belonged to them. In cross-examination she was asked questions about a decision which 'Eneasi had apparently made at some stage when they were living in the dwellinghouse to allow a deacon of the Church and his wife to live with the family until the deacon's own home was ready for occupation. The suggestion being put to Mrs Mahe was that 'Eneasi had made the decision without the obtaining Vakalaiti's approval and this was evidence that in reality he was in charge of the house and, therefore, the real owner. Mrs Mahe rejected the proposition. She said that in the Tongan way the children had to respect the parents but she and 'Eneasi were just living in the house. The boys were the workers and they were the owners.

82 year-old 'Eneasi gave evidence but he was able to contribute very little. When asked what work he did, his response was: "I am waiting for my call". He could not recollect any business dealings with either Bank and he could not recall signing any papers or having been served with any court documents. He indicated to the court that he had been suffering from memory problems for the last two years or

so. It was suggested to him in cross-examination that his memory loss may have been selective and I suspect that there could well be some truth in that proposition but, in the absence of any medical evidence, it is difficult to be certain. On balance, I consider that at the present time 'Eneasi is not mentally competent to enter into any business proposition.

How 'Eneasi's state of mind was back in February 1998 when he signed the loan agreement with the TDB is something which was not explored in evidence before me but some insight into this issue arose out of part of Vakalaiti's evidence. Vakalaiti said that he had no knowledge whatsoever that his father had pledged the dwellinghouse to the TDB until sometime in 1999 when he saw in the local newspaper a notice by the TDB calling for tenders for what he immediately recognised as his own dwellinghouse at Toula. He told the court that he then asked his father if he had signed something with the Bank and his father replied that he had. Vakalaiti questioned his father further about the matter. He asked him if he had pledged the house to the TDB and his father denied it. He told Vakalaiti that the Bank officer had given him papers to sign relating to the poultry farm but he had not explained them to him. He said that the officer had simply put the papers down in front of him and asked him to sign. Vakalaiti was critical of the TDB. He said that the Bank was in the wrong because it should have made it clear to his father exactly what he was being asked to sign.

No one from the TDB was called to give evidence and so this part of the interpleader's case was left completely unchallenged.

The TDB called two witnesses. First, it subpoenaed Mr Mohotomu Tupou, the manager of the Vava'u branch of the BOT. He was unable to produce any records relating to the original loan to the two brothers in 1989 but he did produce the loan agreement relating to the second advance from the Bank in 1994. The securities pledged in that document are described as:

> *"Registered mortgage over 'Eneasi Mahe's town allotment at Toula, Vava'u Book 249 Folio 41 plus all properties thereon including dwellinghouse and all contents."*

In earlier evidence, the BOT loans officer, Mr Vahai, who had been called as a witness by the interpleader, had said that in so far as the BOT was concerned, the house was owned by Vakalaiti and 'Amanaki because they had taken out the loans and repaid the loans and the only reason the father had been made a party to the second mortgage was because the Bank wanted to take security over his api as well as over the dwellinghouse but he said that there was nothing in the BOT's records to suggest that the house belonged to 'Eneasi. Mr Vahai also confirmed that the house had been insured in Vakalaiti's name with the bank's interest noted on the policy and Vakalaiti had paid the insurance premiums out of his wages.

Both Mr Vahai and Mr Tupou were asked questions about a credit check which the TDB had requested from the BOT in about July 1999. The credit check contained a handwritten reference to a charge "over 'Eneasi Mahe's storey block house plus contents at Toula, Vava'u". The person who wrote the statement was not called as a witness and both BOT Bank officers said that the credit check was incomplete. It is also dated well after the TDB loan agreement of 11 February 1998. In the

circumstances, I am not prepared to place any weight on the credit check in determining the issue of ownership in relation to this case.

The only other witness called by the TDB, apart from Mr Tupou, was the current town officer in the village of Toula, Manu Moala. Mr Moala said that he was familiar with the interpleader's family and the dwellinghouse in question. He said that to his knowledge the dwellinghouse was built on 'Eneasi's land but it belonged to his children who had built it.

In submissions, counsel for the TDB placed reliance upon section 100(1)(iii) of the Land Act (Cap 132). Counsel submitted that the provisions of paragraph (iii) meant that once a registered mortgage over land is taken out then any dwellinghouse on that land automatically becomes "part of the land". The relevant parts of the section read as follows:

> *"100(1) the registered holder of a tax or town allotment may grant a mortgage over the whole or part of his tax and town allotment provided that*
>
> *(i) the approval of the Minister has been obtained in the manner provided by this Part of this Act*
>
> *(ii) ...*
>
> *(iii) the loan or advance or consideration in respect of which the mortgage is to be granted as security is to be used for the* ***purposes of improvement of the allotment*** *over which the mortgage is to be granted."* (emphasis added by counsel)

I am not prepared to accept that submission. Not only would it involve reading into the paragraph in question provisions which simply are not there, but the principal is contrary to the legal position in Tonga which recognises that a dwellinghouse does not, in fact, form part of the land on which it stands. Thus in *Kolo v Bank of Tonga* (unreported) No 20/97, which was a case where a mortgage had been taken out over a town allotment containing a dwellinghouse, the Court of Appeal held that it was open to Mr Kolo to pledge his house to the Bank as an item separate from the land on which it stood.

Counsel for the TDB also submitted that there was "ample other evidence" that the dwellinghouse, in fact, belonged to 'Eneasi. She referred to evidence given by other people from the village who had said that the home was commonly referred to as the house and api of 'Eneasi and she submitted that the fact that 'Eneasi had apparently made the decision to allow the Church deacon to stay temporarily in the home was further evidence that 'Eneasi was in control and he really owned the dwellinghouse.

I have taken these matters into account but I found the evidence of the villagers equivocal and, in any event, I do not find any of it conclusive on the ownership question.

In the alternative, counsel submitted that the evidence showed that the dwellinghouse belonged to three people — 'Eneasi and his two sons equally and she

submitted, without citing any authority for the proposition, that if the court was so to find then any one of the three owners had authority to pledge the house in his own right.

Looking at the evidence overall I am left in no doubt that the interpleader has made out his case and he has established to my satisfaction that the dwellinghouse in question does not and never did belong to 'Eneasi. In this regard, I must say that I found Vakalaiti to be a completely truthful witness and I found his evidence quite compelling. As no evidence was called or produced from the TDB, I do not know the basis on which the TDB inserted the words "storey dwellinghouse of 'Eneasi" in the February 1998 loan agreement. No witness from the Bank came forward to say that 'Eneasi had ever said anything confirming that he was the owner of the dwellinghouse. The loan agreement was not produced in evidence and there was no evidence as to the circumstances in which it was drawn up and signed. The interpleader's evidence that it had never been explained to 'Eneasi that the documentation he was signing included a pledge of the dwellinghouse was really left unchallenged.

The interpleader's claim is, therefore, upheld. The court order of 7 August 2001 is hereby varied by deleting from paragraph 2 the reference to the "storey dwellinghouse of 'Eneasi situate at Toula". The interpleader is entitled to costs to be agreed or taxed.

R v Tauelangi

Supreme Court, Nuku'alofa
Ford J
Cr 85/2001

4 September, 23 October 2001; 29 October 2001

Practice and procedure – no case submission – accused was discharged
Criminal law – perjury – insufficient evidence

On 19 February 2001 the accused, Sione Tauelangi, went to the office of the Ministry of Lands to get a replacement Deed of Grant (a "map") so that he could mortgage his land to the Bank of Tonga. He was attended by a long serving officer of the Ministry, Mr Samisone Pone ("Soni"), who told him that it would be necessary for him to swear an affidavit. There was a typed standard form of affidavit used by the Ministry of Lands in lost deed of grant situations and the deponent was only required to fill in his name, address, age and occupation. Soni proceeded to fill in the blanks based on information which he said that the accused supplied to him and he then asked the accused to take the form to the Magistrates' Court and swear it. The document was in the name of Finau Havelu. The accused took the document to the Magistrates' Court and swore the affidavit before police magistrate Lokotui. He then took it back to Soni at the Ministry's office. When the accused later returned the completed affidavit to the Ministry's office, Soni proceeded to check the register book under the name Finau Havelu and he found that Finau Havelu had passed away on 6 September 1978 and on 29 January 1972 the allotment had been transferred into the name of Sione Tauelangi. Mr Pone then asked the accused who Sione Tauelangi was and he replied, "myself". Mr Pone asked him why he had sworn the affidavit in the name of Finau Havelu and he responded, "because I thought it was like that". Mr Pone filled in a fresh affidavit of loss of deed of grant with the accused's correct name at the top and he then asked him to have it re-sworn before a magistrate. The accused did so and he was subsequently charged with perjury contrary to section 63(1) of the Criminal Offences Act (Cap 18). He pleaded not guilty and at the end of the Crown's case, his counsel, Mr Veikoso, made a "no case" submission.

Held:

1. The Crown did not call the magistrate before whom the affidavit was taken and so the court had no idea of exactly how the oath was administered or what statements were made upon oath. Nowhere in the body of the affidavit did the accused swear that his name was Finau Havelu. If the person who administered the oath was not called as a witness in a perjury

trial then the court was not able to speculate and reasonable doubt inevitably arose.

2. The threshold for determining whether or not a "no case" submission was made out was satisfied when the judge came to the conclusion that the Crown's evidence taken at its highest was such that a jury properly directed could not properly convict on it. At that point it was the judge's duty to stop the proceedings.

3. The Court upheld the "no case" submission and discharged the accused.

Statutes considered:
Criminal Offences Act (Cap 18)
Magistrates' Courts Act (Cap 11)

Counsel for Crown : Mr Pouono
Counsel for accused : Mr Veikoso

Judgment

The accused is charged with one count of perjury contrary to section 63(1) of the Criminal Offences Act (Cap 18). He pleaded not guilty and at the end of the Crown's case, his counsel, Mr Veikoso, made a "no case" submission.

The particulars of the offence contained in the indictment allege:

> "Sione L. Tauelangi, did on or about 19th February, 01, at Nuku'alofa make an oath in a solemn declaration relating to a town and tax allotment in Pea, in which you know that such statement is false."

The Crown case was that on or about the 19th of February 2001, the accused went to the office of the Ministry of Lands and said that he had lost his map. (The court was told that most Tongans refer to a Deed of Grant as a "map"). The accused said that he wanted another map so that he could mortgage his land to the Bank of Tonga. He was attended by a long serving officer of the Ministry, Mr Samisone Pone who the accused referred to as "Soni". Mr Pone told him that it would be necessary for him to swear an affidavit.

It appears that there is a typed standard form of affidavit used by the Ministry of Lands in lost deed of grant situations. The deponent is only required to fill in his name, address, age and occupation. In this case Mr Pone proceeded to fill in the blanks based on information which he said that the accused supplied to him and he then asked the accused to take the form to the Magistrates' Court and swear it. The accused took the document to the Magistrates' Court and swore the affidavit before police magistrate Lokotui. He then took it back to Mr Pone at the Ministry's office.

The affidavit reads as follows:

> *"I, **Finau Havelu** of **Pea**, age **54**, **planter** by occupation.*
>
> *I hereby swear and say.*

A deed of grant for my tax allotment that I had kept as proof of registration of my tax allotment in ***Pea*** *is lost and I cannot find it now and I have thoroughly searched in my bookshelves at home but to no avail.*

It is not mortgaged or used as security for any financial loan or agreement in any bank in Tonga or overseas but is lost as I have explained in paragraph one."

The words in bold type together with two crossed out references to town allotments which appeared on the printed form were inserted by Mr Pone.

When the accused later returned the completed affidavit to the Ministry's office, Mr Pone proceeded to check the register book under the name Finau Havelu and he found that Finau Havelu had passed away on 6 September 1978 and on 29 January 1972 the allotment had been transferred into the name of Sione Tauelangi. Mr Pone then asked the accused who Sione Tauelangi was and he replied, "myself". Mr Pone asked him why he had sworn the affidavit in the name of Finau Havelu and he responded, "because I thought it was like that".

Mr Pone filled in a fresh affidavit of loss of deed of grant with the accused's correct name at the top and he then asked him to have it re-sworn before a magistrate. The accused did so and he was subsequently charged with perjury in relation to the first affidavit.

A photocopy of the original deed of grant for the allotment in question was produced to the court. That was in the name of the original owner Finau Havelu. Finau Havelu was the accused's father. Mr Pone told the court that as from 25 January 1979 the land had been owned by the accused but the missing deed of grant in his name has apparently never been located.

In cross-examination, Mr Pone said that he did not believe that the accused had any intention to mislead the court or the Ministry of lands in signing the first affidavit in the name of his father. He said that he didn't think that the accused was aware of what to do.

That concession is consistent with the statement the accused gave to the police when he was questioned about the matter. He said that he had taken out a loan with the bank to finish his house and when his wife took the photocopy of the map which he had along to the bank someone in the bank had told her that they do not accept photocopies and they required the original. It was for this reason that the accused had gone to see "Soni" at the Ministry of lands.

The police asked the accused if he had told Soni his name. He replied, "no, I gave Soni the map (the photocopy) with Finau Havelu Tauelangi's name on it and Soni filled in the form."

The police officer then asked the accused why he didn't tell the magistrate that his name was not Finau Havelu but Sione Tauelangi. He replied: "I'm sorry police but I thought to use the name Finau Havelu which shows on the map that I went with from the Ministry of Survey. I only knew today from Soni that my name is on the map and he said to come and swear my full name Sione Likutau Tauelangi which is on the map …"

Against that background Mr Veikoso has made his "no case" submission. His application was based on the fact that the Crown had not called the magistrate who took the affidavit but instead had called as a witness a clerk from the Magistrates'

Court. She gave evidence of having attended the accused when he went to the court office to have the affidavit sworn and she said in evidence that she was present when the accused swore the affidavit.

As I indicated to Crown counsel at the end of his oral submissions, the difficulty the Crown faces in not calling the magistrate before whom the affidavit was taken is that the court has no idea of exactly how the oath was administered or what statements were made upon oath. The translated version of the affidavit has the preamble or introductory part setting out the deponent's name, address, age and occupation followed by the words, "I hereby swear and say …"

In other words, the deponent is swearing as to the accuracy of the statements which then follow. Nowhere in the body of the affidavit, however, does the accused swear that his name is Finau Havelu.

In his statement to the police, the accused admitted that in response to a question he told the magistrate his name was Finau Havelu but he does not say at what point in the discussion that question was asked and he does not say whether the answer was given on oath.

The magistrate who took the affidavit may well simply have followed the format in section 93 of the Magistrates' Courts Act (Cap 11) or he may have administered the oath requiring the deponent not only to swear that the contents of the affidavit were true and correct but also that the name shown in the affidavit was the deponent's true and correct name. That is the format followed in New Zealand, for example, and under that same format the deponent is specifically required to swear that the signature which appears in the jurat is his true and correct signature. But the court cannot act on assumptions. If the person administering the oath is not called as a witness to confirm these things in a perjury trial then the court is not able to speculate and reasonable doubt inevitably arises.

The threshold for determining whether or not a "no case" submission is made out is satisfied when the judge comes to the conclusion that the Crown's evidence taken at its highest is such that a jury properly directed could not properly convict on it. At that point it is the judge's duty to stop the proceedings.

For the reasons mentioned, I have reached that conclusion in the present case and accordingly I uphold the "no case" submission and discharge the accused.

Narayan v Police

Supreme Court, Nuku'alofa
Ford J
Cr 25/2001

26 October 2001; 2 November 2001

Sentencing – appeal against severity of sentence – no understanding of Tongan language – upheld

The appellant, Surya Narayan, pleaded guilty in the Magistrates' Court to a charge of driving while under the influence of alcohol. He was convicted and sentenced to two months imprisonment and his driver's licence was suspended for 12 months. He appealed against the severity of the sentence. The two grounds of the appeal were that the appellant did not understand the Tongan language apart from the basic greetings; and that the magistrate appeared to have a fixed penalty of imprisonment in mind without giving proper consideration to the particular circumstances of the offending and the offender in any given case.

Held:

1. Given the nature of the submissions on the language difficulties in the case, which were corroborated by the magistrate's call for an adjournment and an interpreter before passing sentence, the Court held that an injustice may well have resulted from the appellant's inability to adequately understand the Tongan language and therefore this ground of appeal was upheld.
2. In general for a first-time offender, unless the circumstances of the offending are exceptional, a custodial sentence should not be imposed. Even in those rare cases where a custodial sentence would be appropriate, the magistrate should consider whether, in all the circumstances, a suspended sentence is called for.
3. The sentence imposed was excessive. The appeal was allowed and the case was remitted back to the Magistrates' Court for re-sentencing before another magistrate.

Cases considered:

Matekuolava v R [2001] Tonga LR 276
R v Newman [1976] Crim LR 265
R v Thomas (1973) 57 Cr App R 496
R v Tupa (1973) 58 Cr App 234

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Mr Sisifa

Judgment

There are similarities between this case and another appeal which I heard at the same time *Matekuolava v R* [2001] Tonga LR 276 and I propose to deliver simultaneous judgments.

The appellant, Surya Narayan, pleaded guilty in the Magistrates' Court in August this year to a charge of driving while under the influence of alcohol. He was convicted and sentenced to two months imprisonment and his driver's licence was suspended for 12 months. He appeals against the severity of the sentence.

The appellant was not represented by counsel in the Magistrates' Court and at the outset the magistrate, therefore, quite properly asked him if he wanted counsel because he was facing a serious offence. According to the transcript, the appellant declined the invitation. In hindsight, that was an unwise decision.

The magistrate then asked the appellant if he understood the summons and Tongan. The appellant replied, "Yes, I do understand but I cannot answer back in Tongan."

The police prosecutor then proceeded to outline the summary of facts. Significantly he said that a police officer followed the appellant's car as he was driving at Kolomotua and he noticed the vehicle swerving along the road. He said that it stopped and then took off again. The officer sounded his horn and the defendant stopped his vehicle and was then taken into custody.

After the summary of facts had been read out the magistrate again, quite properly, asked the defendant if he wanted to say anything. The defendant apologised and told the court that it would not happen again. The magistrate then gave his decision on sentencing. The court translation of the transcript reads as follows:

> Court: *"The offence that you have committed is a serious offence in the Traffic Act. The penalty for drunk driving could be a fine or 2 years imprisonment or both penalties could be handed down. It should be known by every driver that when you consume alcohol, you mustn't drive. It is clear that when you are drunk you do not think properly when driving. There are too many vehicles now in Tonga and lots of accidents occur caused by drunk people. In considering your sentence I also consider other innocent people who are also using public roads. It is clear from the doctor's examination that you were drunk. Prosecutor, where is the doctor's report?*
>
> Prosecutor: *Here sir, and for the report to be submitted as exhibit 1.*
>
> Court: *Yes, doctor's report to be exhibit 1. Your pleading guilty and with no previous convictions also is of benefit to you. But the doctor's report says that you were under the influence of alcohol and you can't control a motor vehicle properly if you're driving in that condition. And this is my thinking of your penalty, I think that a fine won't be sufficient for you as this sort of offence is to be stopped absolutely. I want to convey to the rest*

of the public that this sort of crime is a serious crime and also to protect the safety of the public who are using the public road. So the penalty will be two months imprisonment and your driver's licence will be suspended for 12 months as from today."

Mr Tu'utafaiva, for the appellant, made two principal submissions. First, he told the court that, despite what was in the transcript, the appellant did not, in fact, understand the Tongan language apart from the basic greetings. (Counsel seemed to be in agreement that the appellant's answers in the Magistrates' Court had most likely been given by him in English and then transcribed into the transcript in Tongan by the transcriber.) Nor, submitted Mr Tu'utafaiva, did the appellant understand the court procedures or the summary of facts read out by the police prosecutor. Counsel expanded on that submission by telling the court that the appellant's vehicle had not been followed by a police officer but he was travelling behind the police officer's car for a short distance after turning right at a T-intersection into the road that the police officer had been travelling in. After stopping his own car, the officer proceeded to wave down the appellant who at that stage was travelling behind him.

The inference this Court was asked to draw was that the summary of facts as outlined by the police prosecutor in the Magistrates' Court was not challenged by the appellant because he simply did not understand what the prosecutor had said.

Mr Tu'utafaiva submitted that the fact that the appellant could not understand what was going on is borne out by the fact that the official transcript shows that after the summary of facts had been read out, but before the magistrate gave his decision on sentencing, the magistrate had said:

"Could we adjourn for five minutes so that an interpreter can be brought here before I deliver my judgment so that the accused can fully understand as this is a serious offence."

The court then adjourned and an interpreter from the Supreme Court was brought in to interpret the magistrate's decision.

Mr Tu'utafaiva, with some emphasis, then posed the rhetorical question, if the defendant could understand what was going on, why was it necessary to bring in an official interpreter for the last part of the proceeding?

The second principle ground of appeal was the same as that advanced in the other case I have referred to, namely, *Matekuolava v R* [2001] Tonga LR 276. Both cases had been heard by the same magistrate. Counsel acknowledged that the magistrate was quite within his rights to be concerned about the serious problem of drunken driving. His submission, however, in essence, was that the magistrate had gone too far in his efforts to get the message across to the public and he had erred in law in that he did not properly exercise his discretion when it came to sentencing but he appeared to have a fixed penalty of imprisonment in mind without giving proper consideration to the particular circumstances of the offending and the offender in any given case.

Counsel noted that the appellant in the present case was a 40 year-old married man with three children. He works as a motor mechanic for Cowley's Bakeries. He has been driving for some 22 years and this is his first offence.

Mr Tu'utafaiva sought to illustrate the point he was making regarding the alleged failure of the magistrate to exercise his discretion in a proper way by noting that the penalty of two months imprisonment and 12 months cancellation of licence imposed in the present case was identical to the penalty imposed on the offender in *Matekuolava v R* [2001] Tonga LR 276 but in that case there had been an accident whereas no accident was involved in the present case.

One other point was developed in submissions. The record shows that halfway through his decision, the magistrate made a comment on the medical report and then called for the report to be formally produced but it was never made available to the appellant for his comments. The significance of the medical report was that it stated that the appellant had been given a "heel to toe" walking test but Mr Tu'utafaiva said that the appellant strongly denied ever having undergone such a test.

For the Crown, Mr Sisifa, responded to the various submissions advanced by counsel for the appellant and went on to submit that the magistrate was quite entitled to send out a message to the community at large so as to deter would-be offenders and in his submission the sentence imposed in the present case was not a fixed penalty nor was it excessive. Crown counsel submitted that the sentence was appropriate taking into account the seriousness of the offence and the need for a deterrent sentence.

Turning first to the ground of appeal relating to the language difficulties, it is an accepted fact that many defendants find the experience of having to appear in court quite daunting. Those not represented by counsel, in particular, can very easily simply be overwhelmed. Invariably they do not know the procedure of the court nor is it likely that they know their rights or what is expected of them. For this reason, as part of the overall exercise of administering justice, the magistrate faced with an unrepresented defendant must try to ensure, as far as possible, that the defendant's position is explained to him and that he is given any necessary assistance in putting forward his defence or plea in mitigation.

Potential language difficulties simply exacerbate the problem. As is stated by the learned authors of Rogers and Kellock's **The Magistrate in the Commonwealth — Basic Principles and Practice:**

> *"Right from the start the magistrate must be satisfied that the defendant understands what is being said. A fair trial is not possible if the defendant or any witness does not fully understand the language in which it is being conducted. Inevitably interpretations take extra time but it may be necessary to avoid misunderstanding and possible injustice."*

Given the nature of the submissions advanced before me on this aspect of the case, which would appear to be corroborated by the magistrate's call for an adjournment and an interpreter before passing sentence, I consider that an injustice may well have resulted from the appellant's inability to adequately understand the Tongan language and I therefore uphold this ground of appeal.

The second ground of appeal relates to the alleged failure of the magistrate to properly exercise his discretion upon sentencing. The fact that the sentence imposed in this case, where there was no accident involved, is identical to the sentence in the other case which came before me (*Matekuolava v R* [2001] Tonga LR 276), which did involve an accident, does, to my mind, lend weight to counsel's submission that

the magistrate failed to properly exercise his discretion in determining the punishment imposed.

While courts do from time to time justify sentences on grounds of general deterrence, the sentencer cannot, in such cases, impose an exemplary sentence that goes beyond the general level. In other words, if the magistrate concludes that the aspect of deterrence requires the imposition of a sentence of imprisonment, and there are no features which indicate that such a sentence is excessive, no question of wrong principle arises and the Supreme Court is not justified in interfering with the nature of the sentence, but if a custodial sentence is out of line with sentences imposed by other magistrates then the question does arise as to whether the sentencing magistrate has erred in principle. The position is summed up in the following passage from Rogers and Kellock:

> *"There are times when particular types of offences are being committed with alarming frequency and a magistrate may decide that a severe sentence has to be imposed in the interests of society as a whole ... But a magistrate should avoid becoming identified for his personal opposition to a particular crime. For deterrent sentences to be effective and just there should be a broad measure of agreement amongst magistrates in the areas affected by the crimes, and the reasons behind their imposition should be generally understood."* (page 16)

Accepting the correctness of the magistrate's perception of the general abhorrence in the community of drinking and driving, the offence of driving under the influence does not, in itself, automatically require the imposition of a custodial sentence. The situation in the Kingdom should follow the recognised common law sentencing principles in this area. The situation is correctly outlined by D A Thomas in **Principles of Sentencing** (2nd ed) p 84:

> *"The cases do not suggest that a custodial sentence is automatically required whenever there is any evidence of the consumption of alcohol prior to the accident. The question is whether the driving generally fell into that category of selfish disregard for others or deliberate risk taking ... and the presence of a high blood alcohol concentration is probably relevant primarily as an explanation of the offender's conduct or as a rebuttal of some alternative explanation of the accident."*

After reviewing the reported decisions of *R v Thomas* (1973) 57 Cr App R 496; *R v Newman* [1976] Crim LR 265 and noting that the two decisions appeared to be in conflict with *R v Tupa* (1973) 58 Cr App 234, D A Thomas stated (p 192):

> *"... it appears that a sentence of imprisonment is unlikely to be upheld unless there is a high blood alcohol level use combined with either a record of similar offences in the past, or especially dangerous driving, or both."*

I consider these principles to correctly state the position relevant to Tonga although, as there is no blood testing regime in operation in the Kingdom, the high alcohol level

would need to be determined in any given case by direct evidence of the driver's condition through eyewitnesses at the scene or a medical officer's certification following examination.

In each case, before deciding on the appropriate sentence, the magistrate will need to give proper consideration to the circumstances of the offending and the offender.

In general, however, for a first-time offender, unless the circumstances of the offending are exceptional in one or other of the ways I have touched upon, then a custodial sentence should not be imposed. Even in those rare cases where a custodial sentence would be appropriate, the magistrate will still need to go on and consider whether, in all the circumstances, a suspended sentence is called for.

For the reasons outlined, I consider that the sentence imposed in the present case is excessive. The appeal is allowed and the case is remitted back to the Magistrates' Court for re-sentencing before another magistrate.

Matekuolava v R

Supreme Court, Nuku'alofa
Ford J
Cr 22/2001

26 October 2001; 2 November 2001

Sentencing – appeal against sentence – guilty plea

In July 2001 the appellant, 'Okusitino Matekuolava, pleaded guilty in the Magistrates' Court to charges of careless driving and driving under the influence of alcohol. He was fined $50 on the careless use charge and on the driving under the influence charge he was sentenced to two months imprisonment and his driving licence was suspended for 12 months. He appealed against the severity of the latter sentence and submitted that the magistrate had his mind fixed on a sentence of imprisonment for all drunk drivers without giving any weight to the circumstances of the offending and of the offender.

Held:

1. When the offender pleaded guilty he admitted that he committed the offence but he did not necessarily concede that the prosecution case against him was correct in its entirety. He may deny that the facts were as grave as presented by the prosecution.
2. Having heard part of the evidence before the appellant changed his mind and entered the guilty plea, the magistrate should not only have called for a summary of facts but he should have given the appellant the opportunity to give evidence himself then the court could decide what version of the facts it would accept for sentencing purposes and the appellant, in turn, would know exactly what he was being punished for.
3. A miscarriage of justice may well have resulted from the failure of the learned magistrate to follow the recognised procedure. The sentence was quashed; the case was referred back to the Magistrates' Court for re-sentencing before another magistrate.

Cases considered:

Narayan v Police [2001] Tonga LR 270
R v Archer [1994] Crim LR 80

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Miss Tupou

Judgment

In July this year the appellant, 'Okusitino Matekuolava, pleaded guilty in the Magistrates' Court to charges of careless driving and driving under the influence of alcohol. He was fined $50 on the careless use charge and on the driving under the influence charge he was sentenced to two months imprisonment and his driving licence was suspended for 12 months. He appealed to this Court against the severity of the latter sentence only.

The thrust of counsel's principle submission in support of the appeal was that the magistrate had his mind fixed on a sentence of imprisonment for all drunk drivers without giving any weight to the circumstances of the offending and of the offender.

Counsel indicated that this was one of three appeals on similar grounds against decisions of the same learned magistrate. In developing his submission, Mr Tu'utafaiva conceded that the magistrate was correct in holding the view that drinking and driving should be stopped and he also accepted that the magistrate was correct in taking into account in sentencing the safety of other road users but, as counsel put it, "where the magistrate goes wrong is in apparently disregarding the circumstances surrounding the offence and the offender". Counsel said that such an approach was contrary to basic sentencing principles.

When the case was called in the Magistrates' Court the appellant had pleaded not guilty. He was proposing to defend both charges. At that stage he was represented by a different counsel. The case began with the police prosecutor calling his first witness, the health officer who had examined the appellant. The witness said that the appellant's speech was "not too clear", he could smell alcohol and he could tell from the way the appellant walked that "his body was unbalanced". He concluded, "he can't control a vehicle if he drives". The health officer was not cross-examined but at the conclusion of his evidence in chief, counsel for the appellant addressed the court as follows:

> *"Sir, sorry but we have changed our plea to guilty. The accused thought that the doctor told him on this night that he was not drunk, so we decided to change our plea. So, we only ask for a small penalty or fine. The accused has no previous convictions and also we have changed our plea to guilty."*

The magistrate then passed on immediately to pronounce his decision on sentencing. According to the court translated transcript, he said:

> *"What you have been charged with are serious offences under the Traffic Act. Careless driving is not as serious as committing drunken driving. The penalty for both offences can be a fine and also imprisonment. It is obvious that the cause of your careless driving is because you were drunk at the time. The fine for drunk driving is $500 and two years imprisonment. It's clear from the doctor's report that you could not control a vehicle at the time because you were drunk. In Tonga these days there are lots of vehicles and we have to be very careful not only for our life but also for the lives of others using the public roads. Due to the fact that you were drunk and you cannot control your vehicle therefore crashing to the other vehicle causing this accident. I have taken note of*

the fact that you have no previous convictions and also pleaded guilty but I have to take care of other public road users and their lives."

The magistrate then proceeded to impose the penalty already described.

Mr Tu'utafaiva was critical of the fact that following the entry of the guilty plea, the prosecutor did not read out any summary of facts to the magistrate and no oral evidence was before the court about the incident that had given rise to the charges. That was the essence of his other ground of appeal.

Counsel told this Court that on the afternoon in question the appellant had been to the beach with his partner and two children and while at the beach he had consumed six bottles of Royal beer. There is no evidence as to how long the family had been at the beach but the accident happened on his way home at about 7 p.m. that evening. Counsel said that the appellant was driving south along Taufa'ahau road approaching the intersection with Old Pea road and he was about to turn right into Old Pea road. He could see two vehicles travelling towards him heading in a northerly direction along Taufa'ahau road and he thought that he saw the indicator lights on the leading vehicle signal an intention to turn to its left to go down Old Pea road which he also was about to turn into. The appellant believed, therefore, that he had the right of way and proceeded to turn across Taufa'ahau road but the other vehicle collided with the passenger side of his vehicle. After the accident the appellant realised that the blinking indicator lights which he had seen had actually been coming from the second car, not from the leading vehicle — hence his guilty plea to the careless driving charge.

Mr Tu'utafaiva said that the appellant was 57 years of age and he had been driving for 40 years without any previous offences. He was a delivery van driver by occupation, delivering eggs for Vete Poultry. Counsel submitted that, given his unblemished record and lengthy period of driving, the appropriate penalty should have been cancellation of his licence and a fine or, in the alternative, a suspended prison sentence.

Miss Tupou, for the Crown, said that the sentence imposed of two months imprisonment was appropriate and not too harsh. She told the court that to her knowledge, apart from cancellation of one's driver's licence, there was no "typical sentence" in the Magistrate's Court for driving under the influence. Miss Tupou acknowledged that no summary of facts had been read to the court but she submitted that the wording of the summons was quite detailed and the evidence of the health officer together with his medical report showed that the appellant was unable to control his vehicle.

Crown counsel also submitted that if there was insufficient information before the court then there was an onus on counsel for the appellant to proffer an explanation as part of his plea in mitigation.

Mr Tu'utafaiva accepted that counsel should have drawn the various matters in mitigation to the magistrate's attention but his primary submission was that in the end result it would not have made any difference what was said, because the magistrate's mind was fixed on a sentence of imprisonment regardless of the circumstances of the offending and the circumstances of the offender.

In relation to the absence of any summary of facts, Miss Tupou is quite right to stress that it was up to counsel to address the magistrate on all matters that could properly be put forward in mitigation. But there is an important issue that arises in

this case which goes beyond the mere mitigation plea. It is the conclusion by the magistrate that the appellant was so drunk that he was unable to control his vehicle and this caused the collision.

The only evidence before the court that the appellant could not control his vehicle came from the health officer who was not a witness to the accident. There were no eyewitnesses to say that the vehicle was swerving over the road or being driven out of control. If the account of the circumstances leading up to the accident outlined in this Court by counsel for the appellant is correct then it would seem that the real cause of the accident was most likely the appellant's carelessness in concluding that the flashing indicator lights were coming from the leading vehicle rather than from the second vehicle.

By pleading guilty, an offender admits that he committed the offence but he does not necessarily concede that the prosecution case against him is correct in its entirety. He may deny that the facts are as grave as presented by the prosecution.

Having heard part of the evidence before the appellant changed his mind and entered the guilty plea, the magistrate should not only have called for a summary of facts but he should have given the appellant the opportunity to give evidence himself then the court could decide what version of the facts it would accept for sentencing purposes and the appellant, in turn, would know exactly what he was being punished for.

The principle is summed up in the following passage from **Criminal Litigation & Sentencing** (1999/2000) para 14.2.2:

> *"Occasionally, a defendant will decide to change his plea halfway through the trial, after at least some evidence has been given for the prosecution. In those circumstances, the judge should hear evidence from the defendant and then decide upon the version of facts upon which he or she is going to sentence, forming his or her view on the whole of the evidence which was given."*

Likewise, as stated in the commentary to *R v Archer* [1994] Crim LR 80:

> *"In a case where the plea is taken, whether to the charge as laid in the indictment or to a lesser charge, after evidence has been given for the prosecution, the judge will have heard only part of the case and there is a risk that the factual basis for sentence will be determined without hearing the other side of the story. In such circumstances, it has been held that the sentencer should hear the evidence of the defendant before deciding what version of the facts will be adopted for the purposes of sentence."*

Because that procedure was not followed in the present case, there is a real risk, particularly in the absence of a summary of facts, that the magistrate has proceeded to impose sentence upon the possible false premise that the accident happened because the appellant's car was being driven out of control. The manner of driving should have been an important factor in determining the appropriate sentence.

That is enough for me to dispose of this appeal but in a judgment in another case (Cr App 25/01) which will be delivered at the same time as this decision, I deal with the other substantive argument put forward by counsel for the appellant relating to the

alleged failure of the magistrate to exercise his discretion in accordance with recognised sentencing principles. The conclusions I reach in that judgment have equal application to the facts of the present case and, if it had been necessary, I would have upheld the present appeal for those same reasons.

In summary, I suspect that a miscarriage of justice may well have resulted in this case from the failure of the learned magistrate to follow the recognised procedure referred to in the authorities cited above and for that reason I now quash the sentence appealed against and refer the case back to the Magistrates' Court for re-sentencing before another magistrate.

Vea v Police

Supreme Court, Nuku'alofa
Ford J
Cr 17/01

5 October 2001; 6 November 2001

Sentencing – appeal against severity of sentence – assault - not excessive

On the night of 15 March 2001 the complainant, a pregnant woman, was travelling in her car passing the accused who was standing on the roadside of Taufa'ahau road in Ha'ateiho. The accused threw something towards the car and the complainant turned back and asked the accused, Piliote Vea, why he had thrown something at the car. This enraged the accused who then began to verbally abuse the complainant. An argument ensued between the two. The accused then threw a punch at the complainant's face which she dodged causing the blow to strike her on the shoulder. The complainant, fearful that the accused might punch her stomach endangering her pregnancy, fled to her residence. The accused was not satisfied by this and chased her all the way to her home where he yelled obscenities. In April the appellant pleaded guilty in the Magistrates' Court to one charge of common assault and one charge of causing a disturbance. On the disturbance charge he was convicted and fined $50, or, in default, 14 days imprisonment. On the assault charge he was convicted and sentenced to 3 months imprisonment. He appealed severity of the 3 months imprisonment sentence on the assault charge.

Held:

1. In relation to the appellant's belated attempt to dispute the facts, the factual allegations were stated very clearly in the summary of facts and they were not challenged in mitigation by the solicitor acting for the appellant. The Court was not prepared to entertain the ground of appeal relating to any alleged factual discrepancies.
2. The apparent errors by the magistrate were not sufficiently serious to warrant the setting aside of his decision. The nature of the offending was just as serious whether the appellant was in a drunk or sober state at the time.
3. The Court did not regard the sentence as manifestly excessive. The appeal was accordingly dismissed

Cases considered:

Mo'unga v R [1998] Tonga LR 154 (CA)
Wall v R [2001] Tonga LR 238 (CA)

Statutes considered:
Criminal Offences Act (Cap 18)
Order in Public Places Act (Cap 37)

Counsel for appellant : Mr Piukala
Counsel for respondent : Mr Fusitua

Judgment

In April this year the appellant pleaded guilty in the Magistrates' Court to one charge of common assault contrary to section 112(a) of the Criminal Offences Act (Cap 18) and one charge of causing a disturbance in breach of section 3(g) of the Order in Public Places Act (Cap 37).

On the disturbance charge he was convicted and fined $50, or, in default, 14 days imprisonment. On the assault charge he was convicted and sentenced to 3 months imprisonment. He subsequently appealed to this Court.

The appellant's initial grounds of appeal (filed by another counsel) were confusing in that they referred to both charges and alleged, in part, that the magistrate's decision erred in fact and in law "in finding and holding" that the complainant was assaulted by the appellant. That ground of appeal seemed to overlook the fact that the appellant had pleaded guilty to both charges.

At the appeal hearing, Mr Piukala, who had not been involved in the case prior to that stage, (and was, in fact, the third counsel on the record) made it clear that the appellant was not challenging the sentence on the disturbance charge but he was appealing the severity of the 3 months imprisonment on the assault charge. His submissions were more focused than the various points made in the original grounds of appeal.

When the case had been called in the Magistrates' Court the appellant was then represented by his first counsel. After the guilty plea had been entered, the police prosecutor proceeded to outline the summary of facts. The court translation of what he said reads as follows:

> *"Sir, a short history of what happened. On the night of 15 March 2001 the complainant was travelling in her car passing the accused who was standing on the roadside of Taufa'ahau road in Ha'ateiho. The accused threw something towards the car and the complainant turned back and asked the accused, Piliote Vea, why he had thrown something at the car. This enraged the accused who then began to verbally abuse the complainant. An argument ensued between the two. Your Worship, the complainant is a pregnant woman. The accused then threw a punch at the complainant's face which she dodged causing the blow to strike her on the shoulder. The complainant, fearful that the accused might punch her stomach endangering her pregnancy, fled to her residence. The accused was not satisfied by this and chased her all the way to her home where he yelled the obscenities that are stated in the summons 148/2001. Your Worship these are the accused's previous convictions:*

1. *Nukunuku Magistrates' Court — 6/11/95 — assault — Convicted and sentenced to a fine of $50 and $50 compensation Cr 763/95.*

2. *Nuku'alofa Magistrates' Court — 29/3/97 — assault — Convicted and sentenced to a fine of $150 and $50 compensation Cr 156/97."*

The "obscenities" stated in the summons are that he (the appellant) would tear her (the complainant's) anus and genitals apart and destroy her family.

The first counsel, who was then appearing for the appellant, (an experienced lawyer) made submissions in mitigation. Before passing sentence, the learned magistrate made the following remarks:

> *"There are three important considerations that I am taking into account in these proceedings:*
>
> *(i) The complainant is a married woman, pregnant and about to give birth.*
> *(ii) The reason the offences came about were that you were drunk in a public place.*
> *(iii) You have been convicted twice previously for the very same offence and it seems that you have still not learned anything from your two previous convictions for assault."*

At the appeal hearing before me, counsel for the appellant submitted that neither the appellant or his friend had thrown anything at the complainant's car and, although there was an argument and the appellant had hit the complainant, his version is that he was simply wanting her to leave. Counsel said that when the appellant followed the complainant to her home he was wanting to talk to her and tell her that nothing had been thrown at her car.

Mr Piukala then submitted that the magistrate had made a mistake in principle in that he had no evidence before him to support the "important consideration" he had referred to in sentencing about the appellant being drunk in a public place. He also submitted that, although the complainant was pregnant, there was nothing in the evidence to suggest that she was "about to give birth".

Finally, Mr Piukala submitted that even allowing for the two previous convictions, the sentence of three months imprisonment was excessive. He told the court that the appellant was 25 years of age and single. He is a member of the Mormon Church and he lives at the village with his parents. He is very remorseful and he had entered a guilty plea.

For the Crown, Mr Fusitua submitted that the statement in the grounds of appeal that the appellant did not assault the complainant and the suggestion in submissions that he did not throw anything at the complainant's car was "tantamount to a belated not guilty plea" and, as Crown counsel put it, the appellant was faced with the dichotomy of trying to seek credit for a guilty plea on the one hand while at the same time he appeared to be making submissions that he was not guilty.

Crown counsel accepted that there was no reference in the summary of facts to the complainant being in an advanced stage of pregnancy nor to the accused being

drunk at the time of the offending but he submitted that there were aggravated features of the offending and, in any event, the custodial sentence was not excessive.

This Court will not intervene in the exercise of a magistrate's discretion on sentencing unless an appellant can establish that the sentence in question is manifestly excessive or manifestly inadequate or wrong in principle.

I agree with Crown counsel's submissions in relation to the appellant's belated attempt to dispute the facts. The factual allegations were stated very clearly in the summary of facts and they were not challenged in mitigation by the experienced solicitor who was then acting for the appellant. I am not prepared to entertain the ground of appeal relating to any alleged factual discrepancies.

Counsel for the appellant has, however, been able to point to an error in principle in the magistrate's decision in that there is no evidence in the record to suggest that the appellant was drunk at the time of the offending and yet the magistrate stated that this was one of the three "important considerations" which he was taking into account.

In imposing any sentence, a magistrate cannot go beyond the facts that are before the court. The same applies to the suggestion that the magistrate may have overstated the exact state of the woman's pregnancy. A sentencer must take care to ensure that in imposing sentence, he does not embellish in any way the actual facts before the court.

Having said that, however, in the context of this case, I do not regard the apparent errors by the magistrate as sufficiently serious to warrant the setting aside of his decision. In fact, it is not entirely clear why the magistrate regarded his mistaken finding of drunkenness on the part of the appellant as one of the three "important considerations". The nature of the offending, as described in the summary of facts, is just as serious whether the appellant was in a drunk or sober state at the time. I suspect, in any event, that the magistrate made the comment solely in relation to the disturbance charge and, of course, there is no appeal against that decision.

The maximum penalty for common assault is a fine not exceeding $500 or imprisonment for any period not exceeding 1 year or both.

To my mind, this was a despicable, cowardly assault on a pregnant woman by a 25-year-old young man with two previous convictions for assault. The appellant appeared before me as a well-built individual who, I have no doubt, was perfectly able to look after himself. The assault was completely unprovoked. That sort of conduct will not be condoned in any way by this Court and in my judgment the magistrate was quite entitled to impose the custodial sentence he did. The whole ordeal must have been a totally terrifying experience for the complainant and the appellant comes out of it with no credit whatsoever apart, perhaps, from some entitlement to credit in recognition of his early guilty plea.

The magistrate did not specifically refer to the guilty plea in his sentencing decision but the point had been clearly made to him by counsel in mitigation and I am confident that he would have taken the matter into account in fixing penalty. Magistrates should, however, be aware of the recent direction issued by the Court of Appeal in *Wall v R* [2001] Tonga LR 238, where the court said:

> *"Where a reduction is made for a guilty plea, we consider it desirable for the amount of that reduction to be stated by the sentencing judge."*

Taking all relevant factors into account, I do not regard the sentence as manifestly
170 excessive. I have given careful consideration as to whether the custodial term should be suspended in whole or in part but, having regard to the appellant's two previous convictions for assault in 1995 and 1997, I cannot be confident that he is the sort of person who is likely to take the opportunity offered by a suspension of the sentence to rehabilitate himself. That is one of the important tests referred to by the Court of Appeal in *Mo'unga v R* [1998] Tonga LR 154. On the contrary, I agree with Crown counsel's submission that the appellant does not appear to have learned from his two previous non-custodial sentences and it is now time for him to be made accountable.

The appeal is accordingly dismissed.

Fonohema v Piukala

Land Court, Nuku'alofa
Ford J
L 8/2001

22, 23, 24, 27, 28 August, 6, 7, 11, 12 September 2001; 15 November 2001

Land law – agreement for sale and purchase of 'api – unclear terms of contract
Contract law – agreement for sale and purchase of 'api – unfair and oppressive – voidable
Law practitioners — conflict of interest – abused relationship of trust

The plaintiff returned to Tonga with his family after living in the United States for 24 years. He saw an advertisement for a property in Ha'ateiho and was immediately interested. He and his brother visited the 'api and met with the owner Kelepi Piukala, the defendant. Kelepi was a law practitioner with 12 years experience. When the plaintiff saw the defendant's property in August 2000 he liked it and after a period of negotiation he agreed to buy it. His wife returned from the States and the family eventually moved into the house on about 1 Dec 2000. Thereafter, major problems started to develop between the parties over what exactly had been agreed to in the purchase agreement. Matters came to a head in the early months of 2001. In March the defendant wrote to the plaintiff ordering him to vacate the property within 10 days. The defendant, with the assistance of security guards, attempted to forcibly evict the plaintiff's wife from the property. The electricity and telephone supplied to the property was cut off by the defendant. On 11 May 2001 the Chief Justice granted the plaintiff an injunction on his ex parte application which was intended to maintain the status quo pending the hearing of the substantive proceeding. The injunction prohibited the defendant from entering the allotment at Ha'ateiho and from disconnecting or interfering with the supply of electricity, water and telephone services to the property. That injunction remained in force. The court was required to determine exactly what the parties agreed to in the course of their negotiations. The plaintiff sought specific performance of the verbal agreement.

Held:

1. The Court was satisfied that the plaintiff signed the agreement dated 12 September confident that the defendant had simply recorded therein all the terms of their verbal agreement. He did not know what the agreement, in fact, said but he trusted Kelepi the lawyer. As the plaintiff did not know what the agreement contained, there was no *consensus ad idem* and, therefore, the 12 September written agreement was invalid.

2. The defendant was acting as solicitor to both parties and as such he was in a fiduciary relationship to the plaintiff. The defendant not only failed to fulfil the conditions incumbent upon him, but he went further and abused the relationship of trust and confidence by taking advantage of the plaintiff's almost total ignorance of the land laws of Tonga to negotiate an agreement that, from the plaintiff's perspective, based on the defendant's interpretation, was both unfair and oppressive. The verbal agreement was voidable at the plaintiff's option.
3. The Court ordered that within one month the defendant was to give to the plaintiff's solicitor a letter of surrender which shall be signed by the defendant, his wife and his eldest son (the heir), agreeing that the allotment be surrendered in favour of the plaintiff.
4. If the plaintiff was registered as holder of the allotment, he was to pay to the defendant the balance of $36,000, less the losses and damages allowed of $19,000, namely, the sum of $17,000, at the rate of $300 per month, without interest.
5. If the defendant's wife or heir did not sign the surrender or Cabinet did not consent thereto, then leave was reserved to the plaintiff to come back to Court for further relief including damages, loss, and compensation as appropriate.
6. The plaintiff and his family were entitled to remain in occupation of the allotment until further order of the Court. The plaintiff was entitled to costs.

Cases considered:

Demerara Bauxite Co v Louisa Hubbard [1923] PC 673
Gillespie and sons v Gardner [1909] SC 1953
Prasad v Morris [1993] TLR 73 (CA)

Statute considered:

Land Act (Cap 132)

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

Judgment

After residing in Utah in the United States for some 24 years, the plaintiff, Viliami Ma'ilei Fonohema, (often referred to during the hearing simply as Ma'ilei) returned to Tonga for a visit in July 2000. The primary purpose of the visit was to attend the Ha'ateiho reunion. Ma'ilei's American-born wife, Sharon, and their five children aged between 5 and 14 years, accompanied him. Ma'ilei had originally come from the village of Ha'ateiho.

Mrs Fonohema told the court that, although they had originally intended to stay only about six weeks in Tonga, they found that their children loved the place so much, and their father's family in particular, that they wanted to stay in the country and go to school here.

The plaintiff and his wife then made what obviously would have been a momentous decision in their lives. They decided to move to Tonga permanently. Towards the end of July, Mrs Fonohema returned to the States to terminate the lease on their home and to transfer her business to someone else. The plaintiff remained in Tonga with the children.

At that stage the family was anticipating acquiring some land and building a new home. They had no specific location in mind but they were working on an anticipated budget figure of about T$30,000.

The plans regarding the new home all changed, however, one day in early August 2000 when the plaintiff's brother drew his attention to a notice which had appeared in the "Taimi 'o Tonga" newspaper. The notice related to a property in Ha'ateiho which was for sale, lease or rent. The full text of the translated notice reads as follows:

> *"NOTICE*
>
> *TOWN ALLOTMENT TO RENT, LEASE OR OWN ABSOLUTELY*
>
> *I have an 'api which is situated at Ha'ateiho, its size is 1r 24p to a person who wants to rent, lease or own absolutely. Situated on it is a brick house with four bedrooms plus master room (private facilities) fully furnished with double beds in each room & etc, large lounge/sitting-room, fully furnished and also conference table with 8 seats and etc. kitchen with stove, fridge and etc, 3 toilets/bathrooms, a 3000 gallons cement water tank. You are welcome to inspect.*
>
> *And also my town allotment which is situated at Vave Road, Kolomotu'a, its size is 30 perches. It is needed to be released to be owned absolutely according to law by any person. No house has been built on it. Obtain the map and the details from telephone 29-098. Make contact as soon as possible to telephone 29-098."*

The plaintiff was immediately interested in the Ha'ateiho property and he and his brother visited the 'api and met with the owner who was the defendant, Kelepi Piukala. Kelepi (as he was mainly referred to throughout the hearing) is a law practitioner. He has been a law practitioner for some 12 years. Up until recently he apparently practised law in both Vava'u and in Tongatapu. He told the court, however, that he has now closed down his Neiafu office and at the time he advertised his house for sale, he was operating his practice from his home at Ha'ateiho.

When the plaintiff saw the defendant's property in August 2000 he liked it and after a period of negotiation he agreed to buy it. His wife returned from the States and the family eventually moved into the house on about 1 Dec 2000. Thereafter, major problems started to develop between the parties over what exactly had been agreed to in the purchase agreement. Matters came to a head in the early months of this year. In March the defendant wrote to the plaintiff ordering him to vacate the property within 10 days. The court heard evidence as to how the defendant, with the assistance of security guards, attempted to forcibly evict the plaintiff's wife from the property.

There were also allegations of physical assaults which are alleged to have taken place in early April followed by alleged malicious criminal prosecutions. The electricity and telephone supplied to the property was cut off by the defendant. The situation by this time had obviously become very serious.

On 11 May the Chief Justice granted the plaintiff an injunction on his ex parte application which was intended to maintain the status quo pending the hearing of the substantive proceeding. The injunction prohibited the defendant from entering the allotment at Ha'ateiho and from disconnecting or interfering with the supply of electricity, water and telephone services to the property. That injunction continues to remain in force.

Because of the existence of the interim injunction, the case was afforded some urgency. The hearing took place over a nine-day period in August/ September and then, at counsels' request, closing submissions were presented in writing. In effect, the court is now being asked to decide exactly what the parties, in fact, agreed to in the course of their negotiations.

Virtually all of the witnesses were subjected to searching cross examination. There were some sharp conflicts in the evidence which, because the events are of relatively recent origin, cannot, unfortunately, all be attributed to memory lapse.

The plaintiff alleges in paragraph 4 of his statement of claim, and this is the thrust of his whole case, that in September 2000 he and the defendant reached a verbal agreement in the following terms:

> *"(a) that the plaintiff would pay $20,000 as deposit, and upon such payment, the defendant would hand over to him a letter of surrender signed by him and his heir, Kelepi Nuku Piukala, by which the defendant would surrender the allotment in order that the plaintiff would apply to hold it as his town allotment;*
>
> *(b) that in addition to handing over the letter of surrender the defendant would also hand over possession of the allotment and the brick house with all the furniture and contents as they had inspected and agreed plus the motor car registered no. C 7697 of the defendant;*
>
> *(c) that the plaintiff would pay the balance of the purchase price of the house and its contents and of the car, that is $36,000 over 10 years, without interest, at $300 per month;*
>
> *(d) that the defendant would pay and clear all debts for electricity, telephone and water used by him on the allotment prior to the date of possession."*

In his statement of defence the defendant admitted the verbal agreement but said that it was put into writing on 12 September 2000. The defendant went on to qualify his admission of the verbal agreement by saying, inter alia:

(i) in relation to the furniture and contents:

The furniture and contents were in the house to be used by the plaintiff, "only because of love and sympathy by the defendant towards the plaintiff and his family in their wish to occupy the house".

(ii) in relation to the car:

The car was never part of the agreement, "however, it was indicated by the defendant to the plaintiff that there may be times when the defendant is out of the country and the car may be left with the plaintiff until the defendant returns to Tonga."

Neither of these unusual and rather vague alleged arrangements were referred to in the 12 September agreement. After the plaintiff moved into possession of the property in December he immediately realised that the defendant had taken the furniture and the car.

Later on, after taking advice, he was also shocked to realise that the defendant was not proposing to hand over the letter of surrender, so that he (the plaintiff) could apply to obtain title to the allotment, until after the expiration of the 10 year period. These various factors and their consequential implications became the main issues in this litigation.

The 12 September agreement was produced in evidence. It required the defendant to provide the plaintiff with a letter of surrender signed by his next heir and then it made provision for the plaintiff to pay the deposit of $20,000 and the balance of $36,000 at the rate of $300 per month over 10 years.

The defendant pleaded that the 12 September agreement was "written confirmation" of the verbal agreement reached earlier but I do not accept that because it relates only to paragraphs (a) and (c) and makes no reference whatever to the matters agreed to in paragraphs (b) and (d) of the verbal agreement, namely, the house, the car, the contents and furniture, and outstanding bills for property services.

In his closing submissions, counsel for the defendant submitted that the 12 September agreement is, in fact, the whole of the agreement reached between the parties and not just confirmation of the earlier verbal agreement. It is necessary, therefore, at this point for the court to make findings on the exact status of the two agreements.

Turning first to the verbal agreement, considerable evidence was given relating to the negotiations that took place between the plaintiff and the defendant. I do not propose to canvass all that evidence in this judgment but, in summary, I can say that the plaintiff has satisfied me to the required standard of proof in civil cases, that the parties did, in fact, enter into an oral contract, the terms of which are as set out in paragraph 4 of the statement of claim.

I should say at this point that on the issue of credibility generally, although there were some inconsistencies in the plaintiff's evidence (which I found inconsequential in the overall case), I formed a very clear view that the plaintiff and all his witnesses were doing their best to give the court their true recollection of all the matters they talked about in their evidence. On the other hand, I am afraid that I did not form the same favourable view about the evidence given by the defendant. In a number of critical areas, I found his evidence vague and confusing and in many respects it simply lacked credibility.

In his closing submissions, counsel for the plaintiff drew attention to what he submitted was evidence of some collusion between the defendant and his wife which

was reflected in her evidence. I agree with counsel's analysis of the particular passage of the evidence which he referred me to in this regard.

Accepting, as I do, that there was a verbal contract between the parties in the terms set out in paragraph 4 of the statement of claim, I now pass to consider the written agreement dated 12 September 2000.

I accept that the parties had intended that the verbal agreement should be reduced to writing. I also accept the plaintiff's evidence, however, that after living in the United States for 24 years, he had difficulty understanding written Tongan and he, therefore, wanted to take the written agreement which the defendant had prepared in the Tongan language, away with him before he signed it so that he could go through it properly and understand it.

At the point in time the plaintiff was referring to in this regard, the parties were in the living room of the defendant's house at Ha'ateiho which the defendant had been using as his law office. The defendant had drafted the written agreement on his computer. He said that he read out the terms of the agreement from the computer screen to the plaintiff to see if he wanted any changes made before signing. He told the court that the plaintiff said that everything was perfect and so he printed off several copies of the agreement and they both signed.

The defendant said that before signing the agreement, he also signed, in the plaintiff's presence, the letter of surrender. The letter of surrender was dated 3 September 2000. The defendant said that he would have typed the letter of surrender up on that day and then sent it over to his son in Australia to sign as his heir. The son had signed and returned it that same week. In cross-examination it was put to the plaintiff that the defendant had handed him the signed letter of surrender on 12 September, the same day that the written agreement had been signed. The plaintiff strongly denied this assertion. He said that the first time he had seen the letter of surrender was when it was produced in court as an exhibit. He said that he had never seen the letter of surrender prior to then.

The plaintiff's evidence in relation to the 12 September agreement was that he was unsure, first of all, as to whether the 12 September agreement had, in fact, been made and signed on that particular day. The plaintiff denied that the defendant had read out the terms of the agreement from the computer screen. He said, in evidence which I accept, that the agreement when printed off the computer was in the Tongan language and while he was trying to look at the document the defendant, who was seated alongside him, was continually talking. The plaintiff, therefore, said that he would take it home and go through it and he started to walk out of the room with it but the defendant at that point said:

> *"No, no, no, give it to me, give it back to me, it's only between you and me."*

The plaintiff told the court that at that point he agreed to sign the agreement and he left it with Kelepi at his home. The plaintiff said that he was not given a copy, nor was he given a copy of or shown a copy of the letter of surrender. He said that the defendant told him that he was going to get his son to sign the letter of surrender when he next went to Australia and he (the defendant) would then be bringing the document back with him to Tonga. I accept the plaintiff's account of these particular exchanges.

Even though the plaintiff did not understand what was in the 12 September agreement, I accept that he trusted the defendant in the knowledge that he was a solicitor and he was, therefore, confident that the written agreement did no more than embody the terms of the verbal agreement which the parties had earlier concluded.

As I have already mentioned, the written agreement did not, in fact, record all the terms of the verbal agreement. It said nothing whatever about the brick house or about the furniture and contents or the car, nor did it mention the agreement reached regarding the clearing of outstanding debts relating to electricity, telephone and water services to the property.

The agreement is dated 12 September. The defendant said that he had typed it up on his computer and had read its contents from the screen to the plaintiff before it was signed that day. The plaintiff's recollection is that it was not signed on 12 September but sometime prior to then. I prefer the plaintiff's evidence in this regard and it is consistent with the wording of the document itself. Paragraph 2, for example, states that the letter of surrender, "shall be signed jointly by the next heir …". If, as the defendant maintained, the letter of surrender had already been signed by the next heir and a copy of the signed document was before the parties on 12 September, then paragraph 2 would not have been expressed in the way that it was.

The letter of surrender is actually dated 3 September 2000, which was a Sunday. It, therefore, contravenes clause 6 of the Constitution and is invalid. When that was put to the defendant and he was shown clause 6 of the Constitution, his response simply was, "I did not know that provision" — a surprising statement, I would have thought, from a law practitioner with some 12 years experience.

The plaintiff's counsel submitted that there was a more sinister explanation and he suggested that the defendant may have deliberately dated the letter of surrender with the date of a Sunday so that the 12 September agreement would be unenforceable and he would not have to refund the $20,000 deposit which the plaintiff had paid. I would not go that far even though there is some evidence to support that proposition. For one thing, the allegation was not put to the defendant in cross-examination for his response.

Quite apart from those matters, however, I am satisfied that the plaintiff signed the agreement dated 12 September confident that the defendant had simply recorded therein all the terms of their verbal agreement. He did not know what the agreement, in fact, said but he trusted Kelepi the lawyer. His confidence, however, was misplaced. Kelepi was abusing his trust.

As is stated in Halsbury, 4th edition, vol 9, para 288:

> *"It is essential to the validity of a contract that the contracting parties should either have assented or be taken to have assented to the same thing in the same sense, or, as it is sometimes put, that there should be consensus ad idem ... Where, on the consideration of the evidence in the light of these principles, it is impossible to show unequivocally that the parties assented to the same thing in the same sense, then the alleged contract may be vitiated by mistake.*

> *A contract, although assented to by all parties, may be voidable by one of them on the ground that his consent was obtained by ... undue influence ..."*

Accepting these principles, I find that, as the plaintiff did not know what the agreement contained, there was no *consensus ad idem* and, therefore, the 12 September written agreement is invalid. In any event, I would have held that it was voidable because it was obtained by undue influence arising out of a fiduciary relationship and in my judgment the verbal agreement would also have been voidable, at the option of the plaintiff, for that very same reason.

Although undue influence was not pleaded, it was well canvassed in evidence and the Court of Appeal in *Prasad v Morris* [1993] TLR 73, recognised that in those circumstances the issue should not be excluded. I specifically invited counsel to address me on the issue of whether there was a fiduciary relationship between the plaintiff and the defendant and I am grateful to both counsel for making very helpful submissions on the point.

The evidence relevant to the issue came from both the plaintiff and the defendant. Thus, in cross-examination the plaintiff said:

> *"I signed because I trusted the guy. He had grey hair and everything. He was a nice guy. He was a lawyer. He said you don't need a lawyer, I'll do the whole thing."*

And later:

> *"He told me he's a lawyer and he's this and that."*

Then, in response to questions from the court, the plaintiff said:

> *"He told me he's a lawyer from Vava'u and from Tonga on the first day we met. He told me that he was going to take care of everything as a lawyer."*

The defendant did not deny having said these things. In his own evidence in chief he said:

> *"We agreed I would prepare the agreement. He asked me to do it. He said he did not want to go to another lawyer to spend money."*

The plaintiff's evidence is corroborated on this aspect of the case by his wife, who I found to be a completely credible witness. She told the court about a telephone conversation that she had with her husband when she was still in the States and she wanted to know whether he had got anything in writing relating to the transaction. She said that her husband told her that he trusted the man he was dealing with because he was an attorney and he would be taking care of all the legal documents himself. Mrs Fonohema told the court that those assurances cleared up her concerns.

The legal principles relevant to fiduciary relationships were well summed up by Lord Parmoor, delivering the judgment of the Privy Council in *Demerara Bauxite Co v Louisa Hubbard* [1923] PC 673 at 681, in these terms:

> *"The principle has long been established that, in the absence of competent independent advice, a transaction of the character involved in this appeal, between persons in the relationship of solicitor and client, or in a confidential relationship of similar character, cannot be upheld unless persons claiming to enforce a contract can prove affirmatively that the person standing in such confidential position has disclosed, without reservation, all the information in his possession, and can further show that the transaction was in itself a fair one, having regard to all the circumstances. In order that these conditions may be fulfilled it is incumbent to prove that the person who holds the confidential relationship advised his client as diligently as he should have done had the transaction being one between his client and a stranger, and that the transaction was as advantageous to his client as it would have been if he had been endeavouring to sell the property to a stranger. This principle is one of wide application, and must not be regarded as a technical rule of English law. An apt illustration of its application to Scots law is to be found in the case of* Gillespie and sons v Gardner *[1909] SC 1953, to which their Lordships were referred during the argument, and which states that a bargain between the law-agent and his client cannot be supported unless the law-agent can show that the bargain was fair and entered into without concealment of any kind."*

The law relating to transactions between solicitor and client is clear. Halsbury, 4th edition, vol 44, para 118 states:

> *"The relationship of solicitor and client is regarded in equity as a fiduciary relationship, and the rule of equity that a transaction inter vivos is presumed to have been procured by undue influence until the contrary is shown applies to transactions between solicitor and his client."*

I have no difficulty in concluding on the facts of the present case that, at all material times, the defendant was acting as solicitor to both parties (he, of course, being one of those parties) and as such he was in a fiduciary relationship to the plaintiff. Equally, I have no difficulty in concluding on the facts of this case that the defendant not only failed to fulfil the conditions incumbent upon him which Lord Parmoor spoke about, but he went further and abused the relationship of trust and confidence by taking advantage of the plaintiff's almost total ignorance of the land laws of Tonga to negotiate an agreement (here I am referring to both the verbal agreement and the 12 September written agreement) that, from the plaintiff's perspective, based on the defendant's interpretation, was both unfair and oppressive.

In his closing submissions, counsel for the plaintiff referred specifically to a paragraph in the 12 September agreement which had, of course, been drafted by the defendant, which counsel described as "a false statement". Mr Niu then went on to submit:

> *The whole paragraph is fraudulent and the defendant knowingly and deliberately wrote it to mislead and deceive the plaintiff that it was true and that the letter of surrender was in fact the letter of transfer of the title*

> *of the allotment from him to the plaintiff. With his knowledge of the law and the proper procedures to be taken to effect a transfer of title by surrender, there is no question that the defendant knew that paragraph 1 of the agreement was wrong, false and would mislead the plaintiff, whom he knew was not familiar with the land laws of Tonga."*

I do not think that that submission overstates the position.

At another point in his submissions, Mr Niu suggested that his client, the plaintiff, who was a steel worker in the States, "is not very bright". Again, I think that that is a fair assessment. I also consider that the defendant picked up that point very early in the piece and he proceeded to take full advantage of the situation at every opportunity. I suspect that the actual moment in time when the defendant first began to sense that the plaintiff was not particularly bright came during their very first meeting when the plaintiff, rather naively, freely admitted the total amount of cash he had at his disposal, which was hardly the mark of an astute negotiator. The defendant had shown him around every room in the house and had told him that, with the property, he would sell all the furniture and the car outside and he asked whether he could make a down payment of $5,000. In response, the defendant said, "I've got $30,000". The plaintiff told the court that Kelepi's reply to that was, "what, come back and we will talk."

Describing part of the same first meeting, the plaintiff's brother, Titali, who I found to be another reliable witness, gave the following evidence in chief:

> *"**Witness:** He (the defendant) told us we would be very lucky, we would have the house, all the contents inside the house, nothing would be taken including the car. The car was parked outside the house. It was a red car. He told us that he would move out from the house and he would not take anything from the house.*
>
> ***Counsel:** Any mention of costs?*
>
> ***Witness:** No.*
>
> ***Counsel:** You ask?*
>
> ***Witness:** We wanted to know. He told us he doesn't want to give us any amount. I do not know the reason. He said we will leave but if we will be lucky we will have the house and we left.*
>
> ***Counsel:** How would you know whether you would be lucky?*
>
> ***Witness:** He told us to go and pray a lot and if our prayer is good we would have the house."*

Instead of telling the plaintiff to go and pray a lot, what the defendant should have been recommending at that point in time or shortly thereafter, in terms of his fiduciary obligations, was that the plaintiff should obtain competent independent advice in relation to the whole transaction or, at the very least, he should have advised him diligently and honestly on every aspect of the transaction. The defendant failed on both counts and I have no hesitation in concluding that both agreements were obtained through undue influence and are, therefore, voidable.

I have already found the written agreement of 12 September to be illegal. The plaintiff, however, does not seek to set aside the earlier verbal agreement which I

have found to be voidable at his option. On the contrary, he now seeks an order that it be specifically performed.

There are obvious defects in the verbal agreement which resulted from the failure of the defendant to properly fulfil his fiduciary duty. No provision is made, for example, to cover the situation of the widow's constitutional entitlement to the allotment in the event of both the defendant and his son (the heir) dying before the agreement crystallised. No provision is made as to what might happen should Cabinet not approve the surrender or if there was a default in the payment of the monthly instalments of $300.

The plaintiff, as is his right, nevertheless seeks specific performance of the verbal agreement and submits that if the agreement is frustrated, for any of the reasons I have just touched upon or any other reason beyond the control of the parties, then the court is able to remedy the matter by granting further appropriate relief.

In his detailed and concise submissions, counsel for the defendant raised 4 principle grounds against the plaintiff's claim. I have already dealt with two of those grounds. For completeness, I now touch briefly on the remaining grounds.

First, it is said that the Land Court has no jurisdiction to order specific performance of the agreement because using the "ejusdem generis" principle of statutory interpretation, the Land Court, under section 149(1)(b) of the Land Act (Cap 132), can only hear and determine any "disputes of title, claims of title and questions of title", and this is not such a case.

It is not necessary for me to determine in this case whether that analysis is strictly correct because for present purposes the plaintiff accepts it as being so. The plaintiff, however, submits in response that in this proceeding the court is required to determine the question of title affecting land because, if specific performance is ordered and the defendant is required to submit to Cabinet his letter of surrender, then his title to the allotment "may end as if he had died, and the only court which can answer such a question is the Land Court."

I agree with that analysis and hold that this Court does have jurisdiction.

The other ground advanced by counsel for the defendant was that both agreements, ie the verbal agreement and the 12 September written agreement, were either null and void because of section 6 of the Land Act or illegal and unlawful because of sections 12 and 13 of the Land Act. I need only deal with the verbal agreement.

The defendant's submission was that the verbal agreement was caught by these provisions because it purports to effect "an out-and-out sale" of an allotment and is therefore null and void.

The term "out-and-out sale" is not defined in the Land Act but it would cover a transaction purporting to be an absolute or outright sale of an allotment. I do not see the verbal agreement in question falling within that category. Under the verbal agreement, the defendant agrees to surrender his allotment in order that the plaintiff might then apply to hold it. An agreement of that nature is not an illegal out-and-out sale of an allotment within the meaning of section 6 of the Act. Rather it is a lawful procedure specifically recognised in the Land Act by virtue of which a holder may surrender his interest in an estate or an allotment. The Land Registration Officer, Sione Uele, gave extensive evidence as to how the procedure operates in practice. Once the surrender is consented to by Cabinet, of course, the former landholder has no say in relation to its subsequent allocation.

Moreover, section 12 of the Land Act is a penal provision and, for that reason, it would need to be even more strictly construed in favour of an alleged offender. The verbal agreement in the present case is not in my view a sale or attempted out-and-out sale of land.

Finally, the defendant relies on section 13 of the Land Act and submits that the verbal agreement is illegal by virtue of that provision. Again, section 13 is a penal provision and it would, therefore, need to be strictly construed. My analysis of section 13 is that, just as section 12 was intended to deter landholders from purporting to sell land outright in the Kingdom to unsuspecting purchasers, section 13 is intended to deter landholders from entering into any agreement for profit or benefit relating to the use or occupation of his holding other than pursuant to leases, sub-leases, permits and other methods specifically provided for in the Land Act. The verbal agreement in the present case is not, and in my view does not purport to be, such an agreement.

I, therefore, reject the various grounds advanced by the defendant in opposition to the plaintiff's claim. In any event, I find the whole notion of the defendant now arguing forcefully against the legality of the agreements which he drafted and entered into at a time when he was acting as solicitor for both parties, quite repugnant.

As part of the relief claimed, the plaintiff seeks an appropriate deduction from the balance payable of $36,000 on account of the proven damages or loss. The various amounts are summarised by counsel in his submissions under this head as follows:

"Furniture:	*$23,000*
Car:	*$6,000*
And also damages:	
For attempted eviction on 9/4/01:	*$1,500*
For electricity and telephone disconnections on 9/5/01:	*$500*
For malicious prosecution:	*$500"*

These figures total $31,500. The plaintiff's submission is that he will, therefore, only need to pay $36,000 less $31,500, in other words, $4500 at $300 per month.

Mrs Fonohema estimated the value of the furniture and contents removed from the house at $23,000. She described how she arrived at that figure and said that it was half the value of quotations she had received for new items of the same kind. Whilst I accept this evidence, I consider, having listened to the description of the furnishings given by the various witnesses, that the resulting figure is still probably on the high side because, after all, it is still second-hand, used furniture. I also find that Mrs Fonohema was genuinely mistaken over some of the items listed such as the television antenna, the two gas stoves with ovens, the gas bottles and one queen sized bed. In all the circumstances, I believe that a fair sum to allow under this head is $13,000.

The value claimed on the transaction for the loss of the car of $6000 is consistent with the evidence. The figure was not seriously challenged.

I find these matters to be integral elements of the claim before this Court, even accepting that they are not matters which would normally be associated with a Land Court claim, and I, therefore, propose to allow them. I am not so persuaded, however,

in respect of the other items of damages claimed and I do not propose to allow them at this point in time. As no submissions were directed at this particular jurisdictional aspect of the claim, however, and as the Court did not invite such submissions, to avoid the risk of an injustice, I would, if the plaintiff so desired, entertain an application for leave to file further submissions solely in relation to this issue.

The plaintiff seeks an order that in the event that he does not become the landholder (for whatever reason) then the defendant is to repay the $20,000 deposit and pay damages in the sum of $2,500 plus interest at 10%.

Rather than make a fixed order now in those terms in respect of a contingency which may or may not arise in the future, the Court would prefer to have the flexibility to be able to deal with the situation and grant appropriate relief having regard to the known facts at the time. This flexibility is reflected in the order which I am about to make.

I can indicate however, that when it comes to final relief, the Court will be anxious to ensure, as far as possible, that the plaintiff is fully compensated for the wrongs which the defendant has inflicted upon him.

The plaintiff also seeks an order that the monthly payments should commence after such time as he is registered as the holder of the allotment. In his submissions in reply Mr Tu'utafaiva submits that there is no justification for delaying the commencement of the monthly instalments.

I find that the intention of the parties at the time the verbal agreement was entered into was that the monthly payments would commence as soon as the signed letter of surrender was handed over. The payments were not to be dependent upon the plaintiff taking title. At the same time I accept that although the plaintiff anticipated that there would be some delay before he would take title, he did not, then realize that he would have to wait at least 12 months before that event could take place. None of that was ever explained to him by the defendant who was acting as his solicitor and I am satisfied that if it had been explained, together with the other contingencies I have referred to, then the plaintiff would not have agreed to start making the payments immediately. The defendant should not be permitted to benefit from his own breach of fiduciary duty and so for that reason I propose to grant relief in the terms sought by the plaintiff. In doing so, I am mindful of the fact that the defendant has had the full use of the $20,000 deposit paid by the plaintiff.

In terms of the relief sought in the statement of claim, I now make the following orders:

1. *Within 1 month of today's date the defendant will give to the plaintiff's solicitor a letter of surrender which shall be signed by the defendant, his wife and his eldest son (the heir), agreeing that the allotment with deed of grant book 140 folio 30 be surrendered in favour of the plaintiff.*
2. *That in the event that the plaintiff is registered as holder of the allotment, he shall pay to the defendant the balance of $36,000, less the losses and damages allowed of $19,000, namely, the sum of $17,000, at the rate of $300 per month, without interest.*
3. *In the event that, the defendant's wife or heir does not sign the surrender or Cabinet does not consent thereto, then*

leave is reserved to the plaintiff to come back to this Court for further relief including damages, loss and compensation as appropriate.

4. *Until further order of the Court, the plaintiff and his wife and children are entitled to remain in occupation of the said allotment.* (In this regard, the court is mindful of the evidence that the defendant has had the full use of the $20,000 deposit paid by the plaintiff.)

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5. *The plaintiff is entitled to costs, to be agreed or taxed.*

Mamata v 'Akolo

Supreme Court, Nuku'alofa
Ford J
F 86/2000

18 September, 12 November 2001; 15 November 2001

Family law – divorce application – granted on basis of unreasonable behaviour
Practice and procedure – application to amend petition – not bona fide so application refused

The parties were married at Nuku'alofa on 17 June 1999. On 27 April 2000 the petitioner gave birth to a son. The couple separated on 15 September 2000 and on 26 September 2000 the wife filed for divorce on the grounds that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with him. On 5 October 2000, the petitioner, without her husband's knowledge, took her young son to New Zealand. She told the court that she went to Auckland to reside with her mother's sister. She thereafter made no attempt to contact her husband. On 11 December 2000 the petitioner telephoned her supervisor at the Tonga Communications Corporation, Hon Luani, and asked for more time off work. He spoke to her about the separation and he went and got her husband and put him on the phone and he then left the room. Over the next few weeks the respondent telephoned her and sent her a total of $400. The petitioner told her husband that she was pregnant when she had left Tonga back in October. The last telephone communication between the couple was in early March 2001. On 8 May 2001 she gave birth to another son and returned to Tonga on 3 July 2001. By this time the respondent was cohabiting with the co-respondent, Popua Moa. On 10 July, the petitioner filed an application in the Magistrates' Court for maintenance. The magistrate ordered the husband to pay $10 per week for the wife's maintenance and $18 per week for each child, making a total maintenance payment of $46 per week. The petitioner told the court that she had applied for maintenance of $250 per week. On 13 August 2001 the wife made ex parte application to amend her petition to allege adultery and claim damages in the sum of $1000 from the intended co-respondent, Popua Moa.

Held:

1. The Court refused the application for leave to amend her petition on two grounds: the application was devoid of merit; and the Court did not accept that it was a bona fide application.

2. When the petitioner failed to secure the maintenance award that she sought from the magistrate, she filed her application for leave to seek damages from the co-respondent. That did not give rise to a bona fide application.
3. As to the merit of the application, damages were not normally awarded for adultery. The remedy was inappropriate because the adultery was merely a symptom, and not the cause, of the breakdown in the marriage.
4. The petitioner was granted a decree nisi on the basis of her petition dated 25 September 2000 on the grounds of the respondent's unreasonable behaviour. Custody of the two children of the family was awarded to the petitioner with reasonable rights of access reserved to the respondent. Each party should bear their own costs.

Cases considered:
'Afa v Tali & Sika [1990] Tonga LR 181
Sugar v Fatafehi & Taholo [1993] Tonga LR 4

Rules considered:
Divorce Rules 1991

Counsel for petitioner : Mr Veikoso
Counsel for respondent : Mr Tu'utafaiva

Judgment

Both the petitioner and the respondent are obviously desirous of a divorce. They have filed separate petitions alleging unreasonable behaviour on the part of the other. The dispute before the court arises out of a recent application by the petitioner for leave to amend the grounds of her petition from unreasonable behaviour to adultery on the part of her husband and she seeks leave to add a co-respondent and claim damages in the sum of $1000 from the named co-respondent. That application was opposed but counsel, very sensibly, agreed that I should reserve my decision on the application to amend until after I had heard the whole of the case and then I should give my decision on the leave application as part of my overall judgment. I propose to follow that approach.

The parties were married at Nuku'alofa on 17 June 1999. The wife was then aged 30 and the husband 22. They both worked at Cable & Wireless — the husband as a telephone operator and the wife as a clerk. On 27 April 2000 the petitioner gave birth to a son, Jason Valentino 'Akolo. The couple separated on 15 September 2000 and on 25 September 2000 the wife filed her petition for divorce on the grounds that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with him.

Significantly, in terms of later developments in the case, the wife pleaded in her petition that:

> *"On the 15 September 2000, the petitioner then left the respondent, and have made up her mind* ***to separated the respondent for the rest of her life"*** *(sic).*(emphasis added)

The petitioner gave evidence about the husband's conduct which she alleged forced her to leave the matrimonial home. She said that the first incident related to a motor vehicle. Her parents, who live in the USA, had sent her $1000 as deposit for a motor vehicle. The couple took out a loan to cover the balance of the purchase price. Arguments arose because the husband did not want the wife's family, particularly her brother, using the car. The wife said that she was very disappointed over her husband's stand and she felt pity for her brother. On one occasion the husband threw the key and key ring at her and told her to get out of the house. The key ring hit her on the thigh causing bruising. On that occasion the wife took the child and left the matrimonial home for a week.

The petitioner said that after she returned home she found that her husband had torn up most of her clothing, including pyjamas that her mother had given her. He had also cut up a kiekie which had been a gift from her sister, Ilai'saame. The sister gave evidence and said that after she learned that the respondent had cut up the kiekie she had given the petitioner, she called in the police. Ilai'saame then described a confrontation which had taken place between herself, the respondent and the respondent's mother. The sister's use of what I found to be disgusting and totally offensive language on that occasion was not something that she should be proud of and it no doubt simply added to the acrimony between the parties. The court was totally unimpressed with Ilai'saame's evidence. Her provocative conduct hastened the demise of an obviously fragile marriage.

There was another incident in which the respondent had abused the petitioner's brother in front of the petitioner and the petitioner explained to the court that in terms of Tongan culture, such behaviour was deeply offensive. Following that particular incident, the husband told the petitioner to pack her things and move back to her family and he kicked her on the back causing bruising and pain. The petitioner told the court that not long after that incident she took her young son and moved back to live with her family. That was on 15 September 2000.

On 26 September 2000, the petitioner filed her petition for divorce based on unreasonable behaviour. The petition was served on the husband the following day, 27 September 2000.

The respondent, through his counsel Mr Tu'utafaiva, did not dispute the allegations of unreasonable behaviour and he did not oppose the petition based on those grounds. The matter did not end there, however.

On 5 October 2000, the petitioner, without her husband's knowledge, took her young son to New Zealand. She told the court that she went to Auckland to reside with her mother's sister. She thereafter made no attempt to contact her husband.

On 11 December 2000 the petitioner telephoned her supervisor at the Tonga Communications Corporation, Hon Luani, and asked for more time off work. Hon Luani gave evidence. He said that the petitioner was supposed to have returned to work in December but she telephoned him on 11 December from New Zealand and asked if she could extend her leave until January. Hon Luani told the court that he had heard about the separation and so he asked the petitioner during the telephone call whether it was true. She told him that it was. He then advised her in quite strong terms that she should consider a reconciliation with her husband for the sake of the child. He said that she appeared to "mellow down" and so he went and got her husband and put him on the phone and he then left the room.

Describing this telephone conversation with her husband, the petitioner said that he was angry with her and asked her why she had gone to New Zealand. She said that she told him that she had decided to spend her leave in New Zealand with the child before going back to Tonga. In the course of the telephone conversation, she gave her husband her telephone number and the evidence showed that he then telephoned her on a number of occasions over the following few weeks or so. On 23 December he sent her $200; on 10 January he sent her $100 and on 25 January he sent her another $100.

Although the evidence is not clear, it appears that in one of their telephone conversations, the petitioner told her husband that she was pregnant and that she had, in fact, been pregnant when she had left Tonga back in October. The last telephone communication between the couple appears to have been in early March 2001. The petitioner continued to remain in New Zealand. On 8 May 2001 she gave birth to another son, Theophilus Roger Rhiner 'Akolo. She eventually returned to Tonga on 3 July 2001.

The petitioner told the court that by the time she returned to Tonga, the respondent was cohabiting with the co-respondent, Popua Moa, but had it not been for that, then she would have resumed cohabitation with her husband. She admitted that when she had left the matrimonial home back in September 2000, she then had no intention of resuming cohabitation with her husband but she told the court that following her telephone conversation with Hon Luani on 11 December, she was thinking of resuming cohabitation again. She said that she suspected in about February that her husband was associating with Popua because when she tried to telephone him one day about that time she was told by the operator that he was out at lunch with Popua. When she put the allegation to her husband, however, in what was probably their final telephone conversation in early March, he denied any affair.

The petitioner never contacted her husband after that nor did she try and speak to him after she returned to Tonga on 3 July 2001. On 9 July, she was served with a petition for divorce that had been filed by her husband on 29 June 2001. Part of the unreasonable behaviour relied upon by the husband in that petition was the wife's decision to go to New Zealand without his knowledge. That petition has been put on hold pending the outcome of the present case.

On 10 July, the petitioner filed an application in the Magistrates' Court for maintenance and a hearing was held on 20 July. The magistrate delivered his decision on 3 August 2001. He ordered the husband to pay $10 per week for the wife's maintenance and $18 per week for each child, making a total maintenance payment of $46 per week. The petitioner told the court that she had applied for maintenance of $250 per week.

The hearing date for the wife's petition had been fixed by the court back in February. On 13 August 2001 the wife made ex parte application to amend her petition to allege adultery and claim damages in the sum of $1000 from the intended co-respondent, Popua Moa. The divorce rules provided that after a petition has been served it can only be amended with the leave of the court. No guidelines are laid down in the rules as to how the court should exercise its discretion when considering an application to amend but I would grant leave if I was satisfied that it was in the interests of justice to do so.

In this case, I propose to turn down the application for leave to amend for two main reasons. First, I am in no doubt at all that the application is totally devoid of merit. Secondly, I do not accept that it is a bona fide application.

As to the bona fides of the application, it is significant in my view that the petitioner did not seek leave to amend back in February or March when she says that she first suspected an affair. Nor did she seek leave after she returned to Tonga even though she wasted no time at that stage in instructing a lawyer to initiate maintenance proceedings in the Magistrates' Court. After listening to her evidence, I had no difficulty in concluding that her real reason for seeking leave to amend the petition to include the damages claim was her bitter disappointment over the maintenance award made by the magistrate. When the petitioner failed to secure the maintenance award that she was seeking from the magistrate, she filed her application for leave to seek damages from the co-respondent. To my mind that scenario does not give rise to a bona fide application.

Turning now to the merits, the law in Tonga on claims for damages for adultery is clear. The principles were stated by Webster J in *'Afa v Tali & Sika* [1990] Tonga LR 181. Damages are not normally awarded unless there is clear evidence that the co-respondent's conduct brought about the separation. Webster J said:

> *"Although permitted by law, such claims for damages are most uncommon and very infrequent in Tonga."*

Eleven years later that proposition continues to hold true. If anything, the pendulum has moved even further against the granting of such relief. As Webster J recognised, so often the remedy is inappropriate because the adultery is merely a symptom, and not the cause, of the breakdown in the marriage.

In this case, although the application does not mention a date when the adultery is alleged to have commenced, it was clearly many months after the parties had, in fact, separated. The petitioner's conduct in leaving Tonga on 5 October 2000 and taking the child with her to New Zealand without any consultation with her husband shows clearly that, so far as she was concerned, the marriage was over — finished. I do not accept that following her telephone conversation with Hon Luani she entertained any serious prospects of a reconciliation with her husband. She may have considered the notion for a short time but her behaviour in continuing to stay in New Zealand while taking no action to withdraw the divorce petition belies any notion of a serious change of heart on her part. There was no need for her to stay in New Zealand. She conceded that much in cross-examination. Her conduct in remaining in that country until July 2001 is consistent with her resolve, as expressed in the final paragraph of her original petition filed back into September 2000, to remain separated from the respondent, "for the rest of her life".

I, therefore, decline the application for leave to amend the petition and add that even had I been persuaded to allow the same, I would not have awarded any damages against the co-respondent. On the evidence before me, this marriage was over long before the co-respondent ever arrived on the scene.

I will grant the petitioner a decree nisi on the basis of her petition dated 25 September 2000 on the grounds of the respondent's unreasonable behaviour. I award custody of the two children of the family to the petitioner with reasonable rights of access reserved to the respondent.

As I indicated to counsel during the hearing, I am not prepared to entertain the petitioner's application for an increase in maintenance. In *Sugar v Fatafehi & Taholo* [1993] Tonga LR 4, this Court warned counsel that the Divorce Rules 1991 must be complied with to the letter if maintenance orders are going to be sought in conjunction with a divorce petition. That procedure has not been followed in the present case and I do not propose to treat it as an exception to the rule. In any event, as counsel is aware, there are other options open to his client should she wish to pursue the matter.

As I have found the application to be without merit, it would normally follow that I would award costs to the respondent. In this case, however, taking the couple's relevant circumstances into account, I order that each party shall bear their own costs.

Pacific Royale Hotel Ltd v Teta Tours

Supreme Court, Nuku'alofa
Ward CJ
C 901/00

1, 2, 19, 20 November 2001; 28 November 2001

Creditors' remedies – proof of debt – counterclaim

The plaintiff company owned and ran the Pacific Royale Hotel in Tuafa'ahau Road in Nuku'alofa (the Hotel) and the defendant company (Teta) provided tourist services. In about 1981 the two companies entered into an oral agreement under which the Hotel supplied accommodation to tourists on the instructions of Teta. Teta would pay the cost of that accommodation and the Hotel was to send Teta a statement of account from time to time of the amount due. The plaintiff claimed a total of $7,936.16 for accommodation provided for Teta's customers by the Hotel. A number of specific debts were set out. The defendant denied some of the claim but admitted all the remainder apart from two debts. In a counter claim, Teta claimed total payments of $5,000 between January and November 1998 and also sought payment of a total of $666 from the Hotel for airport transfers it had provided for the hotel's clients from June to September 1999. The plaintiff admitted the payments of $5000 but denied the sums for airport transfers.

Held:

1. The plaintiff's evidence alone did not satisfy the burden of proving the debt carried forward from 1997. However, the evidence of the payments and the dates and sums in which they were paid satisfied the Court on a balance of probabilities that they were paid because of the outstanding balance and had to be paid to ensure the Hotel continued to take Teta's clients. The court held that there was an outstanding sum due and carried forward from 1997 of $3050.19, that the defendant had accepted its liability for that sum, and part of the $5000 paid in 1998 was to satisfy it.
2. As to the remainder of the sums in the statement of accounts for 1998, the Court did not accept that the plaintiff established any apart from those supported by the letter of 11 March and those for Yokio, Noriko, and Kaneko. Those were all admitted by the defendant and totalled $3088.52. Together with the $3050.19, the total sum owed by Teta up to the end of 1998 was $6138.71 towards which Teta paid $5000 leaving an outstanding liability for that period of $1138.71.

3. As to the debts under paragraphs 6 to 19, the defence admitted all but the two for which there were no vouchers. The two denied by the defendant total $347.88 and have no voucher to support them. The plaintiff offered no other evidence to support them and so they were not proved. The total claimed for paragraphs 6 to 19 was $5593.68 and when the sums not supported by vouchers was taken away that left a total of $5245.80 for which the defendant was liable.
4. With respect to the counterclaim the burden was on the defendant to prove that. The defendant could not produce vouchers to support the claim of $666 for airport transfers so that claim failed.
5. The defendant's pleadings, by simply denying the sum in paragraph 5 of the claim, did not adequately disclose the extent to which it was admitted. Had that been disclosed at an early stage, the case may have settled. In the circumstances the parties should bear their own costs.

Counsel for plaintiff : Mr Kaufusi
Counsel for defendant : Mr Vaipulu

Judgment

The plaintiff company owns and runs the Pacific Royale Hotel in Tuafa'ahau Road in Nuku'alofa (the Hotel) and the defendant company (Teta) provides tourist services.

It is agreed that in about 1981 the two companies entered into an oral agreement under which the Hotel would supply accommodation to tourists on the instructions of Teta. Teta would pay the cost of that accommodation and the Hotel was to send Teta a statement of account from time to time of the amount due.

It appeared on the evidence that this arrangement has had its problems and there was reference to a court case between the parties that was brought in 1993 for debts due under this agreement.

This claim is for a total of $7,936.16 for accommodation provided for Teta's customers by the Hotel. The statement of claim sets out a number of specific debts. They fall into two groups. The first (paragraph 5) is for a total of $2,341.53 but amended during the trial to $2,474.24 "for accommodation services rendered in accordance with the agreement up to" 1 December 1998. Most of those were bookings for a group who arrived by air in late April 1998 to join a cruise ship. The second group was for various guests at the Hotel for the period from 21 December 1998 to 25 November 1999 (paragraphs 6 to 19) which totalled $5594.63. The total with the amended sum under paragraph 5 became $8,068.87.

The defence filed denied the money due under paragraph 5 but admitted all the remainder apart from the two debts averred in paragraphs 14 and 15. In a counter claim, Teta claimed total payments of $5,000.00 between January and November 1998 (paragraphs 1 to 5) and also sought payment of a total of $666.00 from the Hotel for airport transfers it had provided for the hotel's clients from June to September 1999 (paragraph 6).

The plaintiff admits the payments of $5000.00 but denies that the sums for airport transfers.

The plaintiff's case was that, at the end of 1997, there was an outstanding sum due from Teta of $3,050.19. There had been some problem with payments but the operating manager of the Hotel, Mrs Ramanlal, told the court that Teta had agreed the outstanding sum and so the Hotel continued to take Teta's guests in 1998. In the first half of that year, from 23 January to 20 July, they took a number of guests most of whom were the members of the cruise group. The plaintiff has produced a letter from Teta dated 11 March 1998 listing the names of the cruise group and the dates they were to be provided with accommodation.

The amount due for the balance carried over from 1997 and the first seven months of 1998 was set out in a statement of accounts which the plaintiff sent to Teta. It was not paid.

Included in that statement and debited from the total sum owing are the sums listed in paragraphs 1 to 5 of the counter claim and admitted by the plaintiff. Those payments, as shown on the statement of accounts, were as follows:

19.01.98	$1,000
27.04.98	$2,000
10.06.98	$1,000
29.09.98	$500
12.11.98	$500
	— **a total of $5,000**.

They were deducted from the total sum on the statement of account leaving an outstanding sum of $2474.24.

This account was not paid and so the Hotel stopped taking Teta's clients after July 1998 but, by the end of the year, the part payments were such that the Hotel started taking guests again on 21 December 1998 and through 1999. Those guests are referred to in paragraphs 6 to 19 and are largely admitted by the defendant.

Mrs Ramanlal told the court that there was a voucher system used between Teta and themselves. A guest who arrived with a voucher for his accommodation would give it to the Hotel staff who retained it. When the invoice was sent to Teta, the voucher was attached.

The invoices for 1999 were sent with a copy of the voucher but those for 1998 had no such voucher with one exception. Mrs Ramanlal said that was because the hotel had returned the only copy and they were therefore unable to produce them. It would be fair to say that their accounting system in 1998 appears to have been less than satisfactory.

Teta's attitude to the account for 1998 has been that it will pay any sums for which it has vouchers. As has been stated, there is only one for $506 under the name of Kaneko. However, Mr Vaipulu, for the defendants, has also agreed that they accept liability for any which correspond to the names of the cruise group in the letter of 11 March.

The defendant denies it has ever admitted the sum carried over from 1997 or that there was any debt left unpaid from that time. Mr Vaipulu points out that there is no evidence of the basis of that debt apart from the plaintiff's own statement of account. The plaintiff points out that, when Teta was sent that statement, it did not question it. The plaintiff cannot produce any evidence to support it except to assert that it was orally admitted by the defendant. The burden is on the plaintiff and I need more evidence before I can accept this figure.

The Hotel accounts for 1998 appear to be muddled and inconsistent. The manager of the Hotel, when asked about the earlier accounts, tended to resort to guesswork and speculation to try and explain any discrepancies in the accounts revealed in cross-examination. The Hotel's reception supervisor was also called and I am bound to say that she also was not clear about the accounts and similarly prone to resort to guesswork when she was unsure.

The operations manager of Teta, Mr 'Aho, also gave evidence and it would appear his company's accounts were, in 1998, in no better state than those of the Hotel. He came to court to explain his case without having looked at his accounts. After an adjournment, he was able to agree that, in addition to Kaneko and the cruise group bills that were supported by the 11 March letter, he also found documents to support the bills for Yokio and Noriko. That means that, of the total sums claimed for 1998, the defence admit $3088.52.

As has been said, during that period Teta paid $5000 and its case is that that sum was to pay the debts they admit for 1998 and future debts. If that is the case, they had overpaid by $1911.48 by the end of 1998.

Much turns on the reason for those payments of $5000.

The plaintiff suggests that the payments were made to clear the $3050.19 carried over and part of the fresh debts incurred in 1998. Teta says that, as they are not liable for any sum from 1997, the $5000 was solely for the 1998 debt.

Mr 'Aho explained that the first $1000 was a payment made to Soane Ramanlal, with whom the original arrangement for the cruise group had been made, to pay for guests who had already been accommodated in 1998 and was paid because Soane told him he had a problem with the Hotel's bank account. It was nothing to do with the $3050.19 because there was, he claimed, no such outstanding sum due. He later changed that to say the first $1000 was required by Soane as a deposit for guests that were due to come in 1998 including Yokio and Noriko. It was, he said, to ensure there would be rooms available.

He said the next $2000 was to pay for the cruising group and the subsequent sums were for other guests at the hotel and those which were to come in the future. He was largely paying to help Soane out and he kept no check although he realised he had probably overpaid a little and, indeed, hinted to Soane that he believed he had. Soane did not give evidence.

I find considerable problems with his explanation. If there was no balance brought forward from 1997, when he paid the first $1000 there had not been any Teta guests accommodated at the Hotel. The first were due 4 days later. By the time the next $2000 was paid, the cruise group's bills were known and amounted to $2050. If the second payment was specifically for them, why not pay the actual amount? However, by that time, as he agreed after looking at his accounts and accepting the debt for Yokio and Noriko, the total due was $2582.52. Why did he overpay at that stage by more that $400? On the other hand, if his suggestion that the first $1000 was a deposit is correct, it would have already been deducted and the total bill presented for payment would have been $1582.52.

As has been pointed out, he only admits liability for one more payment in 1998 after the cruise group, that of Kaneko of $506. He had already paid $417 of that as a result of his earlier overpayment. All that was needed to clear his whole indebtedness at that time was a payment of $89. Why then would he go on and pay a further $2000 that year? Teta's record of payments had caused problems with the hotel in the past

yet he tells the court that he was happy to go on paying these sums against possible future guests. Although he realised he was paying too much, he did not even bother to check how much.

If the final $2000 was paid against future guests, it is remarkable that this was at the time the Hotel had again stopped taking his guests because of failure to pay. On his case, he was in credit at that time in the sum of nearly $2000.

I have stated that the plaintiff's evidence alone did not satisfy the burden of proving the debt carried forward from 1997. However, the evidence of these payments and the dates and sums in which they were paid satisfy me on a balance of probabilities that they were paid because of the outstanding balance and had to be paid to ensure the Hotel continued to take Teta's clients in time for the cruise group. I accept, therefore, that there was an outstanding sum due and carried forward from 1997 of $3050.19, that the defendant had accepted its liability for that sum and part of the $5000.00 paid in 1998 was to satisfy it.

As to the remainder of the sums in the statement of accounts for 1998, I do not accept that the plaintiff has been able to establish any apart from those supported by the letter of 11 March and those for Yokio, Noriko and Kaneko. Those are all admitted by the defendant and total $3088.52. Together with the $3050.19, the total sum owed by Teta up to the end of 1998 is therefore $6138.71 towards which Teta has paid $5000 leaving an outstanding liability for that period of $1138.71.

The debts under paragraphs 6 to 19 can be dealt with very shortly. The defence has admitted all but the two for which there are no vouchers. Whatever the shortcomings of the billing system in the hotel in 1998, it is clear they had been solved in 1999 so that each invoice was accompanied by a copy of the voucher. As a result the plaintiff could produce further copies of the vouchers to support its claim. The two denied by the defendant total $347.88 and have no voucher to support them. The plaintiff could offer no other evidence to support them and so I do not find them proved. The total claimed for paragraphs 6 to 19 is $5593.68. Taking away the sums not supported by vouchers leaves a total of $5245.80 for which the defendant is liable.

Thus on the claim I find the defendant is liable for a total sum of $6384.51.

The plaintiff also claimed interest at the rate of 20% on any unpaid sum. It was pleaded that the agreement in 1981 included such a provision but the evidence of Mrs Ramanlal was that is was simply a policy they had in relation to any bills which had remained unpaid for three months. There was no evidence to support the suggestion that it was part of any agreement and it is refused.

The defendant counterclaimed on the basis that it had paid the $5000 towards the admitted debts in paragraphs 6 to 19. It also claimed a total of $666 for the costs of airport transfers undertaken for the hotel's guests. After deduction of the total sum of $5666 from the admitted part of the claim, it sought payment of a balance of $419.25.

I have already found on the evidence that the $5000 was payment also for the outstanding debt from 1997. The plaintiff denies liability for the airport transfers on the basis that the charges were all paid.

Mr 'Aho explained that his company bus would sometimes pick up passengers at the airport who were staying at the hotel. This was sometimes because the hotel bus was not there or there were too many passengers. When that happened they would leave a voucher with the hotel afterwards. They then sent an invoice to the hotel. He

produced invoices sent at the beginning of July, August, September and October 1999 which total $666 which he says were not paid.

The evidence of Mrs Ramanlal on this was unclear. She appeared to agree that they did occasionally arrange for Teta to bring their guests and she insisted they had paid those charges. She also stated that, if ever Teta brought anyone, it was up to the driver to collect the charge from the passenger. Her defence was that all the sums had been paid. When she was shown the invoices she said she had not seen them but agreed they may have gone to another member of her staff.

The burden is on the defendant to prove the counterclaim. Mr 'Aho referred to vouchers but produced none. On the same basis that I have not allowed sums unsupported by vouchers in the case of the Plaintiff's claim, I am unable to find these debts proved in the absence of any other evidence. The defendant's claim for the $666 for airport transfers fails.

I have not allowed the plaintiff's claim for interest under the alleged term of the agreement but I allow interest at the rate of 10% from the date of the filing of the writ.

I was advised by counsel for the defendant that he had offered $2000 in addition to the admissions in the pleadings in an attempt to settle this case. It was not accepted.

The total sum admitted on the pleadings is $5245.80. The result of three days trial has been to establish the defendant's liability to a further $1138.71 which is well under the sum offered in settlement. In such circumstances, the court may consider whether to order the successful party to pay the costs of the other side notwithstanding its success in the action. Had the defendant also paid the admitted and offered sum into court at the time, I should undoubtedly have ordered the plaintiff to pay the defence costs thereafter but that was not done.

I also consider that the defendant's pleadings, by simply denying the sum in paragraph 5 of the claim, did not adequately disclose the extent to which it was admitted. Had that been disclosed at an early stage, this case may have settled. In the circumstances, I feel the proper order is that the parties shall bear their own costs.

R v Filise

Supreme Court, Nuku'alofa
Ford J
Cr 103/2001

29, 30 November 2001; 3 December 2001

Criminal law – indecent assault – Crown to prove indecent intention – failed to so prove – acquittal

On the evening of 14 April the 22 year old complainant, an employee at the Molisi store, was standing out on the raised concrete ramp in front of the store. At the same time the accused was walking along the footpath towards the ramp area with a friend. It was alleged that as he reached the complainant the accused dragged his left hand across the complainant's thighs and vaginal area. She slapped him on the back of his head. The accused immediately became aggressive and climbed the ramp chasing her into the store swearing and threatening her. A security guard eventually forced the accused outside the store and the complainant, who was also outside again at that stage, was able to wave down a passing policeman who proceeded to take the accused into custody. The accused was charged with one count of indecent assault.

Held:

1. In most indecent assault cases the factual circumstances of the alleged assault were inherently indecent. The situation was different where the actions that were alleged to have made up the indecent assault were equivocal. In those circumstances it was necessary to then go on to consider the accused's motive or intent. The Crown must establish that the accused knew that the touching was indecent and that he intended to do it.
2. There was no obligation on an accused to prove that he did not have the requisite intention. It was for the Crown to prove that the accused intended to commit an indecent assault. The Crown failed to do so. The accused was acquitted.

Cases considered:

R v C [1992] Crim LR 642
R v Court [1989] 1 AC 28

Counsel for Crown : Mr Fusitu'a
Counsel for defendant : Mr 'Etika

Judgment

The accused is charged with one count of indecent assault. The particulars in the indictment allege that on the 14th of April 2001 at Kolofo'ou he indecently assaulted the complainant by touching her vaginal area and other parts of her body without her consent.

The assault is alleged to have taken place outside the Molisi Tonga store in Kolofo'ou opposite the Talamahu market. The Crown's case was that sometime between 6:30 pm and 7 pm on the evening of 14 April, which was a Saturday, the 22 year old complainant, who is an employee at the Molisi store, was standing out on the raised concrete ramp in front of the store waiting for someone. At the same time the accused was walking along the footpath towards the ramp area with a friend. It is alleged that as he reached the complainant, who was standing on the raised ramp above him leaning on the safety rail, the accused dragged his left hand across the complainant's thighs and vaginal area.

The complainant gave evidence and basically confirmed what Crown counsel had said in his opening. She said that she was leaning on the rail and it was touching her stomach. She had been talking to a young boy, Mafi Paea, whose father was in charge of security at Molisis. Mafi was also out on the deck. He was sitting on a chair facing the main entrance door to the store. He was sitting only a short distance from where the complainant was standing and he was leaning back against the safety rails.

The complainant said that she was standing facing towards the market area across the road and she had noticed the two boys on the footpath approaching from her right. She then looked around towards her left and next thing she recalled was suddenly feeling someone's hand sliding across her right thigh, her genital area and then her left thigh. She was wearing a uniform top and skirt and the hand was on the outside of her skirt.

The complainant told the court that she immediately looked down and saw the face of the person, who she identified as the accused, and she slapped him on the back of his head. She said that she felt shocked and disgusted over what had happened but the accused immediately became aggressive and climbed the ramp chasing her into the shop swearing and threatening her. A security guard eventually forced the accused outside the store and the complainant, who was also outside again at that stage, was able to wave down a passing policeman who proceeded to take the accused into custody. The investigating police officer told the court that the accused was later charged with indecent assault and drunkenness, but the latter charge is not before this Court.

The Crown accepted that, as in any criminal case, it has the onus of establishing every element of the charge beyond reasonable doubt. There is no obligation on an accused to make any statement or to give evidence on his own behalf but in this particular case the accused elected to give evidence and he also made a statement to the police which was produced by the investigating officer. In his statement to the police the accused said that he had earlier been drinking alcohol with some Kolofo'ou kids and then he and his friend Viliami had curry at the curry store in front of the Polynesian airline office before proceeding to walk into town along the footpath running in front of Molisi's store. The accused told the police that he and Viliami were both in a drunken state but he noticed the complainant standing outside the store on the concrete ramp. He then went on to say that when he saw the girl he dragged his left hand along the rail and it came in contact with the girl's vagina and suddenly he

felt a slap on the back of his head. He was asked by the police officer whether he knew that his hand would come into contact with the complainant's vaginal area and he answered, "yes, I already knew that my hand would hit … (and he names the complainant) vagina."

In his evidence in this Court the accused, who is a 28 year old baker with Cowley's Bakery, said that he was dragging his left hand along the rail and his other hand was hanging on to his friend Viliami. He demonstrated how he had been "dragging his hand". His hand was horizontal, face down on the top of the rail. He said that he had not noticed the complainant and the first time he realised that his hand had come into contact with her was when he received the slap on the back of the head. He said that all he had felt with his hand as he walked past was her clothing.

The Crown called Mafi Paea, the 14-year-old schoolboy who had been sitting in a chair on the concrete ramp outside Molisis when the incident occurred. Paea said that he had heard the boys approaching and he had looked around and was watching them. He said that they changed places as they approached the end of the ramp and the accused moved to the side of the pavement closest to the ramp. He said that he saw the accused then drag his hand along the top of the safety rail and his hand was open in a vertical position facing the direction of his travel with his fingers slightly apart. The witness said that at the same time the complainant, who was between him and the approaching boys, was leaning on the rail and her contact point with the rail was around about her private parts. He said that the complainant was looking across the road towards the market and he then described how the accused did not take his hand off the rail but he dragged it across the front of the complainant's thighs and her private parts.

The witness was cross-examined in some detail about the complainant's point of contact with the rail and the point of contact made by the accused's hand. In cross-examination he conceded that if the complainant had said in her evidence that the rail was about up to her stomach then her evidence was most likely correct. The witness demonstrated to the court his recollection of where the rail came to and where the accused's hand had dragged across the complainant's body. He indicated in his demonstration that the rail had come up to just above the complainant's stomach and that the accused had dragged his hand across her body slightly lower down, in her lower stomach area.

Mafi Paea was the only independent witness and the Crown obviously regarded his evidence as significant. On the Crown's application, the court agreed to take quite a lengthy adjournment on the first day of the hearing when Paea failed to appear so that the Crown could ascertain his whereabouts. In his evidence in chief, Paea agreed that he had been an eyewitness to the whole incident.

One part of Mafi Paea's evidence, which he was quite adamant about, was that he had seen the accused dragging his open hand in a vertical position along the top of the rail and when he reached the complainant he did not move his hand away but he continued to drag it along the top of the rail, touching her body as he did so, until the point where the complainant slapped him across the back of his head. The significance of this evidence emerged at the end of the trial when the court was invited by counsel to take a view of the scene. This involved an inspection of the ramp area outside Molisi's store.

Although the complainant was not present at that stage, there were a number of other people around the ramp area and what clearly emerged from the scene

inspection was that if the complainant, who is a reasonably short person and certainly of no more than average height, was standing on the flat area at the top of the ramp leaning against the top safety rail as she claimed, then there is no way that the accused could have dragged his open hand, whether in a horizontal or vertical position, along the rail so that it came in contact with her vaginal area. The only way that the accused's hand could have made contact with the complainant's private parts was if he had lowered it below the rail and although the complainant had indicated in cross-examination that that is what had happened, it is not what the independent Crown witness told the court he had seen and I am accordingly left with a very real doubt about that aspect of the complainant's evidence. The accused must be given the benefit of any such doubt.

The accused was asked in cross-examination why he had said in his statement to the police that he "hit the girl's vagina". He said that he could not recall it but that is what the policeman told him had happened and the policeman had said that if he did not agree with the statement being included then he would be held longer at the police station. Normally, I would have placed little reliance on this evidence because the allegation had not been put to the police officer for his comments, but the point came up in cross-examination — not in the accused's evidence in chief and, given my conclusions following the scene inspection, I am inclined to accept what the accused says about this matter.

On the evidence, therefore, of the independent witness, who appeared to me to be doing his best to give the court his honest recollection of what had happened, I cannot accept that the touching was in the complainant's vaginal area as alleged.

That is not the end of the matter, however. Counsel for the accused accepted that the evidence disclosed that there had been an assault on the complainant and that she had not consented to what had occurred. The question then arises as to whether that assault was indecent even though I have found on the evidence that the touching was not in the complainant's vaginal area.

In most indecent assault cases that come before this Court the factual circumstances of the alleged assault are inherently indecent. If, for example, in this case I had concluded that the accused had intentionally touched the complainant's vagina then that act would have undoubtedly been indecent and so long as I was satisfied that the complainant had not consented and that the accused had not honestly believed that she had consented then guilt would have been established.

The situation is different, however, where the actions that are alleged to have made up the indecent assault are equivocal. In those circumstances it is necessary to then go on to consider the accused's motive or intent. The Crown must be able to establish that the accused knew that the touching was indecent and that he intended to do it.

That principle arises out of the decision of the House of Lords in *R v Court* [1989] 1 AC 28. Commenting on that decision and the subsequent decision of the English Court of Appeal Criminal Division in *R v C* [1992] Crim LR 642, Professor Smith, on page 643 of the publication, accurately in my respectful view, sums up the current legal position in the following terms:

> *"Indecent assault (meaning battery) is a single offence but since* ***Court*** *it has been established that it takes two forms. (i) Where the manner or circumstances of the assault are unambiguously indecent the assault is an*

indecent assault whether the offender has an indecent purpose or not, provided only that he is aware that the elements of indecency exist, or may exist. (ii) Where the manner or circumstances of an assault are ambiguous, the assault is an indecent assault only if the offender has an indecent purpose ... Where it is alleged that an ambiguous act is an indecent assault the prosecution must prove an indecent purpose. In the absence of that purpose the only offence that has been committed is a common assault."

In the present case there was one particular aspect of the evidence which counsel for the accused highlighted in his helpful written submissions as being relevant to ascertaining the intention of the accused. It is the evidence of his reaction after the complainant slapped him across the back of the head. The complainant said in her evidence that he all of a sudden became angry. He climbed up on to the ramp and chased her into the shop swearing and abusing her. Counsel submitted that this particularly aggressive reaction was consistent with the indignation one would expect from an innocent person rather than one with a guilty mind. Another explanation, of course, is that it may simply have been an arrogant aggressive reaction from a person under the influence of alcohol.

Defence counsel submitted that the accused did not have any intention to indecently assault the complainant but the touching was done accidentally or recklessly while he walked past her dragging his hand along the safety rail. Having considered that aspect of the evidence carefully and having observed the accused giving his evidence, I am inclined to accept counsel's submission as being the most likely scenario. In any event, there is no obligation on an accused to have to prove that he did not have the requisite intention. It is for the Crown to prove that the accused intended to commit an indecent assault. In my judgment, for the reasons I have expressed, regrettably at some length, it has failed to do so.

The accused is accordingly acquitted.

Prescott v Police

Supreme Court, Nuku'alofa
Ford J
Cr 21/01

30 November 2001; 5 December 2001

Sentencing – appeal against severity of sentence – custodial sentence too severe – appeal allowed

On the night of Thursday 24 May 2001 the accused had been drinking with friends at Longolongo. He then drove his car towards Tofoa looking for a kava party. While he was driving he was listening to the music and when he tried to change a cassette he swerved off the road and collided with a power pole. He pleaded guilty to driving under the influence and reckless driving and was sentenced to two months in prison and a fine of $100. He appealed against the sentence.

Held:

1. In general, unless the circumstances are exceptional in some way, a custodial sentence was unlikely to be upheld in respect of a driving under the influence charge, unless the circumstances of the offending reveal a high level of intoxication combined with either a record of similar offending in the past or especially dangerous driving, or both. Even in those relatively rare cases where a custodial sentence for a first-time offender would be appropriate, the magistrate should still consider whether, in all the circumstances, a suspended sentence was called for.
2. The appeal was allowed and the case was referred back to the Magistrates' Court for re-sentencing before another magistrate.

Cases considered:

Matekuolava v R [2001] Tonga LR 276
Narayan v Police [2001] Tonga LR 270

Counsel for appellant : Mrs Vaihu
Counsel for Crown : Miss Tupou

Judgment

Earlier this year three cases came on appeal to this Court from decisions of the same magistrate. They each involved a charge of driving a motor vehicle while under the influence of alcohol. None of the appellants had any previous convictions and

they all had pleaded guilty. On the driving under the influence charge, each appellant had been sentenced to 2 months imprisonment and disqualified from driving. The other two appeals were heard in October and judgments, allowing the appeals, were given on 2 November. This case is the third of the three appeals referred to. It was not heard until 30 November.

In addition to the driving under the influence charge, the appellant in the present case was charged with reckless driving to which he also pleaded guilty and was fined $100.

At the hearing in the court below on 21 June 2001, the prosecutor outlined the summary of facts. He said that on the night of Thursday 24 May 2001, the accused had been drinking with friends at Longolongo and he then drove his car in a southerly direction towards Tofoa looking for a kava party. While he was driving he was listening to the music on his car radio and while he was trying to change a cassette in his recording machine he swerved off the road and collided with a power pole.

Counsel for the appellant, Mrs Vaihu, appeared at the Magistrates' Court hearing and made submissions in mitigation. She accepted that the defendant was under the influence of alcohol. She told the court that the defendant was a 36 year old married man whose wife had given birth to their first child the previous Saturday. Counsel told the magistrate that the defendant was a taxi driver by occupation and he had no other source of income as his vehicle was off the road awaiting repairs. Counsel pointed out that the defendant was a first-time offender and she went on to invite the court to impose a fine or a suspended sentence.

In passing sentence the learned magistrate said:

> *"As the police prosecutor has said, you were drunk on this night (24/5/01) and you were driving along Vaha'akolo Road and you crashed into the power pole at Tofoa. The Court has to take care of the public and due to the fact that there are so many vehicles nowadays, you must be careful when you are driving in order to protect the lives of the public. Your pleading guilty and no previous record helps the court to lessen the penalty that the court will hand down. So the penalty will be that you will serve 2 months in prison for driving under the influence of alcohol and for reckless driving a fine of $100 to be paid within 2 months, if not 2 months imprisonment."*

The magistrate overlooked the mandatory requirement to cancel the appellant's driving licence and so on 18 July 2001 the appellant was re-called and his driving licence was suspended for a period of one year. No issue is made of the late re-call.

In this Court, Mrs Vaihu for the appellant, said that on the day of the incident the appellant had consumed six bottles of Royal beer over a period of about one hour. She said that there was no evidence that the alcohol had affected his driving in any way prior to the accident. Counsel said that there was no medical report obtained by the police to confirm that the appellant was under the influence of alcohol but he had been charged because the investigating officer had smelt beer on his breath and, when asked, he admitted that he had been drinking. Counsel told the court that the accused had married last year which was late in his life. She said that he had saved up to buy the taxi which was his own vehicle but the family did not have the money to repair it and so the accused is presently working as a security watchman earning $50 per

week. Some impressive references were produced to the court on his behalf. Counsel referred to the appellant's excellent driving record and strongly urged the imposition of a fine or a suspended sentence.

For the Crown, Miss Tupou submitted that the sentence imposed was appropriate to the facts of the case and it fell within the magistrate's discretion. She noted that in addition to the alcohol charge, the appellant had also pleaded guilty to a charge of reckless driving. Crown counsel submitted that it was fortunate that it was only a pole that the appellant had collided with on this occasion and she said that the magistrate was quite entitled to express concern over the increasing number of motor accidents involving alcohol and to give the message to the wider community that drinking and driving will not be tolerated.

In both the other appeals I referred to earlier, *Matekuolava v R* [2001] Tonga LR 276 and *Narayan v Police* [2001] Tonga LR 270, the court had to consider the submission that arises in this case, namely, whether the magistrate had applied the correct sentencing principles. What was of concern in the other cases was that the magistrate had imposed the same custodial sentence of two months imprisonment on each offender even though the circumstances of each offender and of the offending differed considerably.

After reviewing the authorities, I concluded, for the reasons set out in the judgments, that the magistrate appeared to have failed to properly exercise his discretion in accordance with recognised sentencing principles. I do not propose to repeat all that I said in those judgments but in *Narayan v Police* [2001] Tonga LR 270 I set out the approach which magistrate's in the Kingdom should adopt in future in relation to sentencing on driving under the influence charges.

In all the circumstances, it is difficult to avoid the suspicion that in the present case the learned magistrate has simply followed the same approach to sentencing which I was critical of in the other appeals. In other words, as it had been expressed to the court in one of those cases, "the magistrate's mind was fixed on a sentence of imprisonment regardless of the circumstances of the offending and the circumstances of the offender".

In general, unless the circumstances are exceptional in some way, such as where there is an accident involving injury or death for example, a custodial sentence is unlikely to be upheld in respect of a driving under the influence charge, unless the circumstances of the offending reveal a high level of intoxication combined with either a record of similar offending in the past or especially dangerous driving, or both. Even in those, one would hope, relatively rare cases where a custodial sentence for a first-time offender would be appropriate, the magistrate will still need to consider whether, in all the circumstances, a suspended sentence is called for.

I consider that the justice of the case can best be met, therefore, if I simply follow the same approach in this case which I adopted with the other appeals. I propose to allow the appeal and refer the case back to the Magistrates' Court for re-sentencing before another magistrate. I deliberately refrain from making any comments on the succinct submissions presented by both counsel in this Court.

R v Simiki

Supreme Court, Nuku'alofa
Ward CJ
Cr 49-50/01

27-30 November, 5, 6 December 2001; 7 December 2001

Criminal law – criminal defamation – absolute privilege – group petition to the King – not guilty

On 13 September 2000 there was a public meeting where the contents of a proposed petition to the King were read out by the second accused, Vika Pulini, on the direction of the first accused, 'Ofa Simiki. At the time they were representing a group of Tongan retail traders and were the secretary and chairman respectively. The petition arose as a result of concern by a number of Tongan small shopkeepers about apparently widespread undercutting of prices by Chinese shopkeepers and the suspicion that this was because of some form of dishonest dealing with various government departments. The accused were each charged with criminal defamation, contrary to section 5 of the Defamation Act (Cap 33). Trial was by jury and, at the conclusion of the evidence, the Court directed the jury to return a verdict of Not Guilty on the basis that the statements charged were absolutely privileged under section 9(a). The Court now gave its reasons.

Held:

1. The terms of section 11 mean that the decision whether or not the defamatory matter was privileged under section 9 was entirely one for the judge and that issue must be taken away from the jury. The question of whether it arose in the circumstances that gave rise to qualified privilege under section 10 was also for the judge but, where he found that they were made in such circumstances, he must leave it to the jury to decide whether the defendant was actuated by anger, ill-will or other improper motive including lack of bona fides.
2. The right to petition the King was a right of every individual but that did not preclude a number of people deciding to present a joint petition. If a group of people decide to petition the King and delegate it to one of their number to draft on their behalf, how else are they to know the contents before they sign? It would make no difference if the words were read out aloud or each possible signatory was given an individual copy — either would be a publication under the Act.

3. The statements made by the accused on 13 September were protected by section 9 and the action was therefore not maintainable. The accused were in the charge of the jury and it must be directed to return a verdict of not guilty.

Statutes considered:
Constitution of Tonga (Cap 2)
Defamation Act (Cap 33)

Counsel for prosecution	:	Mr Kefu
Counsel for first accused	:	Mr Tu'utafaiva
Counsel for second accused	:	Mr Fakahua

Judgment

The accused are each charged with criminal defamation, contrary to section 5 of the Defamation Act (Cap 33). The charges arise from a public meeting on 13 September 2000 at which the contents of a proposed petition to the King were read out by the second accused, Vika Pulini, on the direction of the first accused, 'Ofa Simiki. At the time they were representing a group of Tongan retail traders and were the secretary and chairman respectively.

The indictment charges that they defamed the Minister of Police and particularises three defamatory statements namely that:

> "1. the Minister and a driver who was in police uniform, went in the Ministerial vehicle to collect money from a Chinese man at 2 am in the morning (sic)
> 2. the Minister of Police and the Immigration Division issue work visas without restriction to the Chinese, and not only that they collect a lot of money from the Chinese
> 3. there was a Chinese person who was issued a visa at the Minister of Police's residence, rather than at the office or during Government's working hours."

Trial was by jury and, at the conclusion of the evidence, I directed the jury to return a verdict of Not Guilty on the basis that the statements charged were absolutely privileged under section 9(a). I explained the position to the jury at the time but stated I would give my reasons in writing later and I now do so.

Briefly the evidence was that, as a result of concern by a number of Tongan small shopkeepers about apparently widespread undercutting of prices by Chinese shopkeepers and the suspicion that this was because of some form of dishonest dealing with various government departments, the first accused called a meeting of Tongan shopkeepers. At the first meeting an ad hoc committee was selected of which she was the chairman. Subsequently the second accused became the secretary.

The court heard evidence of more than one meeting prior to the meeting on 13 September from which the charges arose. From those various meetings the consensus was that they should petition the King about their concerns. The terms of the proposed petition were drafted in a number of meetings of a sub-committee and the suggested draft was read out to a meeting on 4 September. Various suggestions were

made to amend the draft and these were considered subsequently by the sub-committee. The principal amendment appears to have been to omit reference to the Ministry of Health which had previously been named in the draft.

The first accused then put an announcement out on the radio inviting Tongan small shopkeepers and anyone else interested to attend the meting on 13 September. The evidence is that she announced the purpose of the meeting was to read out the petition.

On 13 September, more than seventy people attended the meeting. It started with a prayer and then the first accused made a few opening remarks before telling the audience that she would call on the second accused to read out the petition. She added the sensible request that, if anyone had any questions or comments, they should wait until the petition had been read out in its entirety.

The second accused then stood and read out the petition. At the end, there were various comments from the floor but no proposal that the petition should be further amended. It was then placed on a table for those who wished to sign to be able to do so.

A few days later, the petition with a number of signatures was presented to the Palace Office in what the court was advised is the normal manner of delivering petitions to the King. In fact His Majesty was out of the country at the time and the Prime Minister was Regent. Evidence was lead that it was passed to him.

Although the wording of the petition is different from that of the statements in the indictment, it is accepted by the prosecution that the words stated at the meeting were the actual words of the petition. It is also not disputed that the second accused simply read out the actual petition. The charge of defamation relates only to the 13 September meeting.

The defence does not deny those facts. The accused have pleaded not guilty with the alternative defences that the statements were privileged under sections 9 and 10 of the Act.

Those sections so far as they are relevant to this case read:

> *"9. No criminal or civil proceedings for defamation of character shall be maintainable in respect of any matter stated-*
>
> *(a) in any petition to the King or Legislative Assembly;*
>
> *(b) …"*
>
> *10. No criminal or civil proceedings for defamation of character shall be maintainable in respect of any communication made bona fide by any person in discharge of a legal, moral or social duty or in reference to a matter in which he has an interest and the person to whom such a communication is made has an interest in hearing it unless it is proved that the person making such communication was actuated by anger, ill-will or other improper motive."*

The case was tried by a jury but, in view of the provisions of section 11, I invited counsel to address me on the defence under section 9 before the case went to the jury.

Section 11 provides:

> *"11. (1) Whether a communication was or was not made under any of the circumstances mentioned in either section 9 or section 10 hereof shall be decided by the judge at the trial.*
> *(2) If the judge rules that the communication was made under any of the circumstances enumerated in section 9 hereof he shall enter judgment for the defendant.*
> *(3) If it is ruled by the judge that the communication was made under any of the circumstances mentioned in section 10 hereof then if there is no evidence that the defendant was actuated by anger, ill-will or other improper motive the judge shall direct a verdict for the defendant."*

It appears to me that the terms of section 11 mean that the decision whether or not the defamatory matter is privileged under section 9 is entirely one for the judge and he must take that issue away from the jury. The question of whether it arose in the circumstances that give rise to qualified privilege under section 10 is also for the judge but, where he finds that they were made in such circumstances, he must leave it to the jury to decide whether the defendant was actuated by anger, ill-will or other improper motive including, I would assume, lack of bona fides.

The defence case in relation to section 9 is that the words charged were simply matter stated in the petition and therefore absolutely privileged. I suggested an additional possibility that, even if they were not, the wording of article 8 of the Constitution, which not only gives the right to petition but also to meet and consult concerning those matters, should extend the privilege under section 9 to protect such meetings as well.

Article 8 provides:

> *"All people shall be free to send letters or petitions to the King or Legislative Assembly and to meet and consult concerning matters about which they think it right to petition the King or Legislative Assembly to pass or repeal enactments provided that they meet peaceably without arms and without disorder."*

The argument was, in effect, that the Constitution gives a right to petition the King and, as the Act makes the contents of such a petition privileged, the surrounding right given under the Constitution in relation to the petition should be protected similarly.

On reflection, I think I raised a bad point. Undoubtedly article 8 gives a right to petition the King and also to meet and discuss the reasons for the petition. However the inclusion of such meetings in the article is to allow them even where they are to try and seek a change of the law so long as the meeting is peaceable. The article may be a defence to a possible charge of sedition in relating to such a meeting but, if there is any defence to defamatory statements made and discussed during such meeting, it would need to be one of qualified privilege under section 10. In that case it would be a matter for the jury as to the motive and intentions of the people making the defamatory statements.

The basis of the main submission by the defence was that the statements made and charged were the actual words in the petition and that petition had been drafted

on the direction of the people attending the earlier meetings. The meeting on 13 September was simply to read it out so those people who had requested it would know the contents before deciding whether or not to adopt it as their own by adding their signatures.

Mr Kefu, for the prosecution, accepted, as has been stated, that the words charged were the actual words in the petition but suggests that it only becomes a Petition *to the King* when it is presented at the Palace.

I accept there must be some limit to the privilege under section 9. Clearly the privilege under that section cannot be used as a defence to charges over statements made in weeks of meetings under the claim that the meetings will eventually give rise to a petition.

However, the facts of this case as demonstrated in the evidence are very limited. The earlier meetings are not relevant except to confirm that the meeting on the 13 September was to read out a petition that had been amended from an earlier one discussed and drafted at those previous meetings.

The evidence was that the 13 September meeting was called specifically to read out the final petition. Whilst it was not attended solely by shopkeepers and the announcement had included an invitation to other people interested in the same problem, there is no evidence it included anyone other than the same general section of the community as the previous meetings at which the petition had been first mooted.

A television camera was mentioned by one witness but there is no evidence that the meeting was broadcast or subsequently reported or that the defendants had attempted to use the petition further to blacken the name of the Minister of Police or done anything with it, once the signatures had been appended, other than to deliver it to the Palace. There was no evidence even of any further meeting.

Whatever the position of the earlier meetings, I simply cannot accept that the reading of those words on 13 September was not privileged as part of the matter stated in a petition to the King. That is precisely what they were and the reading was only to inform the people who had requested it of its contents.

The right to petition the King is a right of every individual but that does not preclude a number of people deciding to present a joint petition. In the modern idiom, that has become the popular meaning of the word. If a group of people decide to petition the King and, for obvious practical reasons, delegate it to one of their number to draft on their behalf, how else are they to know the contents before they sign? It would make no difference if the words are read out aloud or each possible signatory is given an individual copy — either would be a publication under the Act.

In this case, as I have stated, there was no evidence that the contents were publicised beyond the group which had requested it. Of course, some of those who heard it did not ultimately sign it but that does not mean the words were communicated to them for any reason other than to inform them of the form of the petition that it was intended to present to the King and which was so presented.

I rule therefore that the statements made by the accused on 13 September as charged are protected by section 9 and the action is therefore not maintainable. Despite the reference to entering judgment in section 11(2), the accused are in the charge of the jury and it must be directed to return a verdict of not guilty.

Tonga Development Bank v Helu

Supreme Court, Nuku'alofa
Ford J
C 870/2000

19 September, 22 October 2001; 10 December 2001

Creditors' remedies – whether defendant received portion of loan – plaintiff established its claim
Equity – burdensome contractual obligations – no relief

The Tongan Development Bank, as plaintiff, issued these proceedings in October 2000 seeking to recover a debt of $18,760.79 which was alleged to be the balance owing at that time by the three defendants under a loan agreement dated 24 November 1997. The first and third defendants took no steps to defend the action and on 23 July 2001 the plaintiff obtained judgment in default against each of them. The second defendant, however, filed a statement of defence. His defence was simply that he had no knowledge of the "existing balance" of $22,355. However, as the second defendant's case unfolded it became clear that he had known all about the existing balance owing under the previous loan agreements when he signed the new agreement in November 1997. Defence counsel then conceded that the existing balance of $22,355 was part of the November 1997 loan agreement and he then proceeded to raise two new points. First, he submitted that the second defendant had not received "a substantial part" of the new advance of $6087 under the November 1997 loan agreement and, secondly, he went on to ask the court to invoke its equitable jurisdiction in the matter so as to give a fair result to the defendant.

Held:

1. In relation to whether the second defendant received "a substantial part" of the $6087, the plaintiff's evidence was accepted and the Court was satisfied that, on the pleadings, the plaintiff established its claim on the balance of probabilities and that it was entitled to judgment.
2. In relation to the equitable jurisdiction, the Court held that equity would not provide relief against contractual obligations which may turn out to be unexpectedly burdensome to one of the parties. The second defendant's last-minute plea for equitable relief was refused.
3. The plaintiff succeeded in its claim and was entitled to judgment. The second defendant appears to have been reducing the debt since the proceedings were issued by automatic deductions from his salary. Counsel for the plaintiff was invited to file a memorandum showing the up-to-date

position and judgment would then be entered accordingly. The plaintiff also sought interest on the judgment sum pursuant to the loan agreement at 12% since 8 September 2000. Interest would be awarded but, in the memorandum, counsel should indicate to the court the position regarding interest taking into account all payments made by the second defendant since 8 September 2000.

Case considered:

Export Credits Department v Universal Oil Products Co [1983] 1 WLR 399 (HL)

Counsel for plaintiff	:	Mrs Vaihu
Counsel for defendants	:	Mr Tu'utafaiva

Judgment

The Tongan Development Bank, as plaintiff, issued these proceedings in October 2000 seeking to recover a debt of $18,760.79 which was alleged to be the balance owing at that time by the three defendants under a loan agreement dated 24 November 1997. The total advance under the November 1997 loan agreement was $28,642. The amount was made up as follows:

Personal and family expenses:		$6,087
Painting of dwellinghouse at Kolofo'ou:		$100
Crop maintenance:		$100
Plus existing balance:		$22,355
	total:	**$28,642**

The first and third defendants took no steps to defend the action and on 23 July 2001 the plaintiff obtained judgment in default against each of them.

The second defendant, however, filed a statement of defence. His defence was simply that he had no knowledge of the "existing balance" of $22,355 which is shown in the breakdown above. The second defendant also said in his statement of defence that he had no knowledge of the third defendant's involvement in the loan but that issue was not pursued at the hearing.

The second defendant is 44 years of age, married with eight children. He is employed by the Tongan Communications Corporation. He told the court that the first defendant, a former magistrate, is his first cousin and the third defendant, who lives in Australia, is his father's younger brother.

Exactly how the three defendants came to be included in the one composite loan agreement was not explained to the court but there was no dispute that the second defendant had signed all the relevant loan documentation papers and there was no allegation of fraud, undue influence or duress.

The "existing balance" of $22,355 referred to in the November 1997 loan agreement was made up of the balance owing under two previous loan agreements between the plaintiff Bank and the first and second defendants which were dated 27 June and 20 December 1996 respectively. It was not clear from the evidence why the third defendant, who had not been a party to the earlier loan agreements, agreed to sign the November 1997 agreement thereby assuming liability for the outstanding

balance owing under the two earlier advances which had been made to the other two defendants only but, in all events, the third defendant is not before the court and so the issue does not arise for consideration. In this proceeding the plaintiff seeks judgment against the second defendant pursuant to his signed acknowledgment in each of the loan agreements that the borrowers were jointly and severally liable.

Up until the conclusion of the plaintiff's case the second defendant's defence continued to be that he had no knowledge of the existing balance of $22,355 being included as part of the November 1997 loan agreement. Indeed, even at the stage when counsel opened the case for the defence he told the court that, "the second defendant's case is that he had no knowledge of the existing loan balance of $22,355". However, as the second defendant's case unfolded, and particularly in the course of his lengthy cross-examination, it became abundantly clear to the court that he had, in fact, known all about the existing balance owing under the previous loan agreements when he signed the new agreement in November 1997.

At that stage, it must have become equally obvious to defence counsel that the defence relied upon by his client simply could not be made out on the evidence. To his credit, he did not try to pursue the point in his written closing submissions. Instead, he conceded that the existing balance of $22,355 was part of the November 1997 loan agreement and he then proceeded to raise two new points. First, he submitted that the second defendant had not received "a substantial part" of the new advance of $6087 under the November 1997 loan agreement and, secondly, he went on to ask the court to invoke its equitable jurisdiction in the matter so as to give a fair result to the defendant.

In her submissions in reply, Mrs Vaihu for the plaintiff noted that the second defendant claimed to only have received a small portion of the $6087 advance but she referred the court to the evidence given by Ms Alisi Tu'inukuafe, who had worked in the plaintiff's loans department in 1997. Ms Tu'inukuafe told the court that the whole purpose of the November 1997 loan advance of $6087 was to finance the migration of the second defendant's family to the USA and she produced documentary evidence showing payments made direct by the Bank from the loan monies for expenses consistent with this purpose. The defendant, for his part, claimed to have made many of the payments himself but he was unable to produce any receipts.

I accept the plaintiff's evidence in relation to this aspect of the case and I am satisfied that, on the pleadings, the plaintiff has established its claim on the balance of probabilities and that it is entitled to judgment.

As I have indicated, however, in his closing submissions, counsel for the second defendant raised another new matter. He submitted that the court should grant relief to his client in its equitable jurisdiction by limiting the amount of his liability to $8000 only of the total debt and by releasing all of the security assets he had pledged under the loan agreement of a value in excess of that figure of $8000. Counsel submitted that such a result would be fair and just in all the circumstances. In support of his submission, counsel made reference to certain action allegedly taken by the Bank in relation to the third defendant's share of the debt.

The first point I make about the second defendant's plea to invoke the court's equitable jurisdiction is that it does not appear in the pleadings and no application was made at any stage for leave to amend the statement of defence. The submission raises new issues, including issues of fact, and even had leave been applied for, I would not have been prepared to allow the application at such a late stage in the case.

In any event, the late plea by the second defendant to invoke this Court's equitable jurisdiction seems to involve a fundamental misapprehension of the principles affecting equitable relief. As is stated in **Halsbury**, vol 16, para 1299:

> *"Jurisdiction in equity is exercised upon the principle that equity follows the law ... In matters coming before it which depend solely on legal rights ... equity applies the rules of law as the appropriate system; in such cases the rules of law are in fact binding in equity."*

In other words, equity will not provide relief against contractual obligations which may turn out to be unexpectedly burdensome to one of the parties. As was said by the House of Lords in *Export Credits Department v Universal Oil Products Co* [1983] 1 WLR 399 at 403:

> *"But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain."*

For these reasons, I am not prepared to entertain the second defendant's last-minute plea for equitable relief.

The plaintiff has succeeded in its claim and is entitled to judgment. The second defendant appears to have been reducing the debt since the proceedings were issued by automatic deductions from his salary. The amount owing back in June 2001 when application for judgment in default was made against the other two defendants was $17,273.04 and further payments appear to have been made since that time. Counsel for the plaintiff is, therefore, invited to file a memorandum showing the up-to-date position and judgment will then be entered accordingly. The plaintiff also seeks interest on the judgment sum pursuant to the loan agreement at 12% since 8 September 2000. Interest will be awarded but, in the memorandum, counsel should indicate to the court the position regarding interest taking into account all payments made by the second defendant since 8 September 2000.

The plaintiff is also entitled to costs to be agreed or taxed.

To'ia v Tonga Visitors Bureau

Supreme Court, Nuku'alofa
Ward CJ
C 665/2000

10, 11 December 2001; 14 December 2001

Employment law – unfair dismissal – breach of natural justice – not proved – claim dismissed

The plaintiff was an employee of the defendants for 11 years. On 1 July 1999 he commenced vacation leave of 99 days, which was his leave entitlement. He went to the United States of America for that leave but, before it was completed, he applied by telephone for a further 58 days special leave. That was granted and ran from 8 October to 7 December 1999. The plaintiff was unable to return in time because he was unable to obtain a seat on any flight until 26 December. He sought permission for a further extension but it was refused. By the time he returned to Tonga, the public service was on leave for the Christmas break and so he was unable to report for work until 3 January, the first working day of 2000. The plaintiff was suspended from 3 January and on 18 February there was a letter from the Establishment Division which set out the charge relating to the unauthorised leave and also added that the plaintiff had taken unauthorised leave twice before in 1991 and 1995. There was also a charge that he had misused the Departmental vehicle. It concluded with the requirement that he submit his explanations with the Establishments office no later than 6 March. On 28 February, the plaintiff supplied his reasons in writing. On 1 May he was notified that Cabinet had decided on 19 April 2000 to dismiss him from the Service "on the ground of leave without authority, with effect from the 1st December 1999". He brought an action for unlawful dismissal and sought declarations that the defendants' appeal procedure was unlawful and ineffective, that his dismissal was a breach of natural justice and that it was ultra vires. He sought damages totalling $13,500 for the unfair dismissal.

Held:

1. It was clear that, when permission was given to the plaintiff to extend his time away by special leave, a specific date was stated upon which he had to return to work. If that date was wrong, he should have taken it up at the time. His obligation was to attend work on the date stated and that he failed to do.
2. With respect to breaching the provisions of natural justice, there was no evidence that the final decision to dismiss the plaintiff was anything but a

properly taken decision. There was no evidence that the final decision was reached before it was considered or that it was simply rubberstamping a previous decision. The decision to dismiss was made solely on the basis of the unauthorised leave.

3. The claim was dismissed with costs to the defendants.

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

Judgment

The plaintiff was an employee of the defendants for 11 years until he was dismissed in early 2000. He brings this action for unlawful dismissal and seeks declarations that the defendants' appeal procedure is unlawful and ineffective, that his dismissal was a breach of natural justice and that it was ultra vires. He seeks damages totalling $13,500.00 for the unfair dismissal.

The plaintiff's case is that he commenced vacation leave of 99 days on 1 July 1999, which was his leave entitlement. He went to the United States of America for that leave but, before it was completed, he applied by telephone for a further 58 days special leave. That was granted and ran from 8 October to 7 December 1999.

Unfortunately, the plaintiff was unable to return in time because he was unable to obtain a seat on any flight until 26 December. He sought permission for a further extension but it was refused.

By the time he returned to Tonga, the public service was on leave for the Christmas break and so he was unable to report for work until 3 January, the first working day of 2000.

On that day he was told he was suspended and a letter was given to him saying that he had been recommended for dismissal. It was from the Acting Manager of the Tonga National Centre, Filipo Faiva. It included the passage:

> "According to Estacode therefore I hereby inform that recommendations have been submitted to the Director of Tourism for your dismissal because you failed to comply with your leave requirements. I have already contacted the Minister of the Visitors Bureau Department and he informed me to dismiss you from the Service.
>
> Because this is the second time you have failed to comply with the Department's requirements with regard to staff leave, the matter has been referred to higher authorities for a final decision for your dismissal from the Service."

On 14 January, Mr Faiva again wrote to the plaintiff:

> "I respectfully write to convey to you, that you are required to lodge with the Department an explanation with regard to your leave without authority beginning from your special leave without pay from the 1st of December 1999. You are given fourteen days within which to reply to this letter beginning from today."

On 11 February Mr Faiva again wrote to say that the Minister had ordered the plaintiff's suspension from 3 January and advising him "the Department has referred that matter to the Establishment Office and Staff Board. They will contact you and inform you of their final decision regarding this matter."

This was followed by a letter from the Establishment Division on 18 February. It set out the charge relating to the unauthorised leave and also added that the plaintiff had taken unauthorised leave twice before in 1991 and 1995. There was also a charge that he had misused the Departmental vehicle. It concluded with the requirement that he submit his explanations with the Establishments office no later than 6 March.

On 28 February, the plaintiff supplied his reasons in writing. He heard no more until 1 May when he was notified that Cabinet had decided on 19 April 2000 to dismiss him from the Service "on the ground of leave without authority, with effect from the 1st December 1999".

The defendants' case is simply, that the plaintiff was dismissed following the proper procedures which included the opportunity to put his case.

The evidence was largely undisputed by either side. There was a notable discrepancy in the evidence of the plaintiff in relation to the reason for his request to extend his leave for the further 58 days. He had originally stated in an affidavit that he could not return at the end of the three months vacation leave because he was sick. In his oral evidence, he told the court he stayed because he hoped to obtain financial support for his family. I accept that, at some time, he may have been sick but I do not accept it was the reason why he extended his leave.

When he first went to the United States, he was on a visitor's visa and had to have a return ticket. That would have ensured he could return in time to take up his employment at the end of the vacation leave. The responsibility to return to his work at the right time is his and, even if he had managed to retain that seat, he should not have made any application to extend his leave without first ensuring he could return at the end.

No evidence has been submitted to the court in support of the claim for damages.

Mr Fifita for the plaintiff appears to be submitting two main lines of defence. The first is that the calculation of the leave to which he was entitled is wrong and therefore he was not absent without leave. The second is that the dismissal was not in accordance with proper procedures and was in breach of natural justice.

In relation to the calculation of leave, he suggests two mistakes, the effect of public holidays and the time the plaintiff was sick.

Mr Fifita suggests that, as three public holidays occurred whilst the plaintiff was on leave, those days should be credited and will, therefore, push the date for the end of his leave back by the same amount. Unfortunately for the plaintiff, the Chief Establishment Officer told the court that, under the Civil Service Regulations (Estacode), any public holiday that falls during a period of leave shall be disregarded so that day is still taken as a day of leave. I would add that, even if that had not been so, it was clear that, when permission was given to the plaintiff to extend his time away by special leave, a specific date was stated upon which he had to return to work. If that date was wrong, he should have taken it up at the time. Otherwise I consider his obligation was to attend work on the date stated and that he failed to do.

The second point is that the plaintiff stated in his affidavit that he was sick for 20 days whilst on leave. He did not supply any medical certificate to his employer

when he returned because, his counsel says, he did not realise he needed to and his ignorance is the fault of his employer because there is an obligation under the Estacode to make a copy available to all employees. Although his counsel urged this, there was no evidence that a copy had not been available. It is notable that, whilst his case is that he was sick whilst on leave, he has provided the court with no evidence to support that assertion.

The basis of the submission that this was not in accordance with the principles of natural justice is, if I understand Mr Fifita correctly, that the Head of Department and the Minister had already decided the plaintiff should be dismissed and so the Civil Service Board was simply accepting that. Although the wording of the various letters sent to the plaintiff leave much to be desired, I do not accept that there is any evidence that the final decision to dismiss the plaintiff was anything but a properly taken decision. Counsel's suggestion that the plaintiff was not given a proper opportunity to put his case is clearly wrong. There is no evidence that the final decision was reached before it was considered or that it was simply rubberstamping a previous decision.

That also answers the suggestion that this breached the rules of natural justice by not making the charges clear or failing to allow him to make representation before the decision to dismiss was made.

It is also being suggested that the suspension was in breach of the Estacode and therefore the plaintiff is entitled to pay for that period. I accept that there is some evidence that the decision to suspend the plaintiff was made before the Ministerial Head of Department had considered it. However, the Estacode provides that, at the end of a period of suspension whether it ends by dismissal or re-instatement, Cabinet is given the discretion to determine whether any remuneration for that period should be paid. The wording of the dismissal and the fact that it was stated to be effective from 1 December 1999 shows that Cabinet did consider the point and decided not to allow any payment.

It was also suggested that the additional charges that the plaintiff had taken unauthorised leave previously and that he had misused the departmental car were not correct and should not have been considered in the absence of evidence. This point was made by the plaintiff in his reply to the allegations and it is clear from the memorandum from the Civil Service Board to Cabinet from the meeting of 13 April 2000 that the Board considered both those matters and rejected them. The decision to dismiss was made solely on the basis of the unauthorised leave.

I do not find that the plaintiff has proved that his dismissal from the Civil Service was unlawful, was in breach of natural justice or that the authorities had failed to follow the correct procedures under the Civil Service Regulations. Mr Fifita has not indicated the basis of the claim the decision was ultra vires.

The claim is dismissed with costs to the defendants.

I would add that, whilst his dismissed was made effective from 1 December 1999, there is some evidence that date may have been wrongly calculated. However, as it was leave without pay, it does not affect his entitlement.

Press Release

While sentencing a young offender in a drug case today, the Hon Chief Justice Ward made the following comments:

> "The unprecedented rise in the number of drug cases coming before the courts particularly among young people has prompted me to state just how the courts will deal with such cases in future. Up to now, there have been differences in the sentences ordered by the various courts in Tonga and there can be no inflexible rule in sentencing. Each case has its own facts and so there will always be some variation but I am making this statement to try and ensure that the overall approach will be consistent in all courts.
>
> At present most cases involve Cannabis (Indian Hemp). It is apparent there is a generally held view that this is not a dangerous drug but recent research shows that it can and does have long term effects on many who use it. Far more serious from the community's point of view is the fact that most of the offenders are young and, all too frequently, still at school. It is believed by many people that a conviction for possession of Cannabis will not result in a sentence of imprisonment especially if such a penalty would interfere with the offender's schooling or employment.
>
> It is now time for the court to make clear the penalties that such offences will receive.
>
> The sentence for possession of any drug, including Canaabis, in a small quantity for personal use will result in a sentence of imprisonment. When it is a first offence, the sentence will be suspended. In that way, the offender will have an opportunity to decide whether or not he or she will go to prison because, if he or she offends again, the court will have to bring that sentence into effect in addition to any sentence imposed for the subsequent offence.
>
> Anyone who supplies drugs is taking an active role in the spread of the harm to others. More serious for society as a whole is that, once a supply network has been established, it opens the way for effective distribution of hard drugs. In every case where there is evidence of supply to others, the sentence will inevitably be a longer term of imprisonment and suspension of the sentence in any such cases would not be appropriate. Anyone who sells drugs can expect to go to prison for a very substantial length of time."

1 June 2001
Registrar of the Supreme Court