TONGA
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Editor: Hon. Mr Justice Nigel Hampton O.B.E.
(Chief Justice of Tonga)

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PREFACE

I believe that for the first time in the history of law reporting in the Kingdom I start on the task of editing judgments, writing head-notes and so on for 1997 whilst the year is still running - indeed only about a third of the way through.

It follows that from hence forward, in theory at least, judgments should be able to be considered edited and processed for the Law Reports as they arrive on (or shortly after they arrive on) the editor's desk. That is a goal I set myself to achieve when I arrived in 1995. I am delighted it has been accomplised before I leave, regretfully, the Kingdom. Some almost 25 years of lack of law reporting now has been remedied.

If future editors can keep the reporting contemporaneous it will mean that annual volumes should be able to be prepared and published quite quickly at the end of each year and available early in the succeeding year.

The orderly promotion and advancement of the law, and of the rule of law, will be greatly enhanced.

Nuku'alofa, 1997

Nigel Hampton
[Chief Justice)

MODE OF CITATION

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Supreme Court, Nuku'a lofa
Hampton CJ
Cr 654/96

20 January, 1997

Criminal law - bodily harm - duress or coercion - self defence
Criminal law - defences - duress or coercion - onus
Criminal law - bodily harm - sentencing
Sentencing - bodily harm

The accused, tried by judge alone, pleaded defences of duress or compulion, marital coercion; and also self defence:

Held:-

1. The onus was on the Crown todisprove ornegative thedefences raised beyond reasonable doubt.
2. Initially the complainant and defendant engaged in a fight involving some mutual hair pulling and scratching, but then with the defendant sitting on top of the complainant, the defendant's husband took hold of and restrained the hands of the complainant so that shewas defenceless, and the defondant, at the urging of the husband, bit the complainant ju st above and to the outer comer of the left eye, taking out skin and flesh and causing permanent scaning.
3. That was bodily harm caused deliberately or wilfully i.e. intentionally, and without lawful justifica tion. There could be no possible element of self-defence, which was negatived by the Crown.
4. There was no factual basis for the raised defences of compulsion (or duress) and/or marital coercion. There was no evidence to show any sort of threat by the husband over-bearing the defendant's mind and forcing her to act in this way. All the evidence showed was an aiding, abetting, counselling and inciting by the husband.
5. At common law the defences of compulsion (or duress) and of marital coercion were separate defences.
6. Duress or compulsion is on the basis that the defendant's wi ll has been overborne by threat of death orserious personal injury, of sufficient immediacy, and threat of lesser harm or to property are not sufficient. The threat must be operative and effective at the time of the act charged.
7. When duress is relied on the defendant must point to a proper evidential foundation for the defence, to show it is fi t to go to the court for decision; and

once that is done it is for the prosecution to negative it, if it can, beyond reasonable doubt.

8. As to marital coercion at common law there was a presumption, in relation to certain crimes, that where that crime was committed by a wife in the presence of her husband, the wife was presumed to have acted under the coercion of the husband. Tllat presumption was abolished in the UK in 1925 and putting the burden of proving coercion on the wife, making that defence less favourable to a wife that a defence of duress.

9. Marital coercion consists of an overbearing of the will of the wife by threat of the husband, but the threat can be of lesser hann.

10. Such a defence does not apply in Tonga given s.22 Criminal Offences Act which provides that a married woman committing an offence in the presence of her husband shall not be presumed to have committed it in under his compulsion. The word compulsion was used. Marital compulsion was never a concept at common law.

11. Therefore the test when such mtters were raised, in Tonga, between husband and wife, was whether {a) there was an evidential foundation for the defence i.e. a foundation for the claim of an overbearing of will by threats of death or serious personal injury; and (b) then had the prosecution established beyond reasonable doubt that the defence had not been made out.

12. The defendant was convicted and sentenced to 12 months imprisonment suspended in whole for3 years, with an order for compensation of $500 to the complainant.

Cases considered:

Lynch v D.P.P. (1975] A.C. 653
A.G. v Whelan [1934] 1.R 518

Statutes considered:

Criminal Offences Act ss 107, 22
Criminal Justice Act 1925 (UK)

Counsel for prosecution — Ms Bloomfield
Counsel for accused — Mr Tu'utafaiva

Judgment

The accused faces one count of bodily harm contrary to section 107 subsections 1 and 2(c) of the Criminal Offences Act. This is a serious criminal charge and I remind myself at the start that the onus of proof is on the Crown toprove the elements of the crime beyond reasonable doubt and to negative certain defences that may be raised. That negativing or disproving is to that same standard, beyond reasonable doubt and the two heads of the defence raised are (i) duress otcompulsion and/or marital coercion and also (ii) self-defence.

The alleged offence arises out of some unseemly and rather stupid events of 23 November 1995 at Tofoa.

There were two stages to this incident:

the first taking place at the defendant's home;
the second taking place at the complainant's.

As to the first part of the incident, I am not convinced that the complainant's account is in all respects accurate and that she was not as calm or as unaggressive as she would make out She was very angry about what had been said about the defendant and her husband, that is the complainant's husband .. As I am sure on the evidence that she made the initial movement towards the towel that was the only garment that the defendant was wearing at that time. She (the complainant) started the events and the two of them then engaged in some sort of fighting which was broken up by the defendant's husband. The defendant's husband seemed to suggest that she (the defendant) should be dressed if she was going to engage in the fight It would seem that there was a certain amount of scratching and hair pulling in that first part of the fight.

The complainant then went back to her own 'api and it would seem on the evidence I have heard that she had cooled down somewhat. The defendant, having put on some clothes, then left and followed down towards where the complainant was, accompanied by her husband. The evidence again was clear: by then the roles were reversed and really she (the defendant) was the aggressor. That is clear not only from the complainant's evidence but also from the evidenceof the other eye-witnesses who were heard, sci.me 5 in number. And also in the interview which was carried out by the police the defendant said that she went down there tocarry on the fight. As she told the police officer she was hurt with what had happened at her own place and she wanted to carry on the fight.

When she got down to where the complainant was, the complainant indicated tothe defendant that she did not want to fight further, although she did not move away. The defendant's husband was with her and he seems to have been not only egging her on verbally but also physically pushed her towards where the complainant was. But as I will come to it shortly, there was, I conclude, no forcing by him, forcing the defendant to engage in the fighting.

I concludethat the defendant was willingto fightand did so. And it would seem after the initial reluctance or turning away, the initial reluctance by the complainant, that she also was willing to engage in a fight. They struggled again, with the expectation that there would be some scratching and pulling and hitting of one to the other.

I concludeon the evidence they were both willing to engage in such a fight, and that is exactly what they did. On the basis of the evidence I heard, the type of fight that was expected was what happened. There was some hair pulling, some scratchingor gouging

and that was about the extent of events (and the extent of injuries that resulted) up until that stage.

But then what occurred was indeed beyond anyof theoriginal expectations on either side because, with the defendant sitti ng on the upper body of the complainant who had fallen on to the ground, the defendant's husband started to play a part physically in what happened. He took hold of and restrained the hands of the complainant, so she was defenceless ineffect, and he said something to his wife, telling her to bite the other woman. And with him still holding the complainant's hands the defendant leaned forward and bit the complainant, just above and to the outer comer of the left eye:

In those circumstances it is hard to see as possibleany element of self defence or any need for a pre-emptive strike as it were on the part of the defendant and the prosecution has negatived any suggestion of self defence in my view. Subject to what !will say shortly on the question of compulsion, or duress as it is sometimes called, and the issue of marital coercion I find this bite and the injury that it caused (which is a permanent scarring of the area that was bitten) was harm within the meaning of section 107(2) of the Criminal Offences Act. Itwas harm that was caused by the defendant on the complainant by her deliberately or wilfully (that is intentionally) biting on the temporal area and causing thereby considerable blood and injury. The remainin g element which must be proved beyond reasonable doubt is whether what was done was without lawful justification? In my view, therecould be nolawfuljustificati on forsucha biting injury, in thecircumstances that were in fact present in this case, of a person whose hands were being held, defenceless, by another.

Mr Tu'utafaiva for the defendant has raised questions of compulsion or duress as it is sometimes called and/or marital coercion. I say at theoutset that, whatever view I take of the law, and I will look at that in a moment, the factual basis for these defences, or the factual foundation for such defences, has not been shown on the evidence.

There is simply no evidence before me which would show any sort of threat by the husband towards the defendant over-bearing her will or mind and forcing her, in effect, to act in this way. All the evidence comes to, and shows in my view, is an inciting or a counselling, an aidingand abetting by the husband of the wife, in actively urging oregging on and indeed, then, in an active taking part by holding the other person's hands.

In the common law, there was a defence (and there is a defence) of duress or compulsion. And in addition, therewas a defence, a separate defence, of marital coercion. The duress or compulsion defence is on the basis that the defendant's will has been over-borne by threats of death orserious personal injury, and the threat of lesser harm ora threat to property is not sufficient.

I refer to the case of Lynch v Director of Public Prosecutions for Northern Ireland (1975] A.C. 653 & 1All E.R. 913. The threats have to be of sufficient immediacy and that is underlined by an Irish case of the Attorney General v Whelan [1934) I.R. 518, where it was said duress is a defence because "threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal" (526).

The defence is available only where thethreat was operative and effective at the time of the act charged. When duress is relied on thedefendant must point to a proper evidential foundation for the defence, to show that the issue was fit to go to the judge or the judge and jury, i.e. the tribunal deciding the facts; and once that is done it is for the prosecution

to establish, beyond reasonable doubt, that the defence is not made out.

Having regard to section 22 of our Criminal Offences Act, which I will come to m detail in a moment, I believe that the above is the frame work within which a defence of compulsion or duress fits in Tongan law.

Here as I have said, on the facts the defendant cannot even show a proper foundatton forthe defence. There is simply no evidence beforemeof any threat atall, let alone a threat or threats of death or serious personal injury, let alone an overbearing of the defendant's will. On all accounts she willingly engaged in the fight twice, the second, admittedly, urged on, egged on, by her husband. I have no doubt that he was angry as well.

Mr Tu'utafaiva raises the question of marital coercion. At common law there was a presumption, in relation tocertain crimes, that where thatcrime was committed by a"'.ife in the presence of her husband, the wife was presumed to have acted under the coercion of the husband.

That common law presumption was abolished in the U.K. in 1925 by the Criminal Justice Act of that year, which went on to provide that where a married woman was charged with an offence other than treason or murder it was a "?efence to prove tht the offence was committed in the presence of. and under the coercion of, the husband . the burden of prcving coercion lyingon the defendant, that is the ife. Becuse-?f that revrse onus it, rightfully, has been said that the defence of manta!coercion m the Uruted Kingdom is less favourable to the defendant than a defence of duress - because the defendant hasto prove the coercion on the balance of probabilities whereas duress has to be disproved by the Crown (beyond reasonable doubt).

Coercion it would seem, would include threats of a lesser character than threats of death or serious persona l injuries, threats of lesser harm would suffice. But again there had to be, would have to be shown, some overbearing of the will of the wife by the threat of thehusband. And because of the threats shecould nolonger act as it were "voluntarily" but had to go along with the husband.

Now that is the U.K. position! MrTu'utafaiva says it should apply here, accepting, he says, then that the reverse onus applies to or falls on his client. Because of our section 22, which I will come to shortly, I have doubt whether that section of the U.K. Act does have application here, but even if it does then again, on the evidence, there has been no proof put before me of, and nothing from which I could have inferred, any sort of threat whether of the greater or the lesser character.

I have doubt whether the marital coercion defence, as now enshrined in the U.K.'s statute is a defence in that form in Tonga. I say that because of the clear provision in our Crimiial Offences Act contained in section 22. That says "a married woman committing an offence in the presence of her husband shall not be presumed to have committed i under his compulsion.•

It is clear, in my view, that the legislature in considering crimi nal offending, considered the position of marital relations between wife and hus_band and he abilty a husband might have to influence or exert pressure on a wife. Deliberately, m my view, they referred to the matter as being compulsion.

Marital compulsion was never an existingconcept in the common law; 1twas manta! coercion and a lesser standard as I have stated. But here in our Act the legislaturesaidquite clearly, that compulsion was what had to be looked at, irt effect, between husband and wife, and that there was to be no presumption. Therefore the test when such matters were

raised between wife and husband, was that serious test of whether there was (i) a proper evidential foundation for the defence, that is a proper foundation for the claim of an overbearing of will by threats of death or serious personal injury; and (ii) whether then the prosecution, if the foundation was there, whether the prosecution had established beyond reasonable doubt that the defence had not been made out.

Here, as I have said, the foundation has not been laid. Any suggestion in any event of compulsion or duress or indeed of marital coercion (and if I go to that lesser defence) has been negatived by the proseeution beyond reasonable doubt I find the chargeand all the constituentelements of the charge made out beyond reasonable doubt Thecharge has been proved, the defendant will be convicted of it.

SENTENCE

Two things I suppose, generally, can be said about this offence that might be favourable from your point of view. First is that the complainant really instigated the confrontation, but you then carried on. Secondly I am sure that there was a considerable urging. inciting or counselling by your hsband to keep you up to the mark and carry on with this fight

As to the first I accept there was some degree of provocation initially; and then there was a degree of inciting by your husband subsequently. But none of that justifies a barbarian's act of taking a sizeable piece of skin and flesh out of someone p,lse's face with your teeth.

The offence for which you have·been convicted carries a maximum period of imprisonment for 5 years. In the circumstances the particular offence of which you have been convicted calls, in my view, for a sentence of imprisonment I wquld be failing in my duty if I did not mark the conviction with imprisonment.

You are 21, married, with a young3 yearold dependent child: Importantly you have not previously offended. Those factors, along with the matters about the offence itself lead me to the view that a sentence of 12months imprisonment would be the appropriate sentence. But I am, in the circumstances and particularly because of your age, your lack of earlier offending and your young dependent child prepared to suspend that sentence in whole for the maximum statutory period of 3 years.

Soyou are sentenced toimprisonment for 12months, that whole sentence suspended for a period of 3 years. That is on condition that you are not convicted of any offence punishable by imprisonment during the 3 years of suspension. Ifyou are convicted of any other offence then you have to serYe the 12 months imprisonment Do you understand that? Itis hanging over your head for the next 3 years; if you take a step out of line, you go to jail. You may count yourself lucky that I suspended it in whole; I was tempted to make you serve part and then suspend part but I am influenced by your young child.

There is an ability in this Court to order payment of compensation to a person injured. Itmay be said to be hard on you with you not in employment yourself but your husband, I am told, is. I dointend to make an award, an order, that you make compensation to the complainant for the injuries she has suffered and will continue to suffer. Given the scaning shehas left, and which is pennanent, as a result of your bite theamounll am going to award is really a token award but I feel some efforts should be made by you to make some compensation is that fonn. I order you to make compensation to the complainant in the sum of $500-00 for the injury caused, that compensation to be paid by 28th February 1997 into this Court.

R v Talia'uli

Supreme Court, Nuku'alofa
Hampton CJ
Cr 758/96

22 January, 1997

Criminal law ·possession of pistols ·sentencing
Arms & Ammunition - possession ·pistol ·ammunition
Sentencing - possession - pistol and a11unition

The defendant pleaded guilty to charges of possessings pistols without licence and possessing ammunition without licence.

Held:

1. The Anns and Ammunition Act and Regulations were toensure proper control and regulation of potentially lethal weapons. A check thereby is kept on the type and condition of fireanns and the type and characterof potential holders of fireanns.
2. There was nagrant disregard of the Act by the defendant and certain sinister and suspicious aspects to the possession by him.
3. A tenn of 2 years imprisonment was appropriate and on balance, it was suspended for 3 years.
4. An order for forfeiture of the anns and ammunition was made with a recommendation to the Minister of Police for their destruction.

Counsel for prosecution — Ms Simiki
Counsel for defendant — Mr W Edwards

Judgment

You have pleaded guilty in this Court to two charges brought under section 4 of the Arms & Ammunition Act namely possessing arms without a licence and possess ing ammunition without a licence. Each offence carries a maximum period of imprisonment of 5 years. That maximum penalty available underlines, in my view, the seriousness with which the Legislature views potential offences against these sections of the Arms & Ammunition Act.

The general philosophy, of the Arms & Ammunition Act and the Regulationsmade, is to ensure proper control and regulation of the possession of potentially lethal weapons in the hands of members of the public.

It is the scheme that licences have to be held by persons if they are going to possess use or carry firearms. A check is thereby kept on the type and the condition of firearms and ammunition, and the type and character of the holder, or potential holder of such firearms. In the circumstances which I will come to shortly you have flagrantly, in my view, disregarded the provisions of the Arms & Ammunition Act.

You are 42 years of age; you have not previously appeared, I am told, before any Criminal Court in the Kingdom. You have a wife and six (6) children aged from 15to 5 years; thechildren areall atschool. Iaccept the wife and childrenaredependent upon you.

In these sentencing remarks, and in the sentence which I intend to impose, I take account of and put what weight I can on, your pleas of guilty to the two charges. But those guil ty pleas have to be put in context to some extent because initially you indicated not guilty pleas to this Court, back in August last year, and the matter was set for a trial. It was about a week before the trial that you indicated, through yourcounsel, that you would be pleading guilty to the charges.

You are, I am told by your counsel, and I am assured by the ten or so testimonials that have been provided, of good character and repute. The testimonials or character references come from a widely representative and quite impressive cross-section of the Community :.md I do put some store on what has been said, generally, about you. But I hasten toadd that the man who is described therein those references would not be the man I would have expected to flout the law, and for 2 years or so, have deliberately kept out of the sight of the authorities and out of the knowledge of the authorities two hand guns of thi s nature. The character references speak highly of various aspects of your life; of your concern for your family, your friends and your Community; of your Church; and of various Sporting Organisations; and all of the things which you have done and continue to do for those Organisations and people.

The references also speak highly of your work in your employment in Night Clubs and in your activities primarily for the Church with youth groups. Those latter two aspects though, that is your work with youth and your contact with youth, and your employment in Night Clubs give me, however, some concern in relation to yourpresent offending. The question I ask, iswhether it is appropriate to have suchan offender in the Church and youth Organisations? A nd as well, I ask myself these questions: "whether it is appropriate that a man who is prepared to flout the law and possess hand guns, should be influencing the youth of the Kingdom?" A nd "should a man who is prepared to obtain and retain possession of hand guns be running Night Clubs?" And that again, is a question the appropriate authority in relation to Night Clubs, might want to consider.

These guns were unlawfully obtained by you. They are small, they are easily concealed when carried on the person. When tal<en with the fact that for some 8years or so you have worked in Night Clubs, they have, in my view, sinister connotations. And those sinister aspects are not eased in my mind at all by what I am told by your counsel, namely that normally the two guns were kept at your place of work, that is al the Night Club. One simple question, why?

The actions here are a farcry from the responsible citizen that your counsel, and the referen ces, referred to. You obtained these guns in circumstances that I regard as somewhat unsatisfactory. If you are taking them (the guns) as a responsible man (as you claim) off drunken US sailors, why not just simply hand them straight t the police, the appropriate authority; or rather than taking possession of them at all, notify the police that you had somedrunken sailors in your premises who were armed with hand guns..

One can only express the deepest of suspicions about your motives. You then held on to these guns for something like 2 years and I note that when they were found by the police they were in serviceableorder, able to be used, the magazines and the ammunition kept in proximity to the guns. You say, through your counsel, that having taken possession of them you in fact forgot about them. Again I believe I could be forgiven for being somewhat sceptical about that claim, somehow doubtful of that claim.

Again one asks thequestion, why retain, hold on to, these guns at your place of work for two years? Again I am not satisfied with the claim, and am somewhat doubtful about the claim that these guns were kept locked away from 2 years and that it was jus t sheer bad luck and coincidence that when the police execute the warrant, the guns are found in an unlocked van, sitting on the seat of the van.

This is serious offending. Itis made more serious, in my view, by the fact that these are hand guns. Such are not common in Tonga I am told and nor should they be. The peopleof this Kingdom donot want people walking round with·gunsin theirpockets, guns that are able to be hidden on the person, lethal weapons.

On the first count, that is the charge of possession of the 2 automati c pistols without a licence, the appropriate term of imprisonment is one of 2 years in my view. In relation tothe second count, that is the possession of the ammunition without a licence that charge is related to the first count and is not as serious in itself as the first count and appropriately could be dealt with, and should be dealt with, by a sentence of 6 months imprisonment, that to be concurrent with the other term, that is to run with the other term. That means a total period of 2 years imprionment. In my view, that term is fully deserved by you; you are no public spirited citizen in what you have done here.

The issue which I have found most difficult to resolve about you is whether, in the circumstances, any or all of that sentence of imprisonment should be suspended. If there had been any previous criminal offending of any serious nature then there would have been no question in my mind of suspension. If I had been able to impose a fine as well as a suspended sentence, that would have eased the path so far as my thinking was concerned. But given the provisions of the Criminal Offences Act, I donot believe I have the power to impose both a sentence of imprisonment, even if of suspended, and a fine as well.

In the end what saves you, and what infiuences me to exercise my discretion and suspend, are these factors:

First, apart from the possession itself there is no evidenceas toyour use, in any

way, of the weapons.

Secondly, your lack of any previous offending. You are now, as I have said, aged 42.

Thirdly, your family.

Fourthly, your guilty pleas.

I intend to suspend the whole of both sentences of imprisonment for 3 years. That is the maximum time, the greatest time, I can hold the sentence over your head in effect. If you commit any criminal offence in the next 3 years, then you will be brought back, not only on that criminal offence, but you will then serve the sentence on these charges. So if at any time in the next 3 years you are convicted of a criminal offence punishable by imprisonment, you will be sentenced straight to the 2 years that I have imposed today, do you understand? You may count yourself a very lucky man. It is only by the finest of balans that I have decided to allow the sentence to be suspended. If you want to retain the friendship and the respect of the people who wrote such glowing letters about you, you had better look well at yourself and your conduct.

Under section 37 of the Arms & Ammunition Act, I make an order for the forfeiture of the 2 guns, the magazines and the ammunition, that are the subject of these charges. I note, Ms Simiki, that in tefIJlS of the Arms and Ammunition Regulations, where arms and ammunition are forfeited (it's in Regulation 5, sub-regulation 5) they, that is the arms and ammunition, may be disposed of as directed by the Minister of Police. It is in the Minister's hands but, for what it is worth, I offer a recommendation from this Court that these guns and magazines be destroyed.

If the legislation allowed me that authority, that would have been my order. But my only authority is to make an order as to forfeiture. I make that as a recommendation to be passed on to the Minister. It is in his hands obviously.

Having ordered forfeiture, I direct that my staff immediately hand the guns, the magazines, and the ammunition to the armourer of the police, for proper disposal to the police in that way.

R v Boiani

Supreme Court, Nuku'alofa
Hampton CJ
Cr No.1235/96

24 January, 1997

Criminal law - rape - sentence - sleeping complainant
Sentence - rape - sleeping complainant

The defendant, 20 years of age, with no previous offending, raped a sleeping 19 year old woman friend. Both were intoxicated. The defendant apologised immediately, admitted his offending and pleaded guilty. The complainant had forgiven him.

Held:

1. There were a number of factors to be taken account of in favour of the defendant, including the guilty plea, the apology and time in custody on remand.
2. The starting point here was in the range of 3-3 112 years, but would bl' discounted to 2 years, a very lenient sentence.

Counsel for posecution — Ms Bloomfield
Counsel for defendant — Mr Tu'utafaiva

R v Holani

Judgment

Under section 119 of the Criminal Offences Act, I make an Order directing that the identity of the complainant shall not be published in the Kingdom in a written publication available to the public or be broadcast in the Kingdom.

You have been convicted on your plea of guilty to a charge of rape brought under section 1 18(l)(b) of the Criminal Offences Act. That is the offence of a male raping a female, the male being aware that the female is in a state of insensibility whether due to sleep intoxication or other cause.

I have before me the summary of facts, a pre-sentence report from the Probation Officer, the victim impact report, a letter from the victim and a reference from a rugby football club.

The form of rape with which you have been charged and which is described in a summary of facts is not a particularly usual kind of rape. Both you and the complainant were quite drnnk/intoxicated.

You are now 20 years of age, the complainant is 19. You and the complainant were part of the same group of friends. She, the complainant, seems to have been a girlfriend of one of your male friends. After a prolonged bout of drinking, she went and lay down and went to sleep, and was quite insensible. You, after a rather stupid remark from one of yourother friends, and not being fully in control of yourself through alcohol, went and took advantage of the sleeping intoxicated complainant.

The pre-sentence report mentions a rather casual attitude in you towards sex and may be that is a result of the lack of parental guidance in your life. It can, I suppose be said to your credit (i) that you desisted, you gave up, once the complainant awoke; (ii) that apart from the sexual act itself, and I do not minimise that in any way, but apart from that act there was no other violence by you; (iii) and that you have apologised both immediately, which is important as a mitigating factor in my view, and subsequently. Itwould seem that both you and the complainant, in the last 10 months or so, have resumed contact in that same groupoffriends that I had spoken of earlier. You have been together socially since these events. Your apologies have been accepted by the complainant, apparently, and you areashamed of wh!lt you have done. From the materials before me I accept the genuiness both of the acceptance of your apology and of your shame.

Your position before this Court is eased considerably by the attitude commendable in my view, the attitude of the victim/the complainant towards you. And that attitude is found in the report in this way and I quote: "largely due to her choice to get on with her life and to allow the defendant to get on with his, the complainant seems to have had no physical oremotional aftereffects and, after a short time, was able to meet the defendant normally in a social situation. She has accepted his apology and has told him she has forgiven him. She wrote a letter and does not seek an excessive penalty."

That statement, and the letter from her, demonstrates a practical and generous approach to life and to you. She is, I suspect, far more secure in her life and in her background and upbringing than you are.

You are now 20 years of age, you have no previous criminal convictions of any kind. You were about 19 and a half at the time of these events. It seems you are enthusiastic about your sport and have a degree of expertise in it. That is desirable and, it is my view, helpful that you have that interest and contact and that is one that should not be too long disrupted.

I take full account of your plea of guilty given immeidately by you in thi Court. In my mind, the starting point for an offence of rape always has to be imprisonment, gi ven the maximum term provided in the Act of 15years. Given the unusual circumstances and nature of the event I have already described, the lack of other violence other than the intercourse itself, your age and the lack of previous offending, in my view, the starting point for such an offence would be in a range of 3 to 3 112 years.

I am prepared to discount that level of sentencing to imprison,..,.- nt '1y a quarter, for your immediate guilty plea, and even further for your immediate apology to the complainant. I take account also of the fact that you have been in custody since the 3rd December last, that is about 6 1/2weeks in custody. A nd I make allowance for that time in custody in coming to the final sentence.

I have reached the view that in all the circumstances the appropriate sentence in relati on to you on this cl-> ·ge is one of 2 years imprisonment. For rape, some will say that is a very lenientser. ••ice. And it is, but I have given it because of the circumstances I have referred to.

I have been asked by your counsel toconsider suspending that term of imprisonment in whole or in part. I would be failing in my duty if I were to do so in my yiew. Such a crime must be properly publicly denounced and you must be properly sentenced for it.

The sentence therefore is that you arecommitted to imprisonment for 2 years on the charge.

R v Taufa

Supreme Court, Nuku'alofa
Hampton CJ
Cr No.1331/96

31 January, 1997

Criminal law - motor manslaughter - sentencing
Sentencing - motor manslaughter - disqualification

The defendant (still a school boy) pleaded guilty to motor manslaughter. Driving recklessly he had lost control of his car, collided head on with another vehicle and killed one of his passengers.

Held:

1. The driving was grossly negligent even if, immediately prior to impact, the right front tyre had burst as the defendant claimed.
2. The starting point for the sentence was 2 years imprisonment discounted by 6 months for the plea of guilty at the first available opportunity:
3. The sentence of 18 months imprisonment was suspended because of his age, the lack of previous offending, his own permanent injuries a broken necks, the delay of 18 months since the events - not his making.
4. On the conviction a maximum period of 12 months disqualification only was able to be imposed.

Statutes considered:
Criminal Offences Act
Traffic Act

Counsel for prosecution — Mr Cauchi
Counsel for defendant — Mr Fakahua

Judgment

I have read with care the documents presented to me this morning by the prosecutor and had earlier re-read the summary of facts presented to me in Court when you pleaded guilty. I have considered the pre-sentence report from the Probation Officer and the separate report (the victim impact report) prepared by that officer in relation to the deceased boy's family. I have also seen and considered the medical report about you.

Still a school boy, you were the driver of a car on the 14th August 1995 involved in a fatal accident. Arising out of that accident, you were charged in this Court and appeared on 16th January this year on a charge of manslaughter by negligence.

You pleaded guilty to that charge and I note that was the first opportunity for you to do so in this Court where jurisdiction lay.

I should tell you at the outset so it is understood by you, and any one else, the seriousness of what you are appearing on, that manslaughter by negligence carries a maximum of 10 years imprisonment. That 10 year maximum is recognition by the legislature, by Parliament, that this is or can be serious offending, taking another person's life by gross negligence.

From all I have heard and read about this accident, for which you were the responsible driver, this was stupid and immature driving by you. Not only stupid and immature but dangerous, reckless and with fatal results. There was a load of 5 other school people, children, on board. I am sure you were showing off. And, in your showing off, you killed one young man and injured some 5 of 6 other people including yourself. That is what showing off in a vehicle leads to, it leads to death and to injury. With this loaded vehicle, and I have some concern about its state and its safety, you decided because you had been overtaken by a motor cycle to try and catch up with the motor cycle and overtake it yourself.

You were travelling at speed, you lost control, you went on to the wrong side of the road, and collided head on, with the other vehicle that did its best to avoid you, but you went straight into it.

There is a suggestion made by you in the interview, made by you to the Probation Officer, that at some stage immediately prior to the fatal impact, the right front tyre on the car burst. The prosecutor has nothing on his file, he tells me, that either substantiates or, more importantly, can eliminate that suggestion by you.

I take account of it but even with that there, the driving by you in these circumstances, particularly with your inexperience and without your ever having obtained a driver's licence, was grossly negligent, was reckless, in any event. Reading the accounts of what occurred, you are perhaps fortunate that only one person died. You were seriously injured yourself, you fractured your neck. Fortunately you did not sever your spinal cord, it would seem.

You had a long hospitalisation as a result of that and you still are at risk from future physical activities because of that injury. The affect of the death of this boy, on the boy's family, has been considerable. It concerns me, as it concerns that family, that there has been no attempt, certainly no proper or appropriate attempt, by you or on your behalf to express any apology and contrition about what has occurred.

I accept that some of that lack of appropriate apology may have come from the fact that you are, and have been for some time, very much alone in Tongatapu. In relation to

the accident, I add that there is no suggestion that you were affected in any way by alcohol or any other substance.

It is my view that for an offence such as this imprisonment is not only justified, it must be the sentence that is looked at by this Court. It seems to me that the starting point here, having regard to the circumstances I have outlined, an appropriate starting point would be a term of 2 years imprisonment.

Given the guilty plea that you entered at the first available opportunity in this Court, I am justified, I believe, in discounting that 2 years somewhat, back to 18 months. That term, 18 months, is the term of imprisonment that I intend imposing on this conviction for manslaughter. It marks the seriousness of the taking of a life by you.

The question then, which is one which I have anxiously considered, is whether I would be justified and whether it would be appropriate, to consider suspending all or part of that sentence.

On balance I have decided in favour of suspending the whole of that prison term. I do so for these principle reasons:

> you were 17 years of age at the time of this accident, now 18;
> you were still a secondary school pupil at the time;
> you had not previously offended;
> you have been left with considerable physical and other reminders, seemingly permanent, of what occurred in this accident and which will restrict your future life to some extent;
> it has been something like 18 months now since the accident occurred, the delay has not been of your making, but the result is that this prosecution has been over you, has had its affect upon you, for some considerable time now.

I intend to suspend the 18 months imprisonment for the maximum time I can which is 3 years. Such a sentence is conditional on your not being convicted of any other offence punishable by imprisonment during that 3 year term. If you are convicted of any other offence in the next 3 years you go straight into prison to serve this 18 months term which I have just imposed on you. Do you understand that?

I do so act in this way, suspend the sentence, against to some extent my better judgment because of your age and your intent still to further your education. To send you to jail, to make you serve a term, might put an end to your educational hopes and to your future employment hopes. I want to avoid doing that to a young man, do you understand that? This is a chance that is being given to you, its a once only chance. I expect on behalf of the community, this country, that you are going to take and make something of this opportunity, and make something of your life, and give something back to this community from which you have taken a life.

Mr Cauchi, I am concerned that still I seem to be tied, my hands tied, as to the length of time I can disqualify a person from driving. It was something that I raised sometime ago now. I anticipated that it was going to be amended and soon, but it has not been i.e. the maximum disqualification in the Traffic Act. The Amendment Act No. 10 of 1991, it seems to me, constrains me from, or prevents me from, disqualifying a person in these circumstances for any longer than 12 months.

I have it in front of me, you can have a look at it if you like. If you can persuade me, that allows me to do anything else, that is the Amendment to the Traffic Act, I will be

content to hear the argument.

Mr Cauchi — I am surprised to hear that, Your Honour!

Court — Well, this is in the Traffic Act which deals with the ability of Court to disqualify. For certain offences of drunken driving causing death and reek.less driving causing death it prescribes longer terms of disqualification. It seems to me that subsection 3 of section may have some effect.

Mr Cauchi — I think I have to go with Your Honour's interpretation.

Court — It seems extra-ordinary but that is the view I have reached Mr Cauchi and it is something that I draw to your attention as still needing some quick amendment?

Mr Cauchi — So, in other words, if I have read it correctly, the only way you can impose the lengthier disqualification, is only for those particular offences. And in any other case, the subsection 3 applies.

It seems so to me Mr Cauchi and that's why I draw it to your attention. Perhaps you can make some inquiries where the Amendment Bill is, there was one around last year and I am not sure where it has got to?

Mr Cauchi — I'll do that Your Honour!

Court — Thank you.

If I had been able to do so, I would have disqualified you from driving for a very long time, but the law, it seems to me, prevents me doing any more than imposing a disqualification for a term of 1 year.

Attorney General v Fusitu'a, 'Akau'ola & Moala

Supreme Court, Nuku'alofa
Lewis J
C.1329/96

12 December, 1996, January & 4 February, 1997

Contempt of court - administration ofjustice
Constitution - impeaclunent - contempt
Selltencing - contempt of court

The Attorney General sought orders for the committal to prison of the respondents for contempt of court in respect of words to the effect that if an earlier Parliamentary contemptlhas corpus judgment (sec [1996) Tonga LR) of the Chief Justice was overturned on appeal then perhaps the Chief Justice should be prosecuted/impeached. The words were allegedly spoken by the first respondent, the Speakerof the House, to the second respondent and then reported for a newspaper by the second respondent, and published in that newspaper by the third respondent. The third respondent had not been served so the motion against him was adjourned. A further motion was brought by the Attorney General against the firstrespondent in relation tofurther words allegedly utlered by him, to the same or similar effect, to the Deputy Registrar of the Court. II was claimed U1at the words were calculated to threaten the Chief Justice with prosecution, bring the ju stice system into contempt, interfere with the proper exercise of theoffice of the Chief Justice, interfere with lawful processes of the court, give the impression the Chief Justice was not independent, and suggest that the Supreme Court is subject to manipulation by the Legislative Assembly.

Held:

1. The words alleged to have been spoken lo the Deputy Registrar were spoken by the first respondent There was noevidence that those wordswere thedirect cause of the chief Justice discharging himself from the further hearing of a trial in progress. Nor could they be seen as falling into the category of scandalising the Court and that motion was discharged.
2. As lothe newspaper article the word "Faka'ilo" alleged to have been used may mean, depending upon the context "to prosecute" or "to impeach". Either meaning was equally powerful in the context of the complaint against the respondents.
3. The coµrt was satisfied beyond any resonable doubt that the words the second respondent used in writing the article were words spoken to him by the first respondent
4. In effect the second respondent was asserting that the Chief Justice by delivering the habeas corpus judgment was in breach of a resolution of the Assembly and therefore liable to impeachment under cl.75Constitution. The court concluded that the Chief Justice had not so offended in the delivery of his reasons and judgment. It was never open to anybody to seek the impeachment, prosecution or dismissal of the Chief Justice yet here ilie Speaker of the House was solemnly asserting that the Law Committee of the Assembly would be doing work towards that. It was there that the gravity of the article, its authorship and its publication had its worst consequences.
5. The Contempt of Court Act 1981(UK) did not apply to these proceedings as they related toallegations of interference with the administration of justice as a continuing process.
6. The first responden t at all material times spoke and acted in a personal and private capacity but in any event itwas immaterial in what capacity he altered the words once he is found to be a contemnor. Even Ministers of the Crown are, like any oilier citizen, subject to the law, the rule of law and the full ju risdiction of the Courts.
7. IIis open tooneju dge tocommit for theestablished contempt of anotherjudge.
8. The former categorisation of contempts into civil and criminal isno longer of assistance. Interference with the dueadministration ofju sticeis acharacteristic common to all contempts. It is the fundamental supremacy of the law which is challenged.
9. The court concluded that the first respondent had intended to interfere with the proper course of the administration ofjustice by putting about misleading information. That could only be a most serious contempt of court. He knew full well that what he was saying was wrong in law and in fact and that he intended to put misleading information about. Itwas contempt of the court to do so for it is interference with the administration of justice.
10. The second respondent was also found quilty of comlempt by participat ing in publishing the words.
11. On sentence - punishment consequent upon a conviction for contempt is inflicted not for the purpose of protecting thecourt as a wholeor the individual judges from a repetition of the attack, but o'f protecting the public (and especially those who either volunlarity or by compulsion are subject to the jurisdiction of the court) from the misch ief they will incur if the authority of the court is underm ined or impaired.
12. Theclear implication of the words was that the Chief Justice and the court was not independent making theadministra tion of just ice unreliable and unsafe for those who may have cause to use it.
13. Fines were imposed and a retraction ordered tobe published (Refer to the case immediately following as lo the non-publication of the retraclion by the second respondent).

Note - The second respondent, 'Akau'ola, succeeded on appeal in the Court of Appeal. That report follows hereunder.

Cases considered:

R *v* Gray [1890) QB 336
M *v* Home Office (1992) 4 All ER 97
Balough *v* St Albans Crown Court (1975] QB 73
A tt. Gen *v* Newspaper Publishing [1988) Ch 333
Att. Gen *v* Leveller Magozine (1979) AC 440
Att. Gen *v* Butterworth (1963) 1QB 696
Johnson *v* Grant (1923) SC 789

Statutes considered:

Constitution cl.75
Contempt of Court Act 1981 (UK)

Counsel for Attorney General	Mrs Taumoepeau & Mr Cauchi
Counsel for first respondent	Mr W Edwards & Mr Paasi
Counsel for second respondent	Mrs Taufaeteau

Judgment

1. PRELIMINARY

By notice of motion dated 29 November 19% the Hon. Attorney General moved seeking orders of this court requiring the respondents to show cause why they ought not be committed to prison for contempt of court in respect to words allegedly spoken by the first respondent Fusitu'a and published by the second and third respondents, 'Akau'ola and Moala in the Taimi 'o Tonga Newspaper Volume 7 No.48 of Wednesday 27 November 1996. An affidavit in support of the motion has been filed by 'Alisi Taumoepeau Acting Solicitor General of Tonga.

On November 29, 1996 the Hon, The Chief Justice having heard an application by the Hon. The Attorney General for leave to summons the respondents granted leave for summonses to issue against to each respondent to appear in the Supreme Court and show cause why the respondents ought not be committed for contempt of court.

Two respondents, Fusitu'a and 'Akau'ola appeared to show cause on the day appointed. Moala had not been served on the appointed day of the first hearing of this motion on 3 December 1996. Leave was given to serve Moala at an address in New Zealand.

On 3 December a second notice of motion, (hereinafter the "Deputy Registrar Motion") was filed by the Acting Solicitor General together with an affidavit in support of the notice. The motion alleged that Hon. Fusitu'a had used words which constituted contempt. The motion seeks an order that the Hon. Fusitu'a be required toshow cause why he ought not be committed to prison.

Since he appeared in response lo the summons on the first motion (hereinafter the "Taimi 'o Tonga Motion"), this court odered that he appea in respect of the Deputy Registrar motion simultaneously with the Taimi 'o Tonga Motion. A hearing date was fixed for the mattersto be heard together on 12December at 9.00am or sosoon thereafter as counsel may be heard.

2. THE ALLEGED CONTEMPTS

2.1 The Taimi 'o Tonga words and publication

The Attorney General alleges that there are three distinct contempts; one 'attributable to each respondent:-

Fusitu_'.!

Is alleged to have spoken words to thejourna list 'Akau'ola to the effect that -

> "He was dissatisfied with the decision of the Chief Justice and went on to say that if an appeal proves the Legislative Assembly ri ght, may be it would be right that something be done about the Chief Justice, that he be prosecuted/impeached".

The motion alleges that the words spoken were calculated to:

threaten the Chief Justice with prosecution,
bring the judicial system into contempt,
interfere with the proper exercise of the office of Chief Justice.
interfere with the lawful processes of the court,
give the impression that the Chief Justice is not independent,
suggest that the Supreme Court of Tonga is subject to manipulation by the Legislative Assembly.

'Akau'ola

ls alleged in his capacity as ajournalist and assistant editor of Taimi 'oTonga to have republished the words spoken by Fusitu'a. The complainant repeats the particulars.

Moala

Is alleged to have in his capacity as editor and publisher of Taimi 'o Tonga to have published the words spoken. The complainant repeats the particulars.

Itis useful to set out in full the article of which complaint is made. It is as follows:- (the article is then set out both in Tongan and in English).

2.2 The Motion containing the allegation of Temaleti Pahulu

Temaleti Pahulu is Deputy Registrar of the Supreme Courtof Tonga. In heraffidavit sworn on 3 December 1996, she recounts a, telephone conversation she had with the respondent Hon. Fusitu'a.

The Deponent says that Fusitu'a during the conversation said to her words to the effect of:-

"I think it is proper for the Chief Justice to be prosecuted,
What do you say about that?"

That she replied

"It's entirely inappropriate for me to comment on such matters".

Fusitu'a said

"It's not a comment butjust a family discussion between us".

The complainant alleges that the words spoken were calculated to:-

Threaten the Chief Justice with prosecution.
Bring thejudicial system into contempt,
Interfere with the proper exercise of the Office of Chief Justice,
Interfere with the lawful processes of the Court.

The accused and each of them submit that nocontempt of court has occurred either by virtue of the matters alleged or at all and both appear to show cause why they ought not be committed.

The evince led in support of the motions is led by affidavit. Some deponents were presented for cross-examination.

3.0 EVIDENCE AND ANDINGS

Findings in these reasons are made once the court has concluded that from the whole of the evidence a matter has been proved by the Attorney-General beyond any reasonable doubt.

For reasons which I delivered ex tempore at trial I have placed no weight on the evidence of the witnesses 'Eseta Fusitu'a and Lesina Tonga called by the Second Respondent. The ruling reflects in no way upon their credit. It was the way in which their evidence was sought and obtained by counsel calling them which caused me to exercise my discretion to exclude it.

4.0 THE MOTION CONCERNING THE DEPLTfY REGISTRAR

The claim of the Crown in this motion is that:-

"Seeking the vil'.ws of the Deputy Registrar of the Supreme Court as to the prosecution of the Chief Justice is in contempt of court as scandalising of the court."

The affidavit of Ms. Pahulu is exhibit P3. It is before the Court without objection. Ms Pahulu's evidence is brief. She says that on the afternoon of the 29 November 1996

she had a telephone call from the Hon. Fusitu'a which she took in the computer room of the court office. Her evidence is that the exchange was as follows:

He said "I think it is proper for the Chief Justice Jo be prosecuted, what do you say about that?"
She said "It's entirely inappropriate for me to comment on such matters".
He said "It's not a comment but just a family discussion between us".

Ms. Pahulu's evidence is that the conversation was in Tongan that the word used which she took to mean "Prosecuted" was "Faka'ilo". The proper English meaning the verb "Faka'ilo" should be given in the context of this motion, is to "Impeach" or to "Prosecute". Either meaning has the same potency in my view.

The Acting Registrar was cross-examined by counsel for Fusitu'a who plainly put to her that Fusitu'a had not called her on the 29th November. Ms Pahulu responded that the words complained of were spoken on the 29th. She said that Fusilu'a has called her onfouroccasions. The occasions were on the 28 and 29 November and that the words were used by Fusitu'a during the fourth conversation "Out of the Blue".

For his own part Fusitu'a refers to the alleged conversation in his sworn evidence. (He had been served with motion No.1352196 on the eve of trial and had no time to file an answering affidavit). His evidence is that he "categorically denies" saying the words complained of; that he had convei:sations with the Deputy Registrar but not on the 29 November. He said "I was looking for a copy of thejudgment" (of the Chief Justice in which the Chief Justice released twojournalist s and the representative 'Akilisi Pohiva). His call to Registrar Pahulu he said was long before the 29th of November. (f he order of the Chief Justice releasing the men is dated 14October 1996).

There is a second order of the Chief Justice dated 29.11.96 which assumes significance in this hr-ng. The order has become exhibit P5. By his order, the Ghief Justice discharges himself from the hearing of the prosecution of Samiuela 'Akilisi Pohiva with certain ancillary paras added."The discharging order was made on the 29 November. It is clearly not the discharging order that Fusitu'a sought from the Registrar - He says so himself - "What I was looking for was the Judgment it was long before the 29th November". - that is thejudgment releasing the three men from prison.

The evidence is that at the time of the incident with the Registrar there had been no meeting of the Legislative Assembly Law Committee which on Fusitu'a's account was about to be convened to consider an appeal against the judgment of the Chief Justice.

During the cross examination of Fusitu'a he was asked

"You have no idea why the Deputy Registrar lied?"

He replied

"I am not saying she lied. I categorically deny saying ii to her."

I have anxiously considered the evidence and the witnesses. There is no reason in evidence as to the Deputy Registrar having cause to or motive for making so serious an accusation falsely. Importantly she was unshaken in her evidence. She impressed me as an utterly reliable witness giving her evidence accurately unhesitatingly and to the best of her recollection about very recent events. I am convinced of her honesty and the accuracy and truthfulness of her evidence beyond any reasonable doubt.

The evidence of the Deputy Registrar is that she was surpri sed on readi ng the conversation in '!.Taimi 'o Tonga", which she had been asked lo translate after the telephone conversation with Fusitu'a. to rind that it related to the same subject.

I am driven to conclude beyond any reasonable doubt that the account of Deputy Registrar Pahulu is to be preferred to that of the respondent Fusitu'a. I find that the conversation to which she deposed occurred as the Deputy Registrar related it to this court. I prefer her evidence about the matter to that of the respondent Fusitu'a.

But is the exchange something which amounts to contempt of Court? The motion Para.3alleges that:-

> "3) That the words spoken were the direct cause of the Chief Justice discharging himself from the further hearing of a trial which was in progress at the time".

There is no evidence which supports such an assertion. The Acting Solicitor-General concedes as much.

The Acting Solicitor-General submits that in seeking the views of the Deputy Registrar of the Supreme Court as to the prosecution/impeachment is to be in contempt of court as •Scandalising the Court" in the sense that the phrase was used by Lord Russell C.J. in Regina v Gray (1890] Q.B. 36 at 40.

> •Any Act done or writing published calculated to bring a Court or a Judge of a Court into contempt, or to lower his authority, is a contempt. Further any act done or writing published calculated to obstruct or interfere with the due course of Justice or the lawful process of the court is a contempt of court. The former processbelongs tothecategory which Lord Hardwicke, Lord Chancellor, characterised as scandalising a Court or a Judge".

There is nothing about the "Deputy Registrar Incident" which would in my opinion constitute contempt of court. An intention to do the proscribed act or acts on the part of Fusitu'a cannot be inferred from the evidence before this court beyond any reasonable doubt.

This is a convenient point to make it plain that in the hearing of these two motions together I have not used findings (of Credit) concerning the decision to be made on one motion in coming to a conclusion (on Credit) about the other. Neither respondent consented to that course being adopted and accordingly I have treated each motion as being separate from and different to the other as I think must be done in circumstances such as the present.

The remarks by Fusitu'a were thoughtless in the sense that they were an invitation to Ms. Pahulu to comment about something "Out of the Blue" about which she had no authority to comment. Her response was proper and appropriate. The remarks may have been inappropriate and, I imagine, embarrassing to her but they cannot be seen in my opinion to constitute contempt of this court in any sense of the consequences pleaded or at all. The motion is discharged.

5.0 THE TAIMI 'O TONGA MOTION

The Crown alleges here that:-

> The words spoken contained in the passage in question scandalises the court.
> That the publication of those words scandalises the court.
> That it interferes with the process of the court in the pending appeal of the habeas corpus orders.
> That it has in fact interfered with the process of the Court in that CJ Hampton has discharged himself from the proceedings of Rex v. Pohiva under the threat of impeachment as the preferred translation by the first respondent published in the paper". (sic)

The article has already been set out in full. What is known of it? The following is established from the evidence before me beyond and reasonable doubt (and I so find):-

> Exhibit P4contains the article containing the quote attributed to Fusitu'a.
> 'Akau'ola was the assistant editor and advertising manager of Taimi 'o Tonga newspaper at all material times.
> 'Akau'ola interviewed Fusitu'a at Fusitu'a residence on 14 November 1996.
> Some of the interview was recorded by 'Akau'ola, some was written in 'Akau'ola's notebook and some of the interview was not recorded at all.
> The article containing the quotation complained of was then placed in "Taimi 'o Tonga" Vol.7 No.48 and was published on 27.11.96. And distributed and read by members of the public.

I am satisfied beyond any reasonable doubt that on 14 November 1996 the respondent 'Akau'ola in his role as assistant editor andjournali st empJ'oyed by the Taimi 'oTonga newspaper visited the respondentFu situ'a at his residence. There he interviewed Fusitu'a.

The words complained of are plain enough with the exception of the possibility of ambiguity in thetrue senseof the translation and useof the word "Faka'ilo". I find Faka'ilo may mean, depending upon the context "to prosecute" or "to impeach". The Attorney General complains that it carries the contextua l meaning in the Taimi 'oTonga article of "to prosecute ". Either meaning, the Acting Solicitor General was quick to point out, is equally powerful in the context of the complaint against the respondents.

Itis necessary tospend some time anal ysing the literalness of the words complained of and how they came into being. Fusitu'a says that he did not say the words and 'Akau'ola claims that they were words Fusitu'a used.

On the score of ju st what was said, Fusitu'a has prevaricated from the very beginning. In his affidavit he says nothing of whether he uttered the words complained of in the (Taimi 'oTonga) motion . In his sworn evidenceasa witness in cross examination he saysof thewords complained of "I cam10t swear whether I said thosewords or whether I did not say them". A nd later he sayshaving heard the tape "I definitelydid not say them". From paragraphs 9 - 17of Fusitu'a affidavit he clearly had a conversation with 'Akau'ola concerning his view on the measures to be taken about the Chief Justice's jud gment.

There are other examples of prevarication in the evidence of Fusitu'a. He has riled in this court a document which he describes as a "reply". In that document which appears to be constructed as a form of "Plea in traverse and avoidance", he claims:

> The recitation of the words in the notice of motion filed by the Hon the A ttorney General are not the same as those appearin g in "Taimi 'oTonga".

That is true. However the different wording must be viewed against the allegation by the Attorney that the respondent Fusitu'a "Said words to the effect".

An immediate reaction to the "reply" is that it does not in any sense coincide with

the evidence the respondent Fusitu'a gave during cross examination. For the first time in cross examination he revealed his position on tqe useof the words. He said "I am unable to swear that I did not say them nor a!Jl I able to swear that I did".

Did 'Akau'ola publish the words complained of (disregarding the translation of the word "Faka'ilo") in the precise form in which the words were used by Fusitu'a? I think not. I reach my conclusion for the following reasons.

An analysis of the evidence about this issue must logically begin with the now familiar publication in Exhibit P4 (f he Taimi 'o Tonga). (An analysis followed, and the judge then concluded):

I am satisfied beyond any reasonable doubt that the words 'Akau'ola used in writing the article are words which were spoken by Fusitu'a to him during the interview of 14 November 1996.

There was some protrated cross examination by counsel for the first responaent (Mr Paasi) which finds its origins no doubt, in paragraphs 10 and 11of the affidavit of Fusitu'a implying that neither 'Akau'ola nor his notes could be relied upon since 'Akau'ola referred to "Judge" instead of "Chief Justice" in his preparatory materials but to "Chief Justice" in the article.

The cross examination and submissio has no force. The subject matter of the interview was the Chief Justice on any account of it ·not anyone else. I accept unhesitatingly 'Akau'ola's explanation of the use of the word "Judge" in his notes.

I repea the case for the Attorney General has always been that Fusitu'a had used "words to the effect" of those complained of in P4. I have no doubt at all given the evidence before me that the words published and complained of are Fusitu'a's words as recorded and recalled by 'Akau'ola. The words may not beassembled in the article in P4 in the same order in \Yhich they were sen by Fusitu'a butf am left in nodoubt1hat tlie words carry the same meaning in P4 as they were intended to carry in the nswers given by Fusitu'a to 'Akau'ola on the 14 November 1996.

Fusitu'a was asserting that a successful appeal of the habeas corpus rulmgs of 14 October 1996 by the Chief Justice would lead to committee discussions in the Legislative Assembly Law Committee forhis prosecution/impeachment/dismis sal. Fusitu'a's assertion needs some careful examination having regard to the law.

The Constitution [1988) Cap 2 Clause 75 provides as follows:-

> "(!) It shall be lawful for the members of the Legislative Assembly to impeach any Privy Councillor, Minister, Governor or Judge for any of the following offences •
>
> Breach of the resolutions or Laws of the Assembly, maladministration , incompetency, destruction or embezzlement of government property, or the performance of acts which may lead to difficulties between this and another country.
>
> [Emphasis added]

[SubClauses (2), (3), (3), (4) and (5) of clause 75of the Constitution are not material to this issue].

The assertion made by Fusitu'a appears to carry the implication that by delivering a judgm ent which, in its effect declared among other things an order of the Legislative Assembly unlawful and unconstitutional, the Chief Justice had committ d an "offence" within the meaning of Clause 75, namely the offence of "Breaching a resolution of the

Legislative Assembly" in ordering the release of two journalists and a membei- of the Legislative Assembly held in custody by order of the House. Had he?

Clause 75, a penal statute, first must be construed strictly. Next it rrmst be r d as referring to "offences" proof of which must include actus reu3 ancl mens rea. Ht contemplation includes the commission of crime by the .Judge to be impeached. The section uses the word "offence" in its drafting. It recites acts for which imp'-achm-;:nt proceeding may be brought. They are, each one of them, "offences". They 11re, ej1.mdem generis, crimes. The judgment about which the first respondent claimed he wao dissatisfied is a published one. It is circulated for all to see after v I' 'lrin in open cot•J t. The applicants were each represented by counsel. The proceedings were i::ond•icted strirtl y in accordance with the requirements of natural justice a.nd the partier1 givF-n llw right to be heard and were heard fully.

Th Legislative Assembly was, in the habeas corpus applicatious, in a r al :icm.Je repres1 .1ted and given the opportun ity to argue its posi lion abo11t whicl1 tl1e first resp• .1dent now claimr be dissatisfied, (he says), on its behalf (since he w;isacthg in an ·ificial capacity when being interviewed).

Most importantly neither respondent suggested by plP.adings or evidence er submissions that the judgment of the Chief Justice was in breach of the. provisions of Clause 75 of the Constitution. Neither respondent has sought to have the Chief Justice cross examined and charged with any offence as a consequ nce of his co71duc1 management of the hearing or his delivery of judgment and mder in tile appt;;;ti<Inf for habeas corpus by 'Akau'ola, Moala and 'Akilisi Poltiva.

This Court must therefore conclude that the respondenls and each of lhem a·r;p that the Chief Justice has not offended against Clause 75in the delivery of the 1eas0!1s •1nd orders in questi<P The first respondent says as much in hi affidavit and in hi:o "Reply". The second respondent has remained silent on those matters.

Where then is the need for debate of impeachment in the Law Commiltee? The answer is that there never has been any issue of whether impeachment procPeding:i ought to be brought against the Chief Justice and there never has been any need to ent<::r in!o discussion about it. The law at that time was as plain as it is tody.

No one at the hearing or atthis moment suggests that he Chief Justice, in deliv P,ri ng his reasqns and in making his order acted other than with care and p•opriety, properly and in accordance with the best traditions of the office of the Chief Justice of tl1e Suq::tne Court of the Kingdom of Tonga - not even the speaker, Fusitu'a.

In the known circumstances of this matter at law and in fact it was nwer op.en to the Law Committee of the Legislative Assembly or any body else to se k thP- impl!achment prosecuti on or dismissal of the Chief Justice and yet here was Fusitu'a tlte Sren 1ker of the Legi slative Assembly solemnly asserting that the commi1tee would be doing wo1k toward investigating his impeachment. It is here, in this very area, that the gravity of the 11rticle its authorship and its publication has its worst consequences.

Those consequences have been carefully spelled ot1t by the A ttorney-Gen C'ral whose job it i s to spell them out when a contempt is alleged. Let me 1epeat the molion. The motion alleges that the words spoken by Fusitu'a were calculated to:

> Threaten the Chief Justice with prosecution,
>
> Bring the judicial system into contempt,
>
> Interfere with the proper exercise of the office of Chief Justice,

> Give the impression that the Chief Justice is not independent,
> Suggest that the Supreme Court of Tonga is subject to manipulation by the Legislative Assembly.

It is very well settled law that punishment consequent on a conviction for contempt is inflicted not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of an attack but of Protecting The Public and especially those who either voluntarily or by compulsion are subject to thejurisdiction of the court from the mischief they will incur if the authority of the tribunal is undermined or impaired.

Where then does that take the matter? On the findings and the defences (socalled), raised by Fusitu'a a consideration of the operation and scope of the U.K. Contempt or Court Act 1981needs to be made.

Although thecommon law is not entirely superceded by the Contempt of Court Ac it is clear that is practice most cases will now fall to be determined under its provisions.

Section 5 of the Act contains the following qualifications to liability:

> "5. A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussions".

S.5 only applies where the proceedings allege a contempt under the strict liability rule.

S.5of the act has no application where it is contended that the relevant publication is intended to impede the administration of Justice; nor where the intereferenceis with the administration of Justice as a continuing process, ratherthan with Justice in that parti -Jlar case ["Contempt of Court" C.J. Miller 2nd ED. 1990). The allegations in both motions relate to interference with the continuing process.

It is noted at once that in respect of both motions before the court the Crown relies on the inherent jurisdiction of this court to deal with matters on contempt, but the Contempt of Court Act 1981 (U.K.) provisions need to be considered in light of the fact that each respondent relies upon the Act for his defence.

From the outset it has been the case for the Attorney-General since the filing of the motion that at all material times, the first respondent said words and acted in a private capacity - not in any official capacity.

Fusitu'a in his evidence given orally and in his affidavit deposes to having spoken asandin his capacity as Speakerof the Legislative Assembly. Certainly 'Akau'olaappears to have sought him out in order to interview him as Speaker. 'Akau'ola's evidence is

> "Why I went to Fusitu'a because I have to know what would the House do when we were released from prison because we knew that there was a letter asking Fusitu'a whilst we were in prison with regards to our release ..... that the person with authority in the House to my knowledge would be the Speaker of the House".(sic)

Even though Fus!tu'a may have believed then (and still believes) that he was acting in his official capacity in speaking with 'Akau'ola, - it is a matter of fact peculiarly within his own knowledge. No one else speaks of it.

I find that at all material times Fusitu'aspoke and acted in a personal and private capacity - (as the SolicitorGeneral alleges), when, in the interview with 'Akau'ola he said the words wbich ultimately were published in 'Taimi 'o Tonga".

It is immaterial in what capacity Fusitu'a uttered the words complained of once he is found to be contemnor ..... "Ministers of the Crown and civil servants are natural persons having a legal personality. The obstacles to liability in contempt which arise in the case of The Crown' and other government departments donot thereforearise in their case. Prima facie they, like any other citizen, are subject to the Law, the rule of law and the full juri sdiction of the Courts", per Lord Donaldson M.R - M v Home Office (1992] 4 All ER 97 at 136.

6.0 THE LAW RELATING TO CONTEMPT

I take the law (as presently advised) to be as follows:

The circumstances of the two matters now before the court give rise, broadly speaking, to three separate and different categories of contempt

> Conte-mpt outside the Court,
> Contempt !:>" words used and
> Conter!JI vy publishing and republishing.

As to the form of this hearing and although no point is taken by counsel, in my opinion it is open to onejudge of this Court to commit for the established contempt of another judge. Balough v St Albans Crown Court (1975] Q.B. 73.

At one time there existed a categorisation of contempt into two heads, civil and criminal contempt. However, in Attorney General v.Newspaper Publishing PLC (1988] .CCh.333, Sir John Donaldson M.R. considered the law of contempt and its basis in principle. He said:

> "Despite its protean nature, contempt has been classified under two heads 'Civil Contempt' and 'Criminal contempt'. Whatever the value of this classification in earlier times I venture lo think that it now tends to mislead rather than lo assist, because the standard of proof is the same namely the criminal standard and there are now common rights of appeal. Of greater assistance is a reclassification as (a) conduct which involves a breach or the assisting in a breach, of a court order and (b) any other conduct which involves an interference with the due administration of Justice, either in a particular case, or, more generally, as a continuing process, the first category being a special form of the latter, such interference being a characteristic common to all contempts: Per Lord Diplock in Attorney General v. Leveller Magazine Ltd. (1979] A.C. 440. What distinguishes the two categories is that in general conduct that involves a breach or assisting in the breach of a court order is treated as a matter for the parties to raise by complaint, whereas other forms of contempt are in general considered to be a matter for the Attorney General to raise. In doing so he acts not as a Government Minister or Legal Adviser, but as the guardian of the public interest in the due administration of Justice".

The Master of the Rolls went on to say (at 368 and 97i),

> "The Law of contempt is based upon the broadest of principle

> namely that the courts cannot and will not permit interference with the due administration of Justice. Its application is universal. The fact that it is applied in novel circumstances, for example the punishment of a witness after he had given evidence (Attorney General v Butterworth [1963] 1Q.B. 696), is not a case of widening its application. It is merely a new example of its application".

What is contempt? Lord President Clyde described it in Johnson *v* Grant (1923) SC 789 at 790, cited with approval by Lord Edmund-Davies in Attorney General v. Leveller Magazine Ltd. [1979] 1 All ER 745 at 757:

> "The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned ..... the offence consists in interfering with the administration of the law ..... it is not the dignity of the court which is offended - a petty and misleading view of the issues involved - it is the fundamental supremacy of the law which is challenged".

Did Fusitu'a interfere with the administration of the law and intend so to do? From the whole of the evidence before me I have no doubt that he intended to make it plain that the reversing of the will of Parliament by an order of the Supreme Court was something that would not be tolerated while he was Speaker. He was, in speaking to the press, making it plain to as many people as he possibly could that If the Court of Appeal demonstrated that the Chief Justice was in error in his releasing of the prisoners then preparations would be made for the impeachment of the Chief Justice.

But Fusitu'a was at all material times the Speaker of the Supreme Law making Body of Tonga. How could he have not known that there was no means whatsoever in the circumstances which he knew to exist in these habeas corpus applications by which the Parliament could impeach the Chief Justice fordoing that which hisjudicial oath required of him? Parliament has made Laws and Parliament required of him thathe uphold its laws. I am reluctantly forced to conclude that Fusitu'a intended to interfere with the proper course of the administration of Justice by putting about misleading information. That can only be a most serious contempt of Court. What he hoped to achieve by his remarks to 'Akau'ola one cannot know. Hesaid in answer to the Acting Solicitor General in cross-examination:

> "What I was concerned about was that we were told that we were wrong constitutionally".

Perh\iPS it was that concern' which motivated his remarks. I am unable to say. Whatever it was that motivated these extraordinary remarks have led him into a grave predicament.

Was Fusitu'a attempting to hold the Chief Justice in fear forever? Wbatever nis purpose I conclude that he knew full well that what he was saying was wrong in law and in fact and that he intended to put the misleading information abo_ut. It is contempt of the Court to do so for it is an interference with the administration of justice and accordingly, a contempt of Court attracting as it does serious consequences. I so find.

I formally find that 'Akau'ola participated in the publishing of the words in the manner which I have described. I find 'Akau'ola guilty of contempt.

I will hear counsel on the appropriate penalties to be imposed in the "Taimi 'o Tonga•

matter.

SENTENCE

Having found the "Taimi 'o Tonga Motion" established beyond any reason doubt it is now necessary to consider the appropriate sanctions to be imposed on Hon. Fusitu'a and Filokalafi 'Akau'ola.

I was reminded recently that "It is not possible for order and peace to be sustained in modern nations unless those nati01;is develop and promote an effective and just legal system. The very legitimacy which citizens are prepared to accord to the state and to the institutions supporting it depends upon their sense that they are treated both fairly and equally with all other citizens. A legal system that is accessible to all citizens which operates according to laws which are known in advance and perceived to be reasonable and fair, and which uses procedures that are both even handed and rec9gnised as effective in reaching the truth, is among the best means of reassuring citizens of that fair and equitable treatment ....."

"An effective legal system isone major means of handling and resolving sometypes of conflicts and disputes which could otherwise get out of hand and lead to general disorder .....•

There is a separation of powers in the structure of state. The Legislature the executive and the judiciary are separate limbs of government Each institution must legitimately manage its own affairs. It has been in the exercise of that management that these proceedings have been prosecuted - for the protection of citizens generally and particulary those who have recourse to the justice system.

I repeat the remarks made in thejudgment. Punishment consequent on a conviction for contempt is inflicted not for the purpose of protecting the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public andespecially thosewho either voluntarily orby compulsion aresubject to thejurisdiction of the court, from the mischief theywill incur if the authority of the tribunal is underrni ned or impaired.

I have carefully noted that what Hon. Fusitu'a said in his affidavit and his reply. It seems extraordinary, that, having spoken about the matterof impeachment with 'Akau'ola in the way he did, he was able to purport to retract the words printed in "Taimi 'o Tonga". Any damage was done in the publishing. It is almost unnecessary to point out the high public office which Fusitu'a held at the time of his published statements to "'Akau'ola". For years he has carried well, the solemn burden in his role as Speaker of upholding the excellent reputation which the Legislative Assembly of the Kingdom of Tonga has acquired over more than one hundred years, a task which he has carried out with distinction.

Associated with Fusitu'a's role is the historical respect in which theoffice of Speaker is and has been held. The consequence is that when Hon. Fusitu'a makes a statement to the press on any matter, privately or as the Speaker of the House, the people generally accept what is said without reserve - for such is the acceptance of the intgrity of the offi ce-holder it neither could nor should, be otherwise.

I have been convinced by what I have heard that Hon. Fusitu'a used the words complained of. No reasonable by-stander who having read the article and having considered the assertions it contained could think that the Chief Justice (and indeed any Judge of the Court), was independent.

The clear implication is that if the Chief Jusitice is not independent then the administration of justice is one which is unreliable and unsafe for those who may have cause to use il

The Attorney General asserts in these proceedings that by his actions Hon. Fusitu'a has:

> Brought the Judicial system into contempt,
> Interfered with the proper exercise of the office of Chief Justice,
> Interfered with the lawful processes of the Court,
> Given the impression that the Chief Justice is not independent and
> Suggested that the Supreme Court of Tonga is subject to manipulation by the Legislative Assembly.

In my opinion all the elements particularised are present in the evidence presented to the Court by the Attorney General to a greater or lesser degree; for reasons which I have already given.

The question now is what is the reality of the effect of what has been said and published? When Fusitu'a used the word "Faka'ilo" whatever the proper translation may have been for those circumstances, he was wrong in fact and he was wrong in Jaw.

I The confidence of ordinary people in the proper safe and efficient administration of Justice must reasonably be seen to have been shaken. Thus it has become necessary for the Attorney General to move these proceedings.

I comment that this matter has become protracted into a relatively lengthy hearing with some associated delay at the instance of the first respondenl The contempt which eltisted from publication has been a continuing one; one from which greater damage to the administration of Justice has the potential to flow. I may have taken a different view of penalty had there been a retraction and an apology made at the earliest time. However, that was not to be and what was bad enough at its utterance may well have become compow1ded overtime; however that is mere speculation. I have no evidence of it before me.

As to 'Akau'ola, it was by means of the newspaper which employed him that the misstatement of the Jaw and of the fact was circulated in Tonga.

This was a most serious contempt but I now take into account that the affidavit and reply of the first respondent reflect a retraction and apology.

After taking into account the facts as I have found them to be and the submissions of counsel I have concluded that the appropriate sanctions are as follows:

> As to Hon. Fusitu'a, I impose a fine of $1000.00.
> As to Filokalafi 'Akau'ola. a fine of $500.00

The question of cots is referred into chambers for taxing or agreement on 4 February 1997 at 9.30am.

I by consent furtherorder that the First Respendent and the Second Respendent each publish on page one of the. next edition o "Tonga 'o Tonga" newspaper a retraction not smaller in prominence thafthe article complained of, to be written in such fashion as shall be approved of by the Solicitor-General Acting on behalf of the Attorney General in this matter.

Attorney General v 'Akau'ola

Supreme Court, Nuku'alofa
Lewis J
C.197/97

7, 9 & 14 April, 1997

Contempt of court - penalty - retraction - failure to comply with court order

The respondent failed to publish the retraction as ordered (see the judgment reported immediately above).

Held:

1. The cause of the failure was the wrong advice given the respondent by his lawyer. No stay pending appeal had been applied for.
2. The absence of compliance with the earlier court order made the contempt of the respondent a continuing one and more serious.
3. The respondent could not shield himself behind the erroneous advice of counsel.
4. The motion was found proved but in view of the apology and explanation costs only were ordered to be paid by the respondent.

Note The respondent later succeeded on appeal from the main judgment. The Court of Appeal judgment is reported immediately following.

Case considered: M v Home Office (1992) 4 All ER 97

Rules of Court considered: Supreme Court Rules 1991, 026

Counsel for Attorney General Mr Cauchi
Counsel for respondent Mr Tu'utafaiva

Judgmc11t

On 3 Febmary 1997 after a contested allegation of contempt of Court by the Respondent to this motion, Filokalafi 'Akau'ola, the Respondent was found in contempt of this Court and fiued. That contempt was found to arise from his participation in the publishing in Taimi 'o Tonga Newspaper of a contempt by Hon. Fusitu'a.

By the same Order by which the fine was imposed, the Respondent was required to publish a retraction and apology the form of which was to be settled by the Solicitor Gene1al of the IGngdom of Tonga. The Order contemplated that the draft apology be presented to the Solicitor General in time for it to be considered, altered if necessary and then presented for Publicati on in Tai mi 'o Tonga in its next edition.

No such publication has occured to the date of this Judgment in spite of numerous approachesby Mr. Cauchi of counsel for theHon. the Attorney General to the Respondent and in spite of warnings given in Chamber hearings by Mr. Cauchi leading to the open Court hearing today.

'Akau'ola has been represented by Paluvava'u Taufateau in both the former and the picsent Motions. The Respondent now has Siosifa Tu'utafaiva as leading counsel. It became necessary because ithas now emerged (although it has only emergedjust before this final hearing,)that the cause of the failure of the Respondent to retract and apologise for hisoriginal conttmptis theconsequenceof wrongadvice given him by *his* representative Mrs. Taufateau.

Ilis most regrettable that the Responden t has been placed in such an invidious position. The Respondent saysandhislegal adviseraccepts that hehad prepared theletter of apology and retraction and that he had delivered it to the Crown Law office. On the 14February 1997 the wording of itwas settled with Crown Law. On the Sunday following the 14 February the Respondent met his legal adviser at church. He says that at that meeting Mrs.Taufateau told him towithhold the publishing of the apology and retraction becausethedecision of theCourt had tobe appealed. On the basisof theadvice givenhim by Mrs. Taufateau he stopped the publishing of the Apology and retraction.

An Appeal was filed in this court and served on the Crown Law Office against the findings and Orders of Lewis J made in the matter of Fusitu'a and 'Akau'ola by the Respondent (but not by the Hon. Fusitu'a) weeks after the due copy date for the Taimi 'o Tonga. Moreover no attempt to stay the Order of 3 February was made.

It does not appear to have been comprehended by the legal representative for 'Akau'ola that hisundertaking to makea retraction and apology was a factor affecting the leniency which was extended to the Responden t. Indeed Mrs. Taufatea u's client consented to the Order made. It does not end there.

The absence of compliance with the Order of 3 Febrnary (i.e. the failure on the part of the Respondent to retract and apologise) makes the contempt a continuing one and the1efore far more serious than it was initially.

Ifthere was any procedural unce1tainty in themind of the Respondent's legal adviser then it was hercleardutyto seekthe adviceof counsel. Itmust besaid, it should have been as clear as it could possibly be to counsel that her first duty was to file an A ppeal Notice within the time limit set for the publication of the retraction and apology and within that same time constraint to apply before a Judge in chambers for a Stay of the Orders under Appeal. The path of events would then have been open for the publication to have been defe1Ted until after the decision of the Court of Appeal.

Counsel for the Crown submits that the Respondent cannot shield himself behind the erroneous advice of his counsel. He cites M v The Home Office [1992] 4 All ER *':17* per Donaldson M.R. at 132 in submitting that Akau'ola is bound by what hie counsel has said to the Court and bound by theadvice given *him* when he chooses to act on it in cases such as the present. I accept that submission.

I concludethisjudgment by commenting onthelamentable way thismatter hasbeen managed by the Respondent's legal adviser. In so saying I take into account the matter referred to in para 4of her affidavitsworn on 8April 1997. Wherever counsel or solicitors find themselves in predicaments whether of their own making or not, the first and only course to take it to either refer the matter to a senior colleague or to \ake advice of Senior Counsel.

I am satisfied from the material before me and from those matters of which I am entitled to take Judicial Notice that the Respondent has committed a continuing contempt of Court by disobedience and non compliance with the Order of this Courtdate3 February 1997 in that he failed oromitted to publish on page one of the edition next after3 February of "Taimi 'o Tonga" newspaper a retraction not smaller in prominence than the article complainedof tobe written in such a fashion asshall beapproved of the Solicitor General acting on behalf of the Attorney General.

Counsel for the Respondent submitted that there has been a noncompliance with RSC Order 26 Rule 12 by the Crown in the present case. I do not propose to make a ruling on that submission. Itdoes not reflect well on the Respondent to have itmade. There has beena submission tothejurisdiction of the Court to hear and determine thismatteron the Motion and indeed an apology for the breach has been made through his now Counsel.

For the sake of completeness I choose to proceed to deal with this matter pursuant to Order 26 Rule 12 (3) (vi) invoking as I do the inherent power and juri sdiction of this Court to make an Order of its own motion.

I find the matters set out in the notice of motion proved. Takinginto accountall the circumstances in this case including the fact that Respondent apologies for lhe breach since its beginning, I consider that the Respondent should pay the Costs of these proceedings to be taxed or agreed l make no further or other Order.

'Akau'ola v Attorney General

Court of Appeal
Morling, Burchett & Tompkins JJ
App.3/97

12 & 20 June 1997

Contempt of court - administration ofjustice

The facts of this matter are clearly set out in the reports immediately above. One respondent in the court below, the journali st, appealed to the Court of Appeal.

Held:

1. The judge below did not find a contempt in the ordinary sense of an interference with the administration of justice in a particular case. Instead there was a finding of contempt in the sense of a "scandalising the court".
2. It was not easy to see how the paragraph in question could have been held, beyond a reasonable doubt, to have had that effect. Justice is not a cloistered virtue.
3. Although the trial judge held that the Speaker should have known that there could not possibly be any ground for theimpeachment of theChief Justice, on thebasis suggested, no such finding was made against the appellant, norcould it have been, at least beyond reasonable .doubt..
4. The court, by which the rule of law is maintained and implemented, is at the heart of a free society; but it is not a fragile institution. Itis, and must be, robust enough to bear the criticisms of the dissatisfied. It was not set up so much to be protected, as to protect.
5. Accordingly, the publication (by theappeallant) of the remarks of the Speaker cannot be held toju stify a finding of contempt of court.'The appeal should be allowed, the orders against the appellant set aside and the motion against him dismissed

Cases considered:

St. James's Evening Post case (1742) 2 Atk 469
R v Gray [1900] 2 QB 36
Ambard v A.O. ITrindad & Tobago) [1936] AC 322
___ v Radio A von [1978] 1 NZLR 225

Counsel for appellant — Mr Tu'utafaiva
Counsel for respondent — Mr Cauchi

Judgment

This i s an appeal against a conviction for contempt of cou rt, and the impos ition accordingly of a fine of T$500.

The circumstances have achieved some notoriety in Tonga, the background to the case bei ug au order of the Supreme Court made 14 October 1996 for the release of three persons from imprisonment under a warrant issued by the Speaker of the Legislative Assembl y. It was the Chief Justice who made that order, wh ich is also the subject of an appeal tothisCourt. Following the releaseof the three persons, oneof them, theappellant, who is a journalist and assistant editor of a newspa per circulating in Tonga, on 14 November 1996 interviewed the Speaker of the Legislative Assembly, seeking his reaction to the judgment of the Chief Justice. A n article written by the appellant then appeared in an issue of the newspaper dated 27 November 1996. The appellant explained that publication of t he article had been delayed, pending the lodgment of an appeal against the Chief Justice· decision, at the request of the Speaker.

Twoof the three men released were the editor and assistant editor (the appellant) of the newspaper, the third being a member of Parliament named 'Akilisi Pohiva who had gi\"en them information for a "scoop", so the article could hardl y have been supposed by anv reader to be an attack on the Chief Justice. However, it reported the events at some le1;gth, and that the Government was lodging an appeal. One paragra ph was alleged. howc1cr, to amount to a contem pt of Court. It read to the following cffecl:

> "In a statement by Fusitu'a [i.e. the Speaker], he said that he was dissatisfied with thejudgment of the I Ion.Chief Justice and he also said: if there is an appeal and the Legislative Assembly is right, may be it is correct to do work [sic] to the I Ion. Chief Justice lo impeach.•

Unfortuna tely, on 25 November 1996, a trial had commenced before the Chief Justice and a ju ry, in which Mr Pohiva was accused of criminal ly libelling the l<ing:and on 29 Nov ember 1996, the Chief Justice disqualified himself frorn continui ng to preside over that trial.

I n these circumstances, it is not surprising that the Attorney-General instituted proceedings for contempt of Court against the Speaker and the editor and assistant editor of the newspaper. There must have seemed lo be a likelihood that the timing of the article was not coincidental, and that it had been a major embarrassment in relation to an important crimina l trial, which had lo be aborted asa consequence. However, the ti111in g was explained at the hearing by the Speaker's request for delay. W hal thejudge held was that the Speaker "inlended to interfere with the proper course of the administration of ju stice bypulli ng about misleadinginfonnation.• His Honour added: Itisan interference with the administration ofjustice and accordingly a contcmol of Court". This is not a finding that the publication was calculated to inlerefere with the due course of JUStice by causing the Chief Justice to disqualif y himself f rom continuing to hear the tria l of Mr Pohiva. That is to say, there was no finding made of conlempt in the ordinary sense of an interference with the administration ofju stice in a part.cular case.

Instead, theju dge at first instance found a contempt in the sense conveyed by Lord 1 lardwicke's phrase (in the SlJames's Evening Post case (1742) 2 A tk. 69) "scandali sing the court". Thal form of conte111pl was said by Lord Russell of J<illowen CJ (in R 1·Grav [1900] 2 QO 36 at 40) 10 consist of "any act done or writing publ ished calculated to brin g

a court or a judge of the court into contempt or to lower his authority."

Bui it is not easy to see how the paragraph in question could have been helcl beyond a reasonable dou bt to have had this effect. Mere criticism, even strong criticism, is not enough. In a celebrated passage, Lord Atki n said (in Ambard v A ttorney Ge n era l for Tri nidad and Toba go (1936) AC 322 at 335):

> 'But whether the authority and postion of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the publi c who el\ercises the ordinary ri ght of criticising, in good faith, in pri vate or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of ju stice, and are genuinely el\ercising a right of criticism, and not acting in malice or attempting to impair the administration of ju stice, they are immune. Justice is not a cloistered virtue: she much be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.·

The reference to 'cloi stered v irtue', i n this contel\t, is obviou sly mea nt to recall Milton's famous defence (i n the A reopagiti ca) of the freedom of the press. The New Zealand Court of Appeal (Richmond P., Woodhouse and Cooke JJ) was (with respect) ri ght in Solici tor-Ge neral v Radio A von Lid [1978] 1 NZLR 225 at 230 when i t added, after citing Lord Atkin's pronouncement:

> "The ri ght of the press or the public to cri ticise the work of the courts was again strongly upheld by the Court of Appeal in England in *R v Commissioner of Police, Exp Blackbum (No.2)* (1968) 2 QB 150; [1968) 2 All ER 319. The courts of New Zealand, as in the United Kingdom, completely recognise the importance of freedom of speech in relation to their work provided that criticism is put forward fairly and honeslly for a legitimate purpose and not for the purpose of injuring our system of justice."

When the Court comes toappl y these statements of the law to thefacts of the present case, it must remember that the appellant was held to have reported faithfully a comment made to him by the Speaker of the Legislative Assembly. Thejudge held that the Speaker should have known there could not possibly be any ground for impeachment of the Chief Justice on the basis suggested. But no such finding was made agai nst the appellant, nor could it have been, at least beyond reasonable doubt. So far as he was concerned, the suggestion had been made by the Speakerof the Legislative Assembly towhich the power of impeachment was entrusted by cl.75 of the Constitution.

A lso, though it was indeed 'wrong headed" of the Speaker to think (if thi s is what he·alluded to) that the allowance of an appeal against the Chief Justice's orders could tri ggerthe application of that part of cl.. 75which refers to 'incompetency", or (suppos ing the only possible alternative) that the bona fide el\ercise of a juri sdiction to rev iew the constitutionality of the Legislative Assembl y's action could amount, within the meaning of cl. 75 to "breach of the ... resolutions of the Legislative Assembl y", that sort of wrong

headedness isjust what Lord A tlcin declared does not amount tocontempt. Indeed, as the view of a memberof the Legislative Assembly, the Speaker's comment had serious public importance. It was not eltpressed in innammatory or abusive language. Far from denigratin g the Chief Justice, the publication of the Speaker's remark might well have been taken to indicate that Tonga had the great benefit of an entirely independent judi ciary, properly free of subservience to any other branch of government.

In Borri e and Low e: The Law of Contempt. 3rd ed. (1996), at 347, the learned authors, having referred to Lord Atkin's endorsement of the right of criticism, refer also to newspaper arti cles "in the most intemperate language ... accompanied by cries for the judge's resignation ordismissal", but they do not suggest these articles have led or should lead to any convictions for contempt. Indeed, they indicate (at 351) than in the previous 65 years there had been no "successful prosecution for contempt by scandalising ... brought in England and Wales". The Court, by which the rule of law is maintained and implemented, is at the heart of a free society; but it is not a fragile institution. It is, and must be, robust enough tobear the criticisms of thedissatisfied. Itwas not set up so much to be protected, as to protect. Of course, the el\tremes of calumny, which might weaken even the strongest institution, need to be repelled. But contempt of court by scandalising the court should befound only in thoseel\ tremescases. Publicreferencetoaconstitutional provision for impeachment will not, in itself, be such a case.

Bearingin mind the requirement that the tendency toscandalise the Court be shown beyond reasonable doubt, the publication of the remarks of the Speaker cannot be held to ju stify a finding of contempt of Court. Accord ingly, although, for the reason stated earlier, the prosecution of this matter by the Attorney-General was entirely appropriate, yet on the evidence adduced and the findings made at trial, the appeal should be allowed with costs; the orders made against the appellant should be set aside; and the motion should be dismissed as against the appellant. However, as the bringingof the motion was at least contributed to by ttie appellant's own action in procuring the publication of the article at the very time when the trial of Mr Pohiva was proceeding, there should noorder as to the appellant's costs of the motion.

R v Puli'uvea

Supreme Court, Nuku'alofa
Hampton CJ
Cr 883/96

27, 28, 29, 30, 31 January, 3, 4, 5, & 6 February, 1997

Criminal law · murder - manslaughter • diminished responsibility
Defences • diminished responsibility - murder - onus of proof
Evidence · previous conduct . intent
Sentencing · manslaughter

The a:cus, a soldie was tried for the murderof his woman friend, by shooting her with a service pistol. His trial was before ajury and extracts from the summing upare reported below. The defence of diminished responsibility had been allowed to be put to thejury.

The extracts include the direction on such matters as:

1. The respective duties of the judge and the jury .
2. The basis for drawing inferences i.e. logical reasonable and fair deductions from facts that have been proved.
3. The burden and standard of proof of the elements of the crime charged (on the Crown, beyond reasonable doubt).
4. The burded and standard of proof of the defence of diminished responsibility (on the accused, on the balance of probabilities).
5. The ingredients of murder (a homicide or killing; that was culpable or blameworthy; carried out with a murderous intent).
6. The differences between intent and motive; and the relevance to intent of evidence of previous conduct.
7. The use which can be made of statements by an accused.
8. Intoxication and the use of such evidence as to formation of requisite intents.
9. Diminished responsibility which was allowed to be put foward as a defence (and only to murder) by the effect of the Civil Law Act resulting in s.2 of the Homicide Act 1957 (UK) being applicable in Tonga.
10. Diminished responsibility which meant that a person would not be convicted of murder, but manslaughteronly, if he proved on the balance of probabilities that she wa uffering from such abnormality of the mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injLry) as to substantially impair his/her mental responsibility for his/her acts and omissions in doing, or being a party to, the killing.
11. The elements of diminished responsibility; and definitions of mind and abnormality..
2. The jury having returneda verdict not guilty of murder but guilty of manslaughter thejudgesentenced the accused to 12years imprisonment taking the view that th offending was at the most serious end of the spectrum of offences of manslaughter.

Statutes considered
Criminal Offences Act
Evidence Act, s7
Homicide Act 1957 (UK) s.2

Counsel for prosecution	Mr Cauchi and Mr Havea
Counsel for deceased	Mr Niu and Mr V Foliaki

Summing up

The Issue

On the night of Saturday 27 April 1996, in that living room of that flat you were in on Thursday of last week, when Petelo Puli'uvea used this Glock 17 pistol and fired at, shot and killed Anarieta Tapeso, has the defence proved to your satisfaction on all the evidence, (by showing that it is probable, more likely than not) that he (Petelo Puli'uvea) was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts? i.e. has the defence proved the defence of diminished responsibility? (for that is what it is called). That is the real question for you at the end of this trial - as the trial has unfolded . And that is really the only issue or question you will have to decide when you retire. Ifyour answer is Yes - the defence has proved that defence of dimil)ished responsibility , then the accused is not guilty of murder but guilty of manslaughter and that would be your proper verdict. If you answer is No. the defence has not proved that defence of diminished responsibility then your proper verdict \vould be guilty of murder.

As I have said that, I believe, is what this trial comes down to; beca use it seems to me, listening to the Crown witnesses, the cross-examination of them by Mr Niu, the evidence of the accused himself and of Dr Puloka , and the addresses, that there is no question but that a culpable homicide occurred, a deliberate shootingof Ana by Peteloand with the necessary murderous intent (and I will explain these things further a little later) so that murder has been made out or proved beyond reasonable doubt by theprosecution . It follows then that is murder (as defined in our law) and that must be your verdict unless you find proved by the defence, (as more probable than not) that at the ti me the accused was suffering from diminished responsibility. Such a finding would reduce murder to manslaughter.

Duties

Having said that I turn back to some of the general things which are said to every jury in a criminal case and which I must say to you as part of my duty. First my job now is very different to yours and much easier. Mine is to tell you what the law is, how to apply that law to the issues of fact that you have to decide and remind you of the important

evidence on those issues. As to the law - you must accept what I tell you.

As to the facts however, you alone are the judges. It is for you to decide what evidence you accept or reject or of which you are just unsure. I stress this:- If I appear to have a view of the evidence or of facts or of a witness with which you do not agree, reject my view. Findings of fact and decisions on the credit of witnesses are for you, not me. And it is in those areas of finding facts, deciding on credit of witnesses, that your common-sense, your collective experience of the world andople and the way people act and react, is of great value. You are people of this community of diverse backgrounds - between you, you have a wealth of experience and common-sense. Use it. It is your best tool.

Look:- Is this just a story - oft - told throughout human history, of human passion and emotions, of lovers, of jealousy, of quick temper, of an attitude of:- "if I cannot have you, nobody will"; or is it more - is it a story of abnormality of mind, of diminished responsibility? That is the reason you heard some of the evidence about the deceased and her past which I cautioned you about last week (you will recall I said to you then, and I remind you - the deceased is not here to be able to answer these things said about her and to pµt her side of the story. So take care). Use that evidence only as to ho it may have affected the mind of the accused. And this perhaps puts it in balance in any event - here was a man, the accused, who apparently had a child by another woman, yet denied that to the deceased. Is it a matter of the pot calling the kettle black? And remember - this was a relationship of only a few months - the qestion of marriage had been discussed and then it drifted away apparentl y, the money borrowed by the accused spent on food and not on air fares to Fiji. So you might ask yourself - what long-term commitment was there by either of them in this relationship in any event? What ties were there, really? All part of the background against which you have to view these events, I suggest.

Evidence

Second thing: You mu st decide the case only on tl1e evidence which has been put before you, in this Court (and at the view last week). You do not decide on the basis of speculation or guess work e.g. about what other evidence there might have been. There will be no more. You consider the whole of the evidence, including the exhibits which you will have with you when you retire.

In the case of each witness (and this includes the accused) consider whether he or she has been telling you the truth and whether he or she has been accurate in the account given . So consider not only what has been said but also how it has been said. How you assess a witness's demeanour may be a valuable aid in assessing his or her reliability and credibility. With each witness you can accept or reject all, or some, of what he or she has told you.

As I said at the start of the trial last week - if any of you have any previous knowledge of this case, or of any person involved in it, put tltat knowledge entirely out of your mind. The accused is entitled to be ju dged only on the evidence. Solikewise you ignore, banish entirely from your minds, any newspaper or radio or other accounts you may have seen or heard (whether before or during the trial). It is your view - not a journalist's - that counts.

And again likewise, you must reach your decision uninfluenced - not at all affected by - prejudice or sympathy. if emotion enters, logic and reason too often departs. You are the judges - no jud ge should ever allow a feeling of prejudice against, or sympathy for, any accused, or any victim, or any witntss to innuence the decision which must be made.

I have said you must not speculate or guess. I repeat that. But in your consideration of the evidence you are entitled to draw inferences from facts which have been properly proved to you. To infer is not to guess. To infer is to draw logical, reasonable and fair deductions from facts that have been proved. So e.g. here the Crown aked you, in opening it's case, to infer that the accused intended to kill or at least cvse bodily harm to the deceased from his firing at her, at very close range 3 shots from this powerful weapon, a type of gun which he well knew, was well versed and trained in, and had fired often before. If you find those facts proved do you then goon to infer those intents? The Crown say - well what else could he have intended. A matter for you. You may draw inferences. And 1 add that, as you have now heard when the accused gave evidence, that intent or those intents the Crown asked you to infer in fact, you may think (but it is for you) have been confirmed well and true by the accused as in his mind at the relevant time.

Burden & Standard of Proof

The fundamental, and very important, matter in all criminal trials in this. The prosecution must prove the guilt of the accused. That is called the burden (or onus) of proof. That burden of proving the essential ingredients of this charge of murder against this accused is on the Crown from start to finish. Subject to what I have already said about diminished responsibility and will explain again shortly, there is no onus on an accused to prove his innocence. So it follows that he need not give evidence. He is entitled to sit there and require the prosecution to prove its case, if it can. The fact that he has given evidence does not alter this part of the burden of proof. But in reality here his evidence, you may well think (but it is for you) reinforces the Crown case - he accepts he fired at least 2 shots at Ana, intending to hit her, knowing that would injure her, at least, or kill her.

I have told you of the Crown's burden of proving the charge - that burden is to satisfy you by proving the charge - the essential ingredients of the charge - beyond reasonable doubt. Reasonable doubt does not mean some vague or fanciful doubt. It means that before you can convict an accused , this accused, of murder - you must be sure of his guilt. If you are not sure of his guilt of murder then it is your duty to find the accused not guilty.

But if, and only if, you are sure of those matters, i.e. proof of murder, then you must go on, in this case, to consider whether the accused was in a state of diminished responsibility at the time he shot and killed the deceased (and that, you might reasonably think, is why he gave evidence before you). That is for the defence to prove on all the evidence, on the balance of probabilities - a lesser standard than beyond reasonable doubt i.e. by showing that it is possible, more likely than not, than he was in a state of diminished responsibility when he shot and killed Anarieta. If you conclude that probably he was in such a state at the time you would find him not guilty of murder but guilty of manslaughter. If you do not find that, then, providing that the Crown has made you sure of what it has to prove, you must find him guilty of murder.

Unanimous

The fourth point - general point - is that your verdict whatever it is, mu st be unanimous. That means that every 1 of you must be of the opinion that the accused is guilty of murder; or not guilty of murder but guilty of manslaughter; or in theory (and it is not claimed here in this tri al by the defence - and nor could it be claimed, on the evidence) not guilty of anything (i.e. an outright acquittal).

Each 1 of you must be of that opinion - but having said that I stress :- each 1 of

you does not have to reach that opinion by the same route or reasoning. You may well have different views on some aspects of the evidence - 1 of you may think 1 piece of evidence very significant and helpful; another of you may not. That matters not - as long as you are unanimous in your verdict. When you return, I will have you asked whether you are unanimously agreed on your verdict because it has to be the verdict of you all. If you are agreed you, Mr Foreman, will then be asked for the jury's verdict.

And as I have said - the way the case has proceeded your verdict will either be (and I ask Mr Foreman that you note this): Guilty of murder; or Not guilty of murder but guilty of manslaughter.

Charge

You have a copy of the charge - the indictment. Itreads:-

> "Petelo Puli'uvea is charged with ... murder, contrary to ss.87(1)(a) or 87(1)(b) of the Criminal Offences Act" in that he "did on or about the 27th April 1996 at Nuku'alofa murder Anarieta Komainausa also known as Anarieta Tapeso".

That charge requires proof of 3 essential ingredients or elements.

Homicide

First - a homicide or killing. (Read s.85 Criminal Offences Act: "Homicide is the killing of a human being by anymeans whatsoever and is eitherculpableornotculpable"). Soa homicide is the killing of 1human being by another by any means howsoever. Itmust be proved here that Petelo killed An by some means i.e. the way the Crown case is here that he shot her and that caused her death (by a bullet rupturin gher lungs, cutting through her trachea or wind pipe, and causing as well loss of blood and shock). Here you have (i) direct eye witness accounts not only of the events between the 2 of them leading up to the shooting but also, and quite unusually, of the shooting itself -eg the dramaticaccounts of Jsapela and, even more vivid, Kinisian; (ii) the admissions made by the accused both on the night to friends and fellow servicemen (acknowledging he'd shot and killed her) and later to Detective Sergeant Ma'u in writing. (Eiths 21 & 22 will be with you - look at those questions and answers nos. 48, 49 & 50 in Eith 21 which the accused acknowledged in evidence as being true); (iii) the clearest of admissions of his acts in his (the accused's) own evidence before you; and (iv) the evidence of the pathologist (Dr 'Akau'ola) and his post mortem ei1.amination and what he found.

As with all elements of a crimeit is a matter foryou todecide if the Crownhas proved this particular element to the required standard - beyond reasonable doubt. It is a matter for you but you might think that is clear and that there has been no attack on that by the defence; no suggestion that has not been proved.

Culpable Homicide

Secondly then theCrown must prove that thehomicidewas culpable orblameworthy. (s..85: "Homicide is the killing of a human being by any means whatsoever and is either culpable or not culpable"). (s.86: "Culpable homicide consists in the killing of any person ...- (a) by an unlawful act;).

So homicide is culpable (blameworthy) when it consists of killing a person by an unlawful act, and to deliberately use force on another, to aim and fire a pistol at another, is an unlawful act. You must be satisfied (beyond reasonable doubt) that this alleged killing was by an unlawful act. If you conclude that the c_rown have established ?eyond reasonable doubt that Petelo Puli'uvea did fire at Ana and tf you are already sa1tsf1ed that

he in effect caused her death then the accused must be found guilty by you of, at least, manslaughter. Again - it seems to me (but it is a matter for you) there is no dispute as to that. So- 1ststage was it homicide?; 2nd: was it culpable or blameworthy?

Murderous Intent

The third stage - 3rd ingredient - of murder is what is called a murderous intent. will read - s.87(la) (lb) which the Crown rely on here: "Culpable homicide is murder in any ofthe following cases - (a) if the offender intended to cause the death of the person killed; or (b) if theoffender intended to cause tothe person killed any bodily injury which the offender knew was likely to cause death and was reckless whether death ensued or not".

The Crown's case against the accused is first that he meant to cause her death. It hardly needs explanation. You must decide on all the evidence whether he, at the time he fired the fatal shot, actually meant to cause death. You can take account of his own evidence which you have heard. Is it not clear from that evidence, any way, what he intended? It is for you but in any event the Crown says; well that is really the only inference you can draw from what he had said in the presence of others, not long before (i.e. a threat to get a gun or knife and kill her - and taken as so real by the deceased as to warrant an immediate trip, for help, to the Police Station); from his going in secrecy and breaking in to the Armoury and getting this gun, 2 magazines, 100 rounds of ammunition; from his loading and bringing the gun intotheflat eventually; cockingandaimin git at her, shooting her twice one straight after the other, and then, having chased a wi tness apparently and threatened another, coming back in and firing at her, on the floor hy then - still moving - a third time; from his subsequent conduct and from what he said in Eiths 21& 22 - the interview & statement - ("I shot her twice with the pistol and killed her" - from Exh 22). So you look for, and decide, intent by regarding what the accused did or did not do and by what he said or did not say. You should look at his actions before, at the time of, and after, the alleged shooting. All those things may shed light on his intention, and his state of mind, at the critical time if that is not abundantly clear, as l have said, from his own evidence.

You have heard some evidence of the previous conduct of these 2 people A narieta and Petelo. In particular you have heard something of previou s beatings, assaults and threats by the ccused on or towards the deceased. You heard evidence about those acts not as painting the accused as a person of bad or violent character (and you must not use them for that) but solely on this matter of intent.

s.7 of our Evidence Act allows such evidence - of acts which point to or show intention. Iti s a commonsense and reasonable provision and I read it to you now.

"s.7. Where there is a question whether an act was accidental or intentional or done with a particular knowledge or intention , evidence may be given that the act formed part of a series of similar occurrences in each of which the person doing the act was concerned."

So here - the question i s whether this fatal shooting was done with murderous intent. Theevidence of previous assaultsand, most especially you might think, of threat sof death by this accused directed at the deceased may be used as evidence of, of proof of, his i ntent on thi s occasion on 27 April last year.

I add this beca use motive has been mentioned - motive is different to intent. The Crown do not have to prove a motive in a murder trial (although here a motive is, I

suggest, quite apparent and related to the - unhappy - state of the relationship of Petelo and Ana. She apparently wanted no more of it; he could not or would not accept that - that is the claim made, indeed by the accused himself it appears (both to others and in evidence it seems to me). Motive in circumstances such as those here really means the emotion - or the emotional reason - that prompted Petelo to act as is alleged. He was, he told you, very angry that she wasattempting to finish their relationship- would not accept him back; he adds, in evidence, that he was angry when she apparently accepted the truth of her alleged other relationship. An intent prompted by angerorjealousyisstill an intent. So also is a drunken intent i.e. it is still an intent, and I will come to the question of intoxication soon.

Tile Crown allege a second alternative intent i.e. that the accused intended to cause Ana bodily injury which was known to him to be likely tocausedeath and he was reckless whether her death ensued ornot. That breaks down tothe Crown having to prove3 things:

ls!: does the evidence establish the accused intended to cause bodily injury or injuries to the deceased (gun shot wounds as described here are such injuries).

. 2nd: does the evidence establish the bodily injuries were likely to cause death i.e. did he have in hismind, when he fired the fatal shot, an actual appreciation that death was a likely consequence of his acts. The Crown say - look he was a soldier, an armourer's assistant - he of all people well knew the capabilities of, and the likely consequences of firing, such a powerful weapon at close range at another human (he had live fired it over 100 times, you will recall). In his evidence, again, (but it is for you) you may think he accepted that he had in mind that shooting at her could injure her, at the least, if not kill her.

3rd: does the evidence establishthat theaccused was reckless whether deathensued ornoti.e.did he know the risks involved yet was he willing to take that risk? Whatitreally comes toisthis -is thereproof that the accused actually appreciated that death was a likely consequence of his shooting and that he wasju st willing to run the ri sk of that? Again (it isfor you) but is that not perfectly clear from his own evidence?

So the 2 claimed intents - either of which the Crown must prove beyond reasonable doubt:- the first is concerned with a deliberate, an intentional killing; the second is concerned with deliberately taking the risk of killing.

Again as I understand the defence and as I listened to the accused's evidence - but it is a matter for you - this third element of murderous intent as I have defined it for you is not in dispute. (ltis a matter for you; but you may think- well itcannot really be disputed - wha\ else could he have intended in firing 3 shots with such a weapon at close range at this deceased - look at the third shot - what other purpose or intent than to finish her off? ltis for y ou.) And if that is the case then, subject to proof on behalf of the accused of the defence of diminished responsibility, which I will come to soon, your proper verdict would be guilty of murder.

Perhaps it is appropriate to mention 1or 2 other matters, briefly, before I come then to this defence of diminished responsibility . Both are connected with matters of intent, and proof of intent.

First: amongst the evidence you consider - and particularly on matters of proof by the Crown of murderous intent and on the question of proof by the defence of diminished responsibility - are the statements of the accused and the use you may make of those statements - both orally (to e.g. drinking companions and fellow soldiers; to police) and

in writing (to the Police - Exhs 21 & 22). You have heard evidence of those statements - they were not made under oath by the accused. You have heard the manner in which these statements were made; and they are properly partof the material for you toconsider. T_he trnthfuless accuracy and weight of those statements are for you. you may attach d1ferent weight and importance to different parts of the statements. Again a decision entirely for you. But you have heard Mr Niu get from the Sergeant the fact the accused oo ate and that he confessed of his own free will. So you may well feel that those 111cnmrnat111g parts of the statements - of his shooting the deceased - are likely to be true - for why else would he have made them? And, of course, much if not all of those statements, yo may think, have now been confim1ed as true by the accused in his own evidence - particularly, as I have said, those important questions and answers in Exh 21 - 48, 49 & 50.

He has given evidence - he did not have to; it does not change the general onus of proof on Crown; but his evidence can be looked at as to how it affects (if at all and as I have already discussed it) the proof of murder (i.e. homicide; culpable or blameworthy· with murderous intent) beyond reasonable doubt by the Crown.

More importantly - and with care - his evidence is to be looked at, in relation to the defence of diminished responsibility and whether his evidence assists the defence in proving such a defence on the balance of probabilities: lwiJJ return to that account of his on oath, soon.

The second thing then before the defence of diminished responsibility is this. you haveheard a bit - quite a lot - about the drinking (of alcohol and methylated spirits) which took place this day - including drinking by the accused. So you are clear - generally speaking intoxication is not in itself a defence.

"S.21(1): Save asprovided in this section intoxication shall not constitute a defence to any criminal charge.•

S.21(2) goes on to say that intmdcation is a defence if theaccused was so intoxicated that ei her he did not know at the time of theact (i.e. lhe shooting here) that act was wrong or he did not know what he was doing and he was by reason of the intoxication insane at the tie of hte shooting. Such a defence is not claimed here - and nor could it be given the ev1dence - the accused from all accounts including his, knew what he was doing and that 1twas wrong. So you do not have to be concerned with that.

_And n?r, I_ad, with any suggestion [insanity. Mr Niu mentioned it in passing in operung say111.gti did not apply as theaccused was not insane at the time. So forget about any su h noti?n of a defence of insanity here (whether caused by intoxication or otherwise). It1s not and cannot be relevant There is no evidence of that at all - and Dr Puloka is very clear aboutthal In April 1996, and now, the doctor concluded the accused was fit to plead i.e. to appear in Court and go to trial and that he was not insane within the meanhg of s_. 17 o our Criminal Offences Act. So do not bother yourself further with queshons of rnsaruty. They are irrelevant.

Back then to intoxication - What our law says is this - S.21(4): "Intoxication shall be taken into accon_t for the purpose of determing whetherthe person charged had formed any mtention spec1f1c or otherwise in the absence of which he would not be guilty of the offence."

So intoxication may be relevant to a decision as to whether the accused had the necessary murderous intent al the time of the fatal shooting. Has the Crown proved such

an intent? You should taken account of all the evidence you have as to his intent, including the evidence as to his state of intoxication and draw such inferences as appear to you to be proper in the circumstances. Was he so intoxicated he did not intend what is alleged against him? Well again - you have heard the accounts of what he said and did; his own accounts of what happened, made both out of court and in court. I will not repeat what I said earlier about those matters of proof of intent. They will be fresh in your minds.

But whatl dosay is that an absence ofintent because of drunkenness is a conclusion that is not to be lightly reached. A drunken intent is still an intent.

Diminished Responsibility

This is a defence which is not contained in our Criminal Offences Act; but is in the English Homicide Act 1957. Because of the absence of such a defence in our Act, and because of the effect of our Civil Law Act (Cap 25 - ss 3 & 4) the defence created by the English Act is applicable here. This is not a defence of insanity and you will recall what I said to you just before about that.

First then I read to you s.2(1)(2) & (3) of the Homicide Act 1957:

> "2(1): Where a person kills or is a party to the killing of another, he shall nol be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility forhis acts and omissions in doing or being a party to the killing.
>
> (2): On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3): A person who , but for this section would be liable, whether as principal as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

This means:-

(i) it (Diminished responsibility) is a defence only to murder

(ii) it becomes relevant to consider it only when the Crown has proved (beyond reasonable doubt to your satisfaction) murder

(iii) if successful it is only a partial defence i.e. ii reduces liability for what would otherwise be murder to manslaughter

(iv) the burden (onus) is placed on the accused to prove the elements of the defence.

Before then I go on to tell you the three elements of this defence I repeat what I said earlier about this burden of proof on the defence here. Itis a burden which is not as heavy as that of the prosecution's in proving guilt i.e. proof beyond reasonable doubt. Here ii is enough if the defence satisfies you on the evidence that its case is more probable, more likely than not, to be true. Ifit does that (and I underline ID you must find the accused nol guilty of murder but guilty of manslaughter. Ifit does not your duty is to return a verdict of guilty of murder.

What then are the 3 elements. First I will read s.2(1) again (relevant pieces only):-

> "Where a person kills another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts in doing the killing".

3 elements:- to be proved - each of them - by the defence:-

1. an abnonnality of the mind
2. which arises from: (as Dr Puloka has explained to you, here)
   - any inherent cause
   or which is: induced by disease
   or induced by injury
3. which substantially impairs the accused's mental responsibility for his acts in doing the killing

As to that first element- abnonnality of mind

"Mind" in this context includes perception, understanding. judgm entand will. And "abnormality" means a state of mind so different from that of ordinary human beings that the reasonable person would call it abnonnal. That is what the defencehavetoshow here.

Look al the evidence - all the evidence - before you as to the accused and his state of mind at the time of the fatal shooting. As I have said - mind includes perception, understanding, judgment and will. So in considering this issue you should look al questions such as the 3 I now pose for your guidance:-

(i) whether the evidence shows he did or did not know what he was physically doing? A soldier, trained in fi reanns, firing such a gun three times at the deceased given the violence and threats (to get such a gun and kill). the determined and thought out in advance efforts by him to get the gun leading to him breaking in to get the pistol (i.e. along the ceiling space and through, by breaking. the hardboard ceiling - which he knew of; of putting the pistol outside the security wire so his hands were free to r.limb out); the loading, concealing and cocking of the gun and so on; his threats to others and to himself afterwards. What do all thosethings tell you? What did he know of what he was doing. Looking at his own evidence before you - did he know what he was doing (e.g. in loading it - he told us of the difficulties with 1 magazine you will recall; in cocking the gun- he told us he did i t when she ran out of that bedroom; of firing the first 2 shots)? From Dr Puloka's examinations what is revealed as to his knowledge of what he was doing? The fact he may now have blocked out some of the events (e.g. the third shot, the subsequent threats) from his mind perhaps as a sort of psychological defence mechanism does not necessarily mean (as Dr Puloka told us) that the accused did not have clear thought processes at the time of the shooting. You will recall the questions to, and answers of, the doctor as to that.

(ii) whether the evidence shows that at the time he shot and killed the deceased he knew, and he had the ability to know and fonn a rational judgment, whether theactof shooting was right or wrong? Look e.g. after he fired thefirst 2 shots and before he fired the 3rd, if you accept the evidence, he pursued and threatened the witness Isapela who ran out; and later threatened Kini - with the baby, - still inside (i.e. the 2 who had seen what he had done); and what he said to Mikaele and later to his Colonel. What do those thin gs tell you as to that? Again what of the evidence of threatening to take his own l ife? Does that not tell you something as to whether he knew he had done wrong?

(iii) whether the evidence shows that the accused had ability at the time of the shooting, to exercise will power to control his acts (of shooting at Ana) in accordance with that rational judgment i.e. does the evidence show whether he could not resist his impulses? You see the abnormality of mind must be one which does impair (substantially when I come to element 3) his mental responsibility. Again look with care at all he did that evening over a period of time - the alleged threat to kill her; the decision, carried out, to goand break in and get the gun; the return with it; the loading of it; the going in with it concealed; the cocking of it; the firing of it twice at her; the chasing after, and threatening, of others; the third shot. What do those things tell you? What does Dr Puloka's evidence of "a degree of loss of impulse control" tell you?

Those 3 questions I have posed, and my comments, are for your guidance in this area. But as I stress, the matters are for you - it is your view that counts.

So you have to consider the extent his mind was answerable for his physical acts and that includes your considering the extent of his ability to exercise will power to control his physical acts.

Whether he was suffering from such an abnormality of mind at the time of the fatal shooting is a question you must answer on all the evidence. Has the defence proved it? The medical evidence of an anxiety and a panic disorder (and that is the factor to be looked at here - you must disregard the effect of alcohol in this defence as I will explain to you shortly), is undoubtedly important but you areentitled (and expected) to take into account all the evidence including the acts and statements of the accused and his demeanour (how he looked and behaved). You are not bound toaccept the medical evidence ifthere is other evidence before you which in your goodjudgment conflicts with it and outweighs it. Do we not all panic - do we not all have anxiety attacks? Dr.Puloka says, yes, but that it is a matter of degree. Did they reach a sufficient degree in this man to make it a mental abnormality? That is for you; for you lo decide on all the evidence.

Dr Puloka says that given the anxiety and panic disorders he has told us of, the accused was suffering at the time from a mental disorder, a mental illness, and that, acting in combination, he had 3 factors affecting him: namely the predisposing (anxiety and panic disorders); the precipitating (alcohol abuse); and the perpetuating (his relationship with, jealou sy towards, Anarieta). I tell you that in terms of our Mental Health Act 1992, to which Dr Puloka referred, "mental disorder" means "mental illness ... and any other disorder or disability of the mind "; and "mental illness• means •a psychiatric disorder which substantially disturbs a person's thinking, feeling or behaviour and impairs the person's ability to function". Well, for you, but what evidence is there of the accused's ability to function being impaired? A trained soldier sorted out especially for duty in Bougainville and employed as the assitant armourer.

Then the second element. Have the defence proved that if such an abnormality of mind existed itarose from (and these are the2 put forward by thedoctor) an inherent cause, or that i twas induced by disease or injury. I summarise his evidence on this point. He says that this claimed abnormality "possibly" (his word) arose from an inherentcause (but he cannot say from what;as I understand his evidence), but does not really know and cannot answer whether it was induced by disease or injury.

Itis for the defence to prove - more probable than not isthe test as I have said. Where. does the doctor's evidence leave you on this point? Again in these circumstances you can

consider not only that psychiatric evidence but alsothe whole facts and circumstances of the case including the nature of the killing, the conduct of the accused, before, at the time, and after and any history indicating any mental abnormality. I suggest you should approach this in a broad commonsense way.

Now the third element - has the defence proved as more probable than not that this claimed abnormality of mind (if you find it proved) substantially impaired the accused's mental responsibility for his acts in killing the deceased.

That is entirely a matter foryou. Itis a question of degree. If you find an abnormality of mind proved then how bad was it? Was it "substantial"? Approach that word ina broad commonsense way, again. It meanS' more than some trivial degree of impairment which does not make any real or appreciable difference to a person's ability to 'control himself. However it does not have to be total impairment.

The medical evidence again is relevant. But it is a matter for you on all the evidence. Again your view may properly differ from that of the doctor depending on your view of the evidence and what has been proved to you. This is a trial by jury - by you - not a trial by experts.

On this aspect, the doctor's evidence was that there was a degree of loss of impulse control - but he does not really spell out what degree or extent. He does goan to say that without the mental disorder he found in the accused this shooting would not have happened. As I say-use a broad commonsense awroach - your most valuable tool, I add.

So as I have said if it is proved that the accused could not resist his impulse, was unable to exercise will power to control his physical acts, provided that was due to abnormality of mind, that would be sufficient to entitle the accused to the benefit of this defence of diminished responsibility. It is a matter for you - the view you take of all the evidence.

Now I return, briefly to intoxication. Where as here alcohol is a factor - and it is on the doctor's own evidence - you are directed by me to disregard what, in your view, was the effect of the alcohol (and I include the methylated spirits) upon the accused since abnormality of mind induced by alchohol is not due lo inherent causes or induced by disease or injury and is not within this defence.

Therefore you must exclude that (the doctor's "precipitating factor") and concentrate on, and consider, whether: first do the combined effect of the other matters (the anxiety disorder and panic disorder together with hisjealousy orpossessiveness towards Ana) fall within the defence i.e. are they, without the alcohol an abnormality of mind and secondly: did they amount to such abnormality of mind as substantially impaired the accused's responsibility. Has the defence satisfied you that it is more likely than not that if the accused had not taken drink (i) he would have killed as he in fact did & (ii) he would have been under dimini shed responsibility when he did so? That follows from what s.2(1) of the Homicide Act says. Itmust be an abnormality of the mind which impairs substantially the mental responsibility and alcohol is not an abnormality of the mind. I repeat - have the defence satisfied you that it is more likely than not that if the accused had not taken drink (i) he would have killed as he in fact did and (ii) he would have been under diminished responsibility when hedid so? This is important. Has that been proved when, on the doctor's own evidence, alcohol was the precipitating - the starting- factor? Without alcohol would this have happened? That question is for you - but may there not be a difficulty here for the defenceon the doctor's own evidence?(He said that without alcohol

it-the killing-may have happened or it may not have. He could not answer that, he said).

That is all the help I can give you.

Remember:-

1. You are the judges - your view, (not mine, not counsels) is the one that counts.
2. Your verdict must be unanimous.
3. The way the case is your verdict will be either:
   (a) Guilty of murder; or
   (b) Not guilty of murder but guilty of manslaughter.

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I now ask you to retire to consider your verdict. The exhibits will be brought in to you. If, during your deliberations, you have any question you wish me to clarify for you please put it in writing and it will be brought to me. I will then answer it, as best I can in Court.

SENTENCE

Petelo Puli'uvea, I take into account what Mr Niu has just said in relation to you and in relation to this matter. I take into account also what has been said in evidence by Dr Puloka about you and what he had earlier written in those two reports. I have given careful thought to those reports and the contents of them.

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I consider that you have been the subject of a merciful verdict by this jury. That is their absolute prerogative and right to return merciful verdicts.

You have been convicted of manslaughter and that means that you are liable to imprisonment for a maximum term of 15 years. Manslaughter can cover a whole spectrum or range of offences of various seriousness. At one end of that range there are occasions where the liability or culpability of the person convicted of manslaughter is very low indeed. At the other end of the spectrum or range of offences there are those that come to close to the borderline with murder. I say immediately that I view your offending here, even though I have heard the evidence from the doctor as to diminished responsibility,

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as being towards that most serious end of the spectrum or range.

I am sure that you became obsessed with the deceased woman. And I am sure that your attitude was that if you could not have her, that no one else would. And those were the very threats that you made from time to time, leading up to this shooting.

Even taking account of everything the doctor has said about your state of mind, still on your own account you acted with considerable deliberation, you threatened that you were going to kill her, by getting a pistol from the armoury, and you did that. You did not just make threats, you earned them out and went down, in secrecy, broke in to the armoury, stole a gun, stole the ammunition, went back and then in confronting her again,

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shot and killed her.

It is those elements, that deliberation and aforethought, even with the diminished responsibility put forward on your behalf by the doctor, which leads me to the view that your offending is at the most serious end of the spectrum.

You fired 3 times at the deceased and you killed her. I am certain on the evidence that you intended to kill her as you had said you would. You have been subject, as I have said, to a merciful verdict at the hands of the jury, reducing the crime from murder to manslaughter.

You are 23, you have no previous matters; your history has been traversed by the

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doctor. The offending by you and the seriousness with which I view it must be marked

by a considerable term of an imprisonment. I would be failing, I believe, in my duty to this community if I did not impose a significant and lengthy term of imprisonment upon you for such an offence.

It may be as the doctor has said that some of the things that you suffer from are remediable. I hope that is so. You will be a young man even after a lengthy sentence of imprisonment is served by you. I have said I trust or hope that what the doctor has spoken of is treatable because if it is not, then on what was described by him, you are a danger or a potential danger to other women with whom you may have association or form a close. association in your future life.

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That is in my view a further reason why the sentence of this in Court must be a heavy one. In all the circumstances and weighing the matter as best if I can, my view is that the appropriate sentence is a sentence of imprisonment for a period of 12 years. And that is the sentence. It is effective from, and runs from, today.

James v Bank of Tonga

Court of Appeal
Hampton CJ, Morling & Burchett JJ
App. 4/97

18 & 20 June 1997

Tort - conversion of goods
Damages - difficulties of assessment - assessment

The Bank had security over certain property, and on default, seized and sold it, including machinery claimed by the appellant as his and nothing to do with the defaulter.

Held:

1. The judge saying that property in the machinery for the appellant was at an end was not an adequate answer to the claim. Once the joint venture was abandoned (if it ever actually came into being) the appellant was left with the machinery which was his property, unencumbered by any continuing right of either of the other parties to the venture.
2. According the appellant was entitled to a verdict; the difficult question was quantum of that verdict.
3. Mere difficulty in estimating damages does not relieve courts from the responsibility of estimating them as best it can, even if, sometimes, that of necessity involves guess work rather than estimation. A court must do the best it can.
4. Appeal allowed; orders below set aside and in lieu a judgment for the appellant.

Cases considered:

Sellar v Adelaide Petroleum (1994) 179 CLR 332
Commonwealth of Aust. v Amann Aviation (1991) 174 CLR 64

Counsel for appellant Mrs Palelei
Counsel for respondent Mr Appleby

Judgment

The Bank of Tonga, having, it appears, security over property belonging to a customer who had gone overseas owing it money, arranged for the sale of a considerable quantity of goods at his motel. Among the items sold, was some sandalwood processing machinery, which fetched a mere T$1,000. This appeal concerns the appellant's claim to that machinery, asserted by an action in conversion.

Lewis J., who heard the matter, found that the machinery was imported into Tonga, and arrived in 'Eua on 7 September 1990. The uncontradicted evidence established that it had been acquired by the appellant in Brisbane, Australia, and there modified at a cost of $26,000. The appellant, who is experienced in the sandalwood industry, and the mechanic who modified the machinery, each estimated its value at T$100,000. It was imported for use in a joint venture which, it was proposed, would exploit sandalwood trees in the royal forest on 'Eua. The joint venturers were to be His Majesty, the appellan and a Mr Wong, a financier. The machinery was to be installed in a factory to be built and operated by the Bank's customer, a Mr Vaka'uta, on behalf of the joint venture. Because of His Majesty's interest in the project, the machinery was imported free of duties, by virtue of a document signed by a palace official. That official gave evidence confirming the proposed joint venture, and the parties to it. However, he said it was not reduced to writing, and the "project never got started".

Construction of the factory did commence, and the machinery was installed while the work was proceeding, but the building remained unfinished. However, the machinery was able to be used, and some sandalwood was processed in 1991. The processing did not continue because of the unavailability of mature trees. The mechanic who installed the machinery, a Mr Sadhu, gave evidence of an admission against interest made to him by Mr Vaka'uta, who told him that the machinery belonged to the appellant.

There was simply no evidence at all to the contrary.

But the trial judge found that the appellant had committed the machinery to the joint venture. On that basis, he held: "Property in the machinery for James was at an end". This is not an adequate answer to the appellant's claim. Once the joint venture was abandoned (if it ever actually came into being), the appellant was left with the machinery which was his property, unencumbered by any continuing right of His Majesty or Mr Wong to have it utilized in the furtherance of a project which did not exist. The appellant was entitled to his machinery. just as His Majesty was entitled to his trees, and Mr Wong to the money he might have had to invest in the venture.

Accordingly, the appellant was entitled to a verdict. The difficult question is the quantum of that verdict.

Undoubtedly, the machinery did not retain, as at 16 June 1994 when the Bank sold it, its earlier value of T$100,000. The price paid, though on a liquidation sale, confirms that. It had, for some 3 1/2 years, been inadequately housed in a partly completed factory at 'Eua, an island well known to provide inclement conditions. The evidence suggests there was a serviceable roof, but there were not completely weather proof walls. The market for machinery of this type was restricted.

However, the Court does have some reason to think the real value was substantially above the derisory sum represented by the eventual sale. The bank manager at 'Eua gave evidence of carrying out a valuation of the machinery in 1993, apparently in November. He then put on it a figure of T$22,500.

Where a plantiff has an entitlement to damages, a mere difficulty of assessment should not deter the Court from fixing an appropriate figure, or an estimated figure, though precision may be impossible. This principle is well established. It was restated comparatively recently in Sellars v. Adelaide Petroleum N.L (1994) 179 CLR332at349, where Mason C.J., Dawson, Toohey and Gaudron JJ said:

> •And, where there has been an actual loss of some sort, the common law does not pennit difficulties of estimating the loss in money to defeat an award of damages".

The principle wasalsoelaborated by Mason C.J.andDawsonJ.inThe Commonwealth of Australia v. Amann Aviation Pty, Limited (1991) 174 C.L.R. 64 at 83, as follows:

> "The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can *(Fink v Fink* (1946), 74 C.L.R. 127, at p. 143; *McRae v Commonwealth Disposals Commission* (1951), 84 C.L.R. 377, at pp.411-412 *Chaplin v. Hicks,* [1911] 2 KB. 786, at p.792). Indeed, in *Jones v Schijfmann* ((1971) 124 C.L.R 303, at p.308) Menzies J. went so far as to say that the 'assessment of damages ... does sometimes, of necessity involve what is guess work rather than estimation'. Where precise evidence is not available the court must do the best it can *(Biggin & Co. Ltd v. Permanite Ltd.,* [1951] 1 K.B. 422, at p. 438, per Devlin J.)."

Accordingly, it is necessary to estimate the value of the machinery at the time of its conversion by the bank. having regard to the indications in the evidence, to which reference has been made. On all the evidence, the damages should be assessed at T$7,500. The appeal should be allowed; the orders made below should be set aside; in lieu thereof, there should be a verdict for the plaintiff for T$7,500 plus costs; and the respondent should pay the appellant's costs of the appeal.

R v Sikuea

Supreme Court, Nuku'alofa
Hampton CJ
Cr 562/96

17 & 18 February 1997

Criminal law - sedition - elements

The accused was charged with sedition (3 counts) arising from his answers to questions after he spoke at an election campaign meeting in early 1996, the accused being a candidate.

Held:

1. The counts were all dismissed for various reasons.
2. First, all 3 counts related to the one exchange or answer, and were not alternatives. It was unsatisfactory for the Crown to say, in effect, that it was up to the court to choose which count the evidence should be fitted within . That was wrong as a matter of principle and of fairness.
3. The accused was entitled to the protection of cl. I I of the Constitution but here he faced a virtual lottery. Some strictness should be applied to pleading such an offence and the indictment must specify the acts by which the seditious intent was evidenced orif an indictment forseditious words, the words alleged to be seditious must be specified.
4. A person in jeopardy on such a serious charge is entitled to know, and must know clearly, what he is to face.
5. Over and above the elements of sedition contained in ss.47 and 48 of the Criminal Offences Act, which reflect the reality of what the common Jaw as to sedition is, there is an additional element namely that the acts or words in question have a tendency to provoke disorder and violence.
6. A court should look at all the circumstances, including the nature of the audience addressed.
7. Courts in recent times have taken a strict and somewhat restrictive view of provisions for allegations of sedition, having regard to the fact that such provisions have the potential to be abused at the expense of the freedom of the press and of the liberty of expression particularly having regard to cl.7 of the Constitution.
8. Under cl.7 a balancing exercise of some delicacy may well be required . A court should be vigilant but should in no way prevent what might be seen as lawful criticism, even robust harsh criticism.
9. The court could not be sure, on the evidence, of the actual words allegedly used

by the accused. Nor did any account come to the words alleged in the counts.

10. Whatever the words, they were not sufficient to say they were expressive of a seditious intention.
11. And again, the words used were given on a conditional and contingent basis as answers to a series of hypothetical questions, and were not sufficient evidence of proof of seditious intention.
12. What constitutes the offence is the expression of a real intention to effect the seditious purpose and that purpose must be a reality. That was lacking here.
13. As well there was no evidence to found proof of the element of a tendency to provoke public disorder and violence and that the words were spoken with intent to incite the violence or create public disorder.

Cases considered:

Bv Sullivan, .B_v Pigot (1868) 11Cox cc 44
Boucher v R [1951] 2 DLR 369
Bv"Chlef. Mel Magistrate exp. Choudhury [1991] 1 All ER 306
Bv Caunt (1947) 64 L QR 203
Burns v Ransley (1949) 79 CLR 101

Statutes considered:

Criminal Offences Act ss 47, 48
Constitution els 11, 7

Counsel for prosecution — Mr Cauchi & Ms Tapueluelu
Counsel for accused — Mr Tu'utafaiva

Judgment

l have listened carefully to, and thought carefully about, the submissions made to me by MrTu'utafaiva fortheaccused whohas in effect submitted that the case against the accused should go no further, it should be dismissed at this stage, that is at the end of the Crown case.

Prior to making that submission, I had raised some matters, which had occwTed to me and which were of concern to me, with the Crown at the end of the case. I have now heard the Crown, Mr Tu'utafaiva and then Mr Cauchi for the Crown in reply.

I say at the outset that I intend to dismiss all of the counts in the indictment at this stage. And I will dosofora number, manifold, reasons, I think possibly 4 or 5 in number.

The indictment charges the accused with 3counts of sedition under, or contrary to, sections 47 and 48 of the Criminal Offences Act. The first count in the particulars, as amended, says this: the accused did on or about the month of January 1996 at Mu'a, commit sedition by speaking words to the effect 'if the campaign to bring reform would tum out to be unsuccessful, he would do what happened atTungi Arcade, just walk right in and bang" with the seditious intention to excitedisaffection against the King of Tonga or against the Parliament or Government of Tonga, or to excite such hostility or illwill between different classes of the inhabitants of the Kingdom as may be injurious to the public welfare, or to incite, encourage or procure violence, disorder or resistance to law or lawlesness in the Kingdom, or to procure otherwise than by lawful means the alteration of any matter affecting theConstitution, Laws orGovemment of the Kingdom."

Count 2, in its particulars says the accused did on or about the month of January 1996at Mu'a commit sedition by speaking words to the effect "if the King won't accept the petition, he will resort to what happened at Tungi Arcade, he will do the obvious and go to the extreme" with seditious intention as spelled out, and I. will not repeat now, as spelled out in count 1's particulars.

Count3, says the accused did on oraboutthe month of January 1996at Mu'a commit sedition by speaking words .to the effect "that if the Parliament would not accept the proposals he would do the other thing, just shoot the gun" with seditious intention etc. as per the previous two counts.

My firs concern, and the first ground on which I would dismiss the counts, is this: I did know, did not realise, when this case started, nor indeed from theopening, that, as I havenow heard from the evidenceandas MrCauchi has said tome, thesecounts relate tojust one exchange. I thought that there must have been3 separate exchanges or events. But that is not the position as disclosed in the evidence and I will come to the evidence in some detail a little later on.

Mr Cauchi in thecourse of hissubmissions tome this afternoon, said that the counts were not in the alternative but were in relation to the same offence. That I find an extraordinary tactic or piece of pleading by the Crown, and in my view quite wrong. I note that even when submissions as to no case were made, the Crown still did not elect, or try toelect, or indeed suggest it would elect, to proceed on a particular one rather than the other two counts, but in effect said well it is a matter for the Court.

To put matters, on this aspect, in a proper context I should say that I have heard the evidence of 7 civilian witnesses who were present at the time the alleged words were spoken by the accused. Each of those witnesses, as I have listened tothem and gone back through my notes, gave different versions (and indeed one of them gave 4 versions when

I looked at it), of the particular answer allegedly made by the accused and relied on by the Crown. An answer to a question directed to him at the meeting which I will come to shortly.

As I havesaid, it seems to me tobe totally unsatisfactory that arising from only the one exchange, only the one occasion in effect, there should be 3 charges. And for the Crown to say, in effect, well its up tothe Court tochoose which count the evidence should be fitted within. I took somecareto notethat submission by the Crown on thisaspect. The Crownsaid that thecountsdid not reflect, or were not put forward as reflecting, 3differenl conversations, but were to reflect the state of the evidence as high, and only as high, as the Crown could put that evidence. And the Crown said, well we leave it to the Court to decide which evidence is the most reliable and which count that might then fit within. A 3 way bet as Mr Cauchi referred to it.

It is wrong, as a matter of principle, to plead one event in 3 separate counts in this way. It is certainly wrong as a matter of fairness. How is an accused supposed to defend these sort of counts in an indictment? How is he supposed to know which interpretation is going to come forth? Which interpretation the Court might accept, if any? Which count might be relied upon?

I remind myself that sedition isa serious offence, and I remind myself. also, that the accused is entitled to the protection of clause 11of the Constitution, which says that the "written indictment shall clearly state the offencecharged against him and the grounds for the charge."

Here we have an accused facing a virtual lottery and that can never be a fair and proper basis for proceeding in a criminal trial, particularly a cri minal trial for alleged offending of this seriousness. It would seem that, historically, sedition has been the subjectof comment as tohow it should be pleaded, and it is evident from thoseauthorities that there should be some strictness applied to pleading such an offence.

I refer briefly to the caseof B*v* Sullivan, & B*v* Pigol (1868) 11Cox C.C. 44at page 46, Fitzgerald J where it was said "the indictment for sedition must specify the acts, the overt or open acts,by which the seditious intent was evidenced ....•

I refer also to what it said in Halsbury 4th Edition Vol.11(1) paragraph 91. "In an indictment for seditious words ... the words alleged to be seditious must be specified."

In my view the way the matter has been pleaded here, is not goodenough and I would dismiss all counts in the indictment on that basis alone. In my view it breaches basic notions of fairness and of pleading.

As I will come to it I would reject, and do reject, the case for the Crown on the basis the evidence, in any event, does not support any one of the 3 counts.

A person in jeopardy on such a serious matter is entitled lo know and must know clearly what he is to face.

I turn then from the pleading matter to the alleged offences themselves. I look first at the statutory provisions in the Criminal Offences Act (Cap.18). Section 47(1) provides that every person who speaks any seditious words shall be liable to be imprisoned. Sub-section 2 goes on - "seditious words are words expressive of a seditious intention." That is the only relevant pan of sub-section 2.

Section 48 then set out in detail the definition of seditious intention. "A seditious intention is an intention to do any of the following matters:

(a) To excite disaffection against the King of Tonga or against the Parliament or Government of Tonga;

(b) To excite such hostility or ill-will between different classes of the inhabitants of the Kingdom as may be injurious to the public welfare;

(c) To incite, encourage or procure violence, disorder or resistance to law or lawlessness in the Kingdom;

(d) To procure otherwise than by lawful means the alteration of any matter affecting the Constitution, Laws or Government of the Kingdom."

Those sections in my view reflect the reality of what the common law as to sedition is. That common law definition is set out in Archbold 1992 Edition Vol.2 at para. 25-198, where amongst other things, a lengthy quotation is set out from Stephen; and there is reference then, amongst othercases, tothe 2cases specifically referred toby Mr Cauchi, the Canadian Case of Boucher v B [1951) 2 D.L.R. 369 and then, more recently.the case of B*v* Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury [1991) 1All E.R. 306.

In particular in thecommentary in Archbold there is reference tothis summary, and it is a summary which in my view correctly reflects and sets out the development of the common law, through the cases, including the Canadian Boucher case and on to the Choudhury case in this way:-

"There is authority to the effect that there is a further ingredient to the offence of sedition, namely that the acts or words in question have a tendency to provoke disorder and violence", (and some older authorities are referred to). "This was certainly the v iew ofBirkettJ in Bv Caunt (1947) (64 L.Q.R. 203). In hischarge totheju ry he said: 'Sedition has always had implicit in the word, publ ic disorder, tumult, insurrections or matters of that kind". Should the point arise for decision it is submitted that the better view is that such a tendency should now be taken to be (and sensibly) "an essential ingredient of the offence. See also Boucher *v* B (approved on this point also by Choudhury) where the Supreme Court of Canada concluded that the offence of sedition required proof of an intention to incite to violence or to create public disorder." That is theeffect of w hat was said by Watkins L.J., and agreed with, in the Choudhu ry case at 323 para. (d) and (e) on that page.

One or two other general matters, as to matters of tendency to excite or incite the various matters referred to in section 48- I take the view that the Court should look at all the circumstances, including the nature of theaudience addressed; and as to the questions of proof of intent or seditious intent, I direct myself that the natural tendency or words is no more than evidence of the intention of the person speaking the words.

Thenext general thing that I refer to is (and it would seem to me quiteappropriately) that Courts, particularly in recent times have taken a strict and, what might be seen as, somewhat restrictive view of provisions for allegations of sedition, havi ng regard to the fact that such provisions have the potential to be abused at the expense of the freedom of the press and of the libeny of expression by the individual.

I remind myself of that because of the provision in the Constitution, clause 7. That provides that "it shall be lawful for all people to speak, write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press forever but nothing in this clause shall be held to outweigh the law of defamation, official secrets or the laws for the protection of the King and the Royal family."

Under a provision such as clause 7, a balan".ing exercise may well be required, an exerciseof some delicacy. But I bearin mind that provision. The Court should be vigil.ant but should in no way prevent what might be seen as lawful criticism even robust harsh ciiticisru.

Those are the back ground matters before I turn to some matters of evidence that I have heard. I have the distinct, and uncomfortable, impression that the prosecution here is trying to make much out of little, and that is reinforced, that impression, by what I have said as to the matters of pleading and the way the indictment was framed.

This indictment arises from a meeting held in the village of Fatumu sometime in January 1996, leading up \o the general election of that year. On a particular night - (and it is interesting and it is a ommentary really on the state of the evidence of the prosecution, as much as anything in a way, that nobody can tell me the night of the week this was, let alone the date this was in January, if indeed it was in January - none of those details as to when this faikava was held are in evidence) - there were two pro-democracy candidates present to address a faikava, including the accused as one of the candidates. Both candidates spoke it would seem (although there was even some divergence about that), and then there was aquestion andanswer session, and I will come to what has been alleged to have been said shortly.

But I note this. That apparently there was no complaint to the police by any of the 7 witnesses. It would seem the police approached people who were at this faikava, perhaps even some weeks later, and perhaps it is that which leads to this position of my not being told the date of the meeting, somewhat extraordinary in itself, when there were some 30 or 40 persons present there.

I donot intend to deal with the evidence which I have heard in any great detail. There were 8 prosecution witnesses, 7 of them present at the meeting, and the 8th a police sergeant, who had the task of interviewing the accused. I will deal with the police sergeant first. This interview (or attempted interview because nothing of any sort was said by the accused apparently on advice from his lawyer), did not take place until 4 March 1996, although, apparently, the accused had been in police custody on the 28 February. Yet nothing was done then in relation to speaking to him about these alleged events. That may reflects something about the seriousness of the position, or the lack of seriousness of the position, in itself.

As I have said, in the question and answer interview, and then when charged and asked to make a statement, the accused said nothing, sonothing can be gained from those aspects.

But he was charged with 3 charges and they are before me as Exhibit A pages 2 & 3. The charges put to him, as framed by the detective sergeant, alleged that he, the accused, had given answers to 3 separate questions from 3 separate questioners. And the questioners were named in the charges as well as, the alleged questions. Now that is very different to the evidence which I have heard in the last 2 days, where all (and it seemed to be one of the few things that the 7 witnesses were consistent about) 7 of the witnesses said that the questions were only asked by the first witness before me Mr Moala. He was the only interlocutor and it would seem that he asked a series of questions (and it is hard to know the number because of the variety of accounts given but perhaps some 4, or even up to 6, questions) of the variety of "but what if". Certain hypothetical facts were laid out and an answer given to that and then, building from that, "but what if" and so it went on.

Each building on the other, it seems to me. But what if you are unsuccessful with that step, what would you do next, is the effect of what was being asked.

As I listened to them, and as I have gone back through my record, starting out as hypothetical and growing even more hypothetical, progressively more highly hypothetical, and more conditional, and more contingent as the questioning WP.nt on.

I will return to that point; but the real point here(and I am moving towards the second basis on which I would, and do, dismiss this indictment) is this. That on the evidence as I have heard it, I could not be satisfied, I could not be sure, as to the actual words used, allegedly, by the accused. There was no contemporaneous record made at the time, whether written or recorded in some other way. None seems to have made. None of the witnesses seems to have made a note at the time, or indeed within a sh01t time thereafter. Indeed the witnesses (or at least the 2 or 3 that were questioned about it in evidence) seemed only to have had the matter brought back to them when the police made enquiries some little time later.

All 7of these witnesses gave different accounts orversions . Both as to the questions and as to the answers. Indeed oneof them, MrTu'itupou, as I have reviewed his evidence in chief and then his.cross-examination, gave 3 possibly 4 different versions of his own. And when I am referring to that, I am referring in particular to different versions of what the accused is alleged to have answered to the last of those series of hypothetical and contingent questions.

The last of those 7 witnesses in a curious piece of evidence (and it really came in re-examination) said that in fact he had heard the full answer that had been put to every witness by Mr Tu'utafaiva in cross-examination (MrTu'utafaiva was putting, as his duty, what he said the accused himself claimed he had answered). This was a curious reversal in re-examination as that witness seemed to accept that he heard those words said.

. The condition of the evidence as I see it and it is in conJunction with the pleading pomt I have mentioned already, is this. The Crown, in effect says: well something was said. But the question is what? That is the very point. It is not for the Court to guess as to what was said; nor is it for the Court to guess what "Tungi Arcade" means. And from the accounts I heard in evidence it means differer.I things, slightly different things, to different people.

But ttie important point here is that there are variations and conflicts between each of these 7 witnesses and there was variations within accounts as well so far as some of them, if not all, are concerned. As I have said none were immediately interviewed, none complained, none made a record, and their recollections were after some time.

In my view the evidence generally, in relation to proof, is totally unsatisfactory. On the basis of this evidence, I cannot be satisfied, I cannot be sure what was said, and indeed it is so unsatisfactory that, in my view, it would be wrong to allow such serious charges to go further. As I have said, I have linked it back to what I have already said about the unsatisfactory position in relation to 3 counts. I also note that not one witness, in any event, exactly said what is alleged in any of those 3 options in the 3 counts.

There are conflicts and variations not just between them as to what the accused allegedly said but also as to whether the accused answered all the questions himself or whether the other candidate present answered some. There is conflict behveen whether the other candidate tried to cover for the accused and stop him on one hand; or whether the other candidate supported him. There was conflict between the witnesses as to the

number of questions asked, ranging from 1up to something like 4 or 5 or indeed more. Some witnesses acknowledged that they did not hear all that was said. All were trying to give what they could from their memories, as they now recalled.

I have reached the view therefore that I should dismiss these counts, all 3 of them on that basis as well. The evidence is so unsatisfactory I cannot find what language was, what words were, in fact used; and as I have said, in any event, none of them, whatever version, come to the words used in those counts. Not only were there different versions of what was allegedly said by the accused, but each witness had his own, and sometimes quite different, view as to what he thought the accused meant.

That, in my view, creates further problems and difficulties for the prosecution in a case such as this, because not only must there be evidence as to what was said, but also as to whether the words were indeed expressive of a seditious intent.

I tum to other bases for dismissal as well. The first put shortly is as to the reality or otherwise of what was claimed to have been said, whatever the words (and I am viewing them in the widest frame work at the moment because of the difficulty, as I have already expressed, for the Crown). Were those words sufficient tosay that they were expressive of a seditious intention (as in section 47 subsection 2)? I say that, given the evidence I have heard, they are not so.

And secondly, as to the contingency basis, the hypothetical and contingency basis on which the answers were given. The words (again viewing them in the widest frame work given the difficulties as I have already outlined) were directed to a contingency merely and in order to give an answer to a questioner. And therefore, in my view, not sufficient evidence on the important question of proof of seditious intention.

As to both those before I go further, I do note that the Crown (again reflecting the shot gun approach, the covering all bases approach , that I have alrea metione in relation to the counts) in opening relied on each of the 4 matters (of seditious mtenl1on) set out in detail in section 48. The Crown says, well, if any of them fit the Court should apply them.

I refer to, and when it comes to it adopt, statements which were made in the High Court of Australia, in the case of Bums *v* Ran sley (1949) 79 CLR 101 and in particular two passages at this stage, from the judgment of Mr Justice Dixon (as he then was) at pp.115-118. I start towards the bottom of page 115:

> "To be seditious, the words uttered must, under so much of paragraph (b) & (d) of section 24 (A) (i) as is relevant be expressive of an intention to effect the purpose of exciting this state of feeling against the Sovereign or the Government or Constitution of the United Ki ngdom or the Government or Constitution of the Commonwealth.
>
> I take the words "expressive of an intention" in the case of an t..tterance, to mean that what is said conveys in fact an intention >n the part of the speaker to excite or produce such an actual state of feeling. What constitutes the offenee._is the expression of a real intention," (the stress I put on real is mine) "te effect the seditious purpose and that purpose itself must be a reality" (and again I stress that word). "It is not sufficient that words have IY!en used upon which a seditious construction can be placed, unless on the occasion when they were used they really conveyed an intention on the part of the speaker to effect an actual seditious purpose" (again my emphasis).

I close that quote there, and then resume at page 117about 2/3rds of the way down. He is then dealing with thefactual situation in that particular case. He refers to a question and answer previou sly given, and then goes on in this way:

> "When the question was repeated and a more categorical reply was insisted upon, his answer and the manner in which it was delivered seem to have exhibited a resolve to state his own sentiments without reserve. But there is no indication of any desire to persuade his audience of anything but his own conviction about the course his party would take if a war with Russia occurred. His answer is a disclosure of his own views actuated by the persi stence of his questioner; not an active attempt to effect a purpose of causing his listeners to adopt an attitude of mind. But supposing that by his answer he did wish to influence opinion as to the side that should be taken in the contingency of a war with Russia. The attitude towards the Crown or the Government of persons whose opinion might be so influenced would be only indirectly and consequentially involved and would not be within the immediate and substantial purpose which the supposition would ascribe to the appellant. His mind and his words were devoted to a contigency. It was spoken of as an hypothesis, an hypothesis involving a dilemma ...•.

Then a little further on page 118this:

> "fn my opinion, he did not in fact commit the crime with which he was charged for the simple reason that he did not answer the question for the purpose of exciting disaffection and his words, as they would be understood in the circumstances in whi ch he uttered them, were not expressive of an intention to effect that purpose."

As I say, I adopt what was said by Dixon J there and tum to two aspects, the two aspects I have mentioned already, under the heading of Reality and Contingency.

Reality. It would seem from what I have heard that the meeting or the faikava was good humoured. There was a series of hypothetical questions culminating in a particular question which the accused is alleged to have answered, on the evidence, in a variety of shapes and forms, but referringin some way tothe Tungi Arcade. Laughter ensued. That may have started, on some accounts, whilst the answer was being given. It certainly was present at the end of, or following, the answer and the laughter seems to have come, on the evidence before me, from the majority of those present.

Two of the witnesses before me have said that they, in effect,heard i t as a joke and treated it as ajoke (whatever it was that was said), and as I have said it provoked, it would seem, a considerable body of laughter at the time. The various witnesses have expressed their own views (different as I have said) as to what was meant by what was said. In my view, on the accounts given me in evidence, the significant and important aspect of a real intention to effect a seditious purpose, that purpose in itself a reality, is lacking with respect to this matter here.

Mr Cauchi, in thecourse of submissions and in referri n g tothe someof the decisions in the Canadian and then the English cases which I have referred to, said that the test was

that there must have been a threat and if what was threatened did happen would that be treason. That is where this question, and a point rightly made in my view by Dixon J is relevant - this question of reality. And on the evidence, there was simply no foundation for that; not in the way the evidence has been revealed to me.

As to the second aspect, contingency. Itwould seem Mr Moala led the accused on. He was the sole interlocutor. Deeper and deeper. "If he was fortunate enough to be elected what would he do if nothing happened? If fortunate enough to be elected again, what would he do (that is to further the pro-democracy position)? If the petition to the King did not succeed, what would he do? If the second petition to the King and the march did not succeed, what would he do? Ifthe third petition to the King did not succeed? What would he do? Any other way?" It is this series of questions, as revealed in the evidence, that leads finally to this answer that provokes the laughter I have already referred to.

I will not refer back to the passages of Mr Justice Dixon. I goon to refer to a passage from Mr Justice McTieman in the same case Burns v Ransley, p.119 about 3 parts of the way down starting with the words.

> "The words in themselves are evidence that the appellant spoke with the criminal intention found by the Magistrate. But it is obvious that all the circumstances in which the words were uttered must be taken into consideration in order to arrive at a correct conclusion on the question whether the appellant uttered the words with the necessary criminal intention.•

And he goes on about the tendency and the purpose of the words and then at page 120,

> "The criminal standard of proof must be applied. I think that there is room for a reasonable doubt that the appellant uttered the words with the intention of effecting any criminal purpose which would render them seditious. It is entirely consistent with the evidence to find the appellant spoke the words charged in order to give an answer to the question put to him and that he had no intention other than to give the infonnation sought by the person who asked the question. That is not a seditious intention."

I have already referred to section 48 and the four paragraphs set out, any one of which the Crown say they rely on. Again that demonstrates the difficulties the Crown has as to what was said, Jet alone the differences between witnesses as to what was meant or could be meant, each as it were placing their own interpretation on it. In my view, this gives the greatest difficulties for the Crown in this area as well.

I go back, finally to the passage I referred to earlier in Archbold and which I read summarising the Boucher and Choudhury cases at paragraph 25 - 198, page 2726, and to that additional element rightly introduced into this charge in the common law, and accepted by the Crown here as being applicable, as additional. That is the proof that the words had a tendency to provoke public disorder and violence and that the words were spoken with intent to incite the violence or create public disorder.

In my view, given all the matters I have already referred to, there was simply no evidence before me on which to found proof of those matters of tendency and intent. It is also on these bases that I dismiss all 3 counts in this indictment against the accused.

I add this. Mr Tu'utafaiva further made submissions to the effect that each count

referred to the alleged offence having taken place at Mu'a, whereas, as the evidence shows, this faikava, and whatever was said took place atFatumu. Ifthat was his only point I would have allowed the Crown an amendment It is not an essential ingredient The accused would not have been disadvantaged by such an amendment. But it is, in my view, irrelevant in view of the judgment and the reasons I have already expressed.

So, also is the fact that no one in evidence seems to have fonnally identified the accused as being the person spoken of, whether at the meeting or at the interview with the police. But again what that was a matter that might well have been subject to correction (and properly so).

The accused should stand. Mr Sikuea, on the 3 counts in the indictment, formally I now enter verdicts of not guilty on each. And in accordance with section 14 subsection 7 of the Supreme Court Act, I direct that you be set at liberty forthwith.

Practice Direction No.1/1997

Re: Committals to Supreme Court from Preliminary Inquiries In Magistrates' Courts

1. When a Magistrate commits an accused person to the Supreme Court (whether under s.38 or s.42(5)(c) of the Magistrates' Court Act) such committal will be made by remanding the accui;ed person (whether in custody, or on bail) to appear in the Supreme Court at 9.30 am on the date six weeks from the date of committal.

2. An exception is made for committals from the Magistrates Courts in Vava'u, Ha'apai and 'Eua. There, a committal should be to the date of the first day of the next known circuit session of the Supreme Court in that particular area.

3. Before the nominated date for appearance in the Supreme Court the Crown will lodge in the Supreme Court and serve on the accused (or counsel) the indictment. On the nominated date the accused person, and counsel for all parties must attend.

NUKU'ALOFA , February 25, 1997.

(Nigel Hampton)
CHIEF JUSTICE

Schafer-Macdonald v Health Practitioners Registration Council & Kingdom of Tonga

Supreme Court, Nuku'alofa
Hampton CJ
C387/95

8, 9, 15, 16, 17, 18 July, 2, 16 August, 4, 7 October 1996, 5 March 1997

Medical practitio11er - registratio11 - delay - damages - statutory duties
Co11stitution - retrospective legislation - new Act
Statutory i11terpretatio11 - rules at common law
Damages - exemplary - failure of statutory duty

The plaintiff sued the defendants for damages (general and exemplary) for breach of their statutory duties relating to the registration of the plaintiff as a medical practitioner. She had qualified in medicine in Germany in 1980 and had been duly licensed to practice. She did a post-graduate degree graduating in 1983. In 1986 she bought a medical practice in Tonga, having earlier in 1986 been registered as a medical practitioner in the United Kingdom. She was granted "temporary" registration in Tonga and in 1990 "full" registration "limited" to a term of 3 years. In 1991 the Kingdom passed into law the Health Practitioners Registration Act 1991, inter alia creating the first defendant and a new regime for registration of health practitioners including medical practitioners. The Act came into force on 1 July 1993. The plaintiff applied for registration under it, in April 1994 at the first time the first defendant had prepared forms and procedures and sought registration. Her l!PPlication was not dealt with however until June 1995 when it was granted by the first defendant but only after issue of proceedings by the plaintiff in the Supreme Court after threats to her by the first defendant to, inter alia, close down her practice and to prosecute her for practising medicine whilst unregistered.

Held:

1. The plaintiff was duly registered in the Kingdom from 1 May 1987. Such registration could not be, as a matter of law, subject to any conditions (whether "temporary" or in terms of a period of years). The Director of Health, under the then in force Medical Registration Act, had a duty to keep and maintain the register of practitioners. The plaintiff's name was entered in the register.
2. For 6 1/2 years up until the coming into force of the 1991 Act the plaintiff had practised medicine in Tonga as an approved and registered duly qualified medical practitioner. The Tonga Government Gazette of July 1992 in publishing the list of persons registered under the old Act which included the plaintiff in the list of persons registered to practise as medical practitioners and made mention of her as being "MD (Germany)" was official confirmation of

her registration and qualifications.

3. In February 1993 the then acting Director of Health issued the plaintiff a certificate advising inter alia, of her registration and that she was a medical practitioner of good standing. That certificate under s.5 of the old Act was presumptive proof of both her registration and her qualification as a medical practitioner.
4. Under the new Act the first defendant can and should conduct a hearing or enquiry in exercise of its duties under the new Act (such as consideration of applications for registration).
5. Reservations were expressed (obiter) as towhether themembershipof the first defendant complied with the Act
6. If, as argued for the defendants, the new Act effected a complete repeal of the old Act then there would have been an unfortunate and lengthy interregnum when there would be no registered health practitioners of any sort able to lawfully practise in Tonga. A matter patently absurd and potentially harmful.
7. Ifthe position was as argued for the defendants, there was no discretion in the first defendant to allow people to continue to practice until procedures could be put in place.
8. The plaintifrs application (for registration under the new Act) was met with extraordinary actions, shifting reasons, procrastination and delays on the past of the first defendant; these actions (or sometimes lack of action) being difficult if not impossible to understand.
9. The applicationof theplaintiff objectively, contained an amplitude of evidence as to her qualifications, prior registrations andprofessional experience, aswell as her good character and professional competence.
10. The first defendant dealt with the application for registration of government staff differently to those of non-government practitioners (such as the plaintiff) yet the Act did not allow such a distinction.
11. The members of the first defendant had a duty to look at, and decide on, the merits of each individual's application.
12. The first defendant deferred making a decision on the plaintifrs application but without telling her of that or of the reasons for it, and during that deferral period the plaintifrs cheque for her registration fee and her annual practising certificate (which could only be issued if she were registered) was banked by the Ministry of Health (part of the second defendant).
13. At no stagedid the first defendant suggest that the plaintiff should come and give evidence before it to attempt to clear up any unresolved questions or ambiguities. Given the duties and powers of the first defendant a hearing before it was required at some stages. Nor did the first defendallt make a decision to refuse to admit the plaintiff to the register, from which she could appeal.
14. The first defendant omitted the plaintifrs namefrom a list of qualified doctors published , in the Government Gazette and in the Tonga Chronicle, in July 1994; and republished in 2 newspapers in December 1994.
15. The plaintiff , having tried for some 9 months to obtain registration, decided to try and obtain registration in Canada, her husband's country of nationality.

16. Many of theexhibits in the control of the first defendant, were only lamely and falteringly produced at trial. They showed that there had been much delay, procrastination and dissemblance by the first defendant and, even when it announced it "no longer doubts the authenicity of the document submitted so far" after somell months - still registration did not proceed; but instead decisions madeto refuse toaccept the plaintiff 's prescriptions and torefer the matter to the Police.
17. Proceedings were issued in May 1995seeking, inter alia, prerogative orders confirming her registration, directing the issue of a practising certificate and prohibiting prosecution. In June 1995 the first defendan! approved her registration and issued a current practising certificate.
18. The first defendant was and is not a separate legal entity. Financial and other responsibility for it rests with the Ministry of Health and, through the Minister, the second defendant.
19. The plaintiff, having given medical advice previously for a member of the judge's family, thejudge enunciated the test of bias-would a reasonable, an objective, observer think iilikely or probable the judge would favour the plaintiff unfairly at the expense of other parties? A suspicion of bias reasonably and not fancifully entertained by reasonable minds. The test of bias is whether there is reasonable suspicion of bias looked at from the objective stand point of a responsible person and not from the subjective standpoint of an aggrieved party. Those tests were not met here and a court J;hould not desist from hearing a case because a party or somebody wrongly and irrationally suspects bias.
20. Even if the plaintiff had to re-apply for registration under the new Act, the treatment of her application and of her was not only quite extraordinary and unreasonable but was in many respects disgraceful.
21. Theactions of the first defendant were reviewable and were wrong in fact and in law. The first defendant had not only stepped outside the limits of its statutory authority from time to time but also at other times acted without authority. Itacted unfairly and unreasonably towards the plaintiff; it failed to perform its statutory duties; having functions requiringit toactjudicially (both in the Act and in accordance with the rules of natural ju stice) it failed todo so; it acted capriciously and in bad faith, without regard to relevant consideration as well as bringing into consideration irrelevant considerations.
22. In addition given the results which would otherwise occur s.15 (a) and (b) Interpretation Act had effect i.e the new Act did not affect the plaintifrs existing registration nor the entry of her name in the register and so she was andremained a duly registered medical practitioner;and she retained her right to practice acquired under the old Act.
23. As to cl 20 of the Constitution (as to retrospative laws) if that provis ion was put alongside and used in conjunction with the common law rules of statutory interpretation which operate in Tonga and in particular the rule that statutes should be interpreted, if possible, so as torespect vested rights, that supported the plaintifrs case. She had a right acquired (to practise medicine) by her as an individual, and which some had and some had not.

24 The plaintiff was entitled to general damages of $30,000 and exemplary d f $5000 given the conduct of the first defendant.
. amages o sappealed. The report of the Court fA· d ment follows]
ppea[1]

The defendant o JU g .

Cases considered:
exp. Angliss Group (1969) 122 CLR 546
Whitford v Manukau City [1974] 2 NZLR 344
R v Simpson (1983) 154 CLR 101
Starey v Graham [1899] 1 QB 406
160 ln re Tonga Ma'a Tonga Kautaha (1910) 1 Tongan LR 5
Fulivai v Kaianuanu (1961) 2 Tongan LR 178
Bennett v Bennett [1989] Tonga LR 45

Statutes considered:
Medical Registration Act
Health Practitioners Registration Act
·Constitution cl.20
Interpretation Act s.15, s2, s23
170 Evidence Act s50

Counsel for plaintiff Mr Niu
Counsel for defendants Mrs Taumoepeau

Judgment

In the matters set out below when I refer to facts then, from the evidence (oral testimony and documentary exhibits), I find those facts proved:-

The Plaintiff was born in Heidelberg, Germany, on 14 February 1949 (Exhs 74, 73).

She studied medicine at the Ludwig-Maximillian University, Munich, Bavaria, Germany (then West Germany or the FDR - the Federal Republic of Germany) from 1974 to 1980 (Exh 80/81) completing and passing her final examination (oral and written) in March, April and May 1980 (Exhs 81, 4/5) and thereupon being approved to practise
JB(J medicine in Germany by the Bavarian Ministry of the Interior (Exh 617).

I give a iiltle more detail of these events. On passing her final examinations she received a "certificate of final medical examination" (Exh 415) of 13 June 1980 - her "Zeugnisuberdie Arztliche Prufung" which certificate, in the World Health Organisation book "World Directory of Medical Schools" 6th Ed (1988) (Exh.99) at p.101, is referred to as the "Title of degree awarded". That book (Exh.99) at p.101 refers to the "duration of medical degree course: 6 years" and at p.105 listed amongst the medical schools is the following "Fachbereich Medizin, Ludwig-Maximillians Universitat Munchen ..... year instruction started 1826 ....."

On receipt of that "Zeugnis uber die Arztliche Prufung" the Plaintiff was then
110 approved to practise medicine by the issue to her of her "Approbation als Artz" - her approval as a medical doctor-contained in the "Certificate of State Approval" ('Approbationsurkunde") (Exh. 6rT) issued by the Bavarian Ministry of Interior on 13 June 1980.

Again I refer to Exh. 99 at p.101 where it is said that "The licence to practise medicine is granted by the Medical Examination Board of the health authorities of the respective 'Lander"• which includes "Bayem-Bayerische Staalsministerium des Junem". That Bavarian Ministry is of course, the very Ministry which issued the Plainlifrs "Certificate of State Approval" (Exh 617).

200 I note some matters of interest, if not significance, now. The book Exh.99 was at all relevant times available, through Dr Welch (a witness in this trial and who is on appointment to the Kingdom for the World Health Organisation) at Vaiola Hospital. It was never sought - or indeed any like equivalent - at any time by the First Defendant.

Both Certificates (i.e. Exhs 5 and 7) were translated into English in October 1986 (Exhs 4 and 6) respectively, at a time when, as I will come to it in this chronology, the Plaintiff was not only contemplating coming, but taking active steps to come, to Tonga.

To resume the chronology, I find that after qualifying and being registered the Plaintiff practised medicine in various places including

210 (a) in the German Heart Centre, Munich (1980 - Exhs 9-12)
(b) on a leprosy island (Culion Sanatorium) in the Philipines (1981 - Exh 8)
(c) in Brunsbuttel Regional Hospital, Schleswig-Holstein, Germany for 4 years (2 years internal medicine; 2 years surgery) (1981-85 - Exhs 16-26).

During the Brunsbuttel employment the Plaintiff wrote a dissertation or thesis on "Yersinia arthritis" through the Ludwig-Maximillian University and on 24 February 1983 graduated as a Doctor of Medicine "cum laude" (Exh. 13/14).

Also during this same time at Brunsbuttel the Plaintiff qualified as a specialist doctor in rescue and lifeguard services (January 1984 - Exh. 27/28) and in mid 1984 she
220 completed a course in the English Language (Exh.15).

In 1985 the Plaintiff transferred to the Regional Hospital in Engen, Badn - Wurttenburg Germany and worked in surgical medicine there forabout 6monthsand later in 1985 and into 1986, still in Baden-Wurttenburg she worked in anaesthesiology and surgical medicine at Breisach Regional Hospital (October 1985 - December 1986 - Exh.31/34).

Itwas during this period at Baden-Wurttenburg that the Plaintiff and her then fiance became interested in a medical practice ("the German Clinic" - still known by that name) in the Kingdom of Tonga, then owned (and advertised for sale in Germany) by a Dr lcks.

The Plaintiff and her then fiance (Dr Bruno Blersch) came to Tonga in August 1986 to inspect the practice and decided to buy the same- and indeed entered into an agreement to do that on 18 December 1986 (Exh 36/37).

Thatjumps ahead a little in the chronology of events becau se, to enable the Plaintiff to practise in Tonga, shedecide to seek full registration as a medical practitioner with the General Medical Council, London, England . That step was necessary because of the provisions inthe (then in force) Medical Registration Act (cap.75) and in particu lar Section3 which enacted, interalia, thata person entitled to practise in the United Kingdom as a medical practitioner (holding a diploma or certificate to that effect) "shall, upon satisfying the Director of Health of his identity ..... be entitled to be registered as a duly qualified" (medical) "practitioner ....."

Accordingly in October and November 1986 the Plaintiff took steps towards that United Kingdom registration. She obtained her necessary certificates of qualification and registration (E;w;hs 5 & 7), had them translated into English (17October 1986- Exhs 4, 6); various references and other documents showing her qualifications and experience were available to her(eg. Exhs.8,9-12, 13/14, 15. 16-26, 27/28); she also obtained a Certificate from the German Federal Ministry for Youth, Family Affairs, Women and Health of 6 October 1986 (Exh 29 - translation 17 October 1986) certifying as follows:-

> "This is to certify that Mrs. Dr. Helga Theresia Schafer-Durst, born on 14th February 1949 in Heidelberg, has undertaken and completed her medical education in ihe Federal Republic of Germany satisfying all requirements according to article 1 of the guideline 75/363/EWG.
>
> Mrs Schafer-Durst was issued with a Certificate of State Approval as a Doctor of Medicine on 13th June 1980 valid from that date by the Bavarian Ministry of the Interior having passed the Final Medical Examination on 29th May, 1980. The Certificate of State Approval as a Doctor of Medicine entitles holder to practise the medical profession extensively within the Federal Republic of Germany.
>
> Furthermore we certify that Mrs. Dr. Schafer-Durst is still entitled to practise the medical profession in the Federal Republic of Germany and that neither professional nor disciplinary legl!l proceedings have ever been initiated against her."

On 28 November 1986 the General Medical Council in London, England, advised the Plaintiff in writing (Exh.30) that "you were granted Full Registration on 25th November 1986 and I enclose your certificate of Full Registration. A fully registered

medical practitioner is entitled to practise medicine in the United Kingdom".

A certified copy of the entry in the (United Kingdom) Register of Medica l Practitioners (overseas list) is Exh.89. It bears the "registration no.3184972' which number is also found on Exh.30. The certified copy Exh..89alsv bears on it "State EJtam . Med. 1980 Munich".

The Plaintiff and Dr Blersch came to Tonga at the end of 1986 and the agreement to buy the German Clinic (Exh.36/37) was signed on 18December of that year (and all signatures witnessed, interestingly enough, by the German Consul here, Mr Ralf Sanft - who is to appear later in this narrative (if not already) asa translator of various documents (German to English).

In keeping with thatagreement the Plaintiff and Dr Blersch commenced the practice of medicine in the Kingdom on 1January 1987. This was apparently done on the basis that the practise was to continue to be conducted under Dr. lck's licence. One wonders as to the regularity of that, but it is not an issue before me. Suffice to say that the Plaintiff did apr .y for registration "1 Tonga under the Medical Registration Act (cap 75) and on 1Ma · 1987 she "wa ":" ..:d temporary registration as medical practitioner" ("to30April *199J")* - refer Exh.51.

Three things about this stage of events require further scrnti ny. First the provisions of the Medical Registration Act itself; second the steps taken by the Plaintiff to obtain registration ; and third the registration obtained.

The Act then in force, the Medical Registration Act, had been in existence sincr. 1918and had remained virtually unchanged for almost70 years. It had been preceded by some legislation in the field of medical services in 1909 (about circumcision) and 1916 (Medical Services Act) but this Act was apparently the firstdeling with Registrationand was "an Act to Regulate the Registration of Medical Practitioners, Dentists, Apothecaries and Mid-wives• (long titl).

In Section 2.it was provided that the Director of Health "shall keep a register ..... of all persons qualified to practise medicine or surgery or dentistry or to practise as pharmaceutists or apothecaries or midwives in the Kingdom and it shall not be lawful for any person.unless soregistered ..... to practise for fees.....". Section 3 provided (inter alia) that "Any person holding a ..... certificate entitling him to practise in" (inter alia medicine or surgery) "in the United Kingdom ..... shall upon satisfying theDirector of Health of his identity with the person named in such certificate ..... be entitled to be registered as a duly qualified practitioner .....". Section 5 provided for the Director to issue to such a registered practitioner a certificate of registration which "shall beadmitted in any court or proceeding as evidence of the facts therein stated and of person's qualification ..... ". Section 11 provided that a list of persons registered "shall be published annually in the Gazette .....•. Section 12 and Section 13 allowed the removal or striking off of names from "the register" in certain circumstances (not applicable here) and Section 14for erasure of names from "the register" on death.(A ny underlinings are mine).

The Plaintiff supplied to the Director of Health certified true copies of her Certificate of Final Examination (Exh 415); her Certificate of State Approval (Exh *6rt);* and her Certificate of Full Registration (United Kingdom -as referred toin EJth 30).Other materials and/or documents also may have been supplied. Whatever, her credentials and identification were obviously accepted and acted upon. I find that the three certificates

mentioned (or at the very least copies thereof) were retained by the Ministry of Health. a matter to which I will return".

As I have said the Plaintiff was granted "temporary registration as Medica l Practitioner ..... from 1May 1987to30 April 1990" (Exh51). Quite what authority there was to create and grant such a status of "temporary registration " for a term of years, and the effect or effects of such is not important here, but is somewhat puzzling. The Act does not create such a category of registration nor does it enable a conditional registration or a term of years. Practitioners such as medical practitioners are either entitled to be registered as qualified to practise medicine (and entered into the register) or they are not. The Act is clear. They are not like "unqualified practitioners" upon whom conditions and limitations could be imposed - refer eg. to Ss 7, 8 and 11 of the 1918 Act.

On the evidence before me I find that the Plaintiff was duly registered in the Kingdom, as a medical practitioner, from iMay 1987 on. Such registration could not be, and was not at law, subject toany conditions (wether theclaimed "temporary" or in terms of a period of years). The Director of Health had a duty to keep and maintain the register of practitioners; the fact that the Defendants have looked, it is said, and now cannot produce, physically, to this Court such a book, does not lead me to find (as argued on behalf of the Defendants) that the register never existed. Given the provi sions of the Act (eg. Sections 2, 3, 12, 13 and 14) this Court can, and does, presume that the Director of Health (or successive Directors of Health previously styled "Chief Medical Officers - over almost 70 years) did keepand maintain such a register as was required by law.(I refer in pa ssing to Section 17 of the Interpretation Act (cap 1) which says that "whenever by any Act.. ..... a duty (is) imposed then unlessthe contrary appears to be intended ..... the duty shall be performed from time to time as occasion requries"). It is footling, in my view, for the Defendants to claim (as was done in their final submission) that "there was no evidence of any register established by the Director of Health under the Medical Registration Act". One notes the statutory presence of the Director of Health (ex officio and as chairman) on the First Defendant Health Practitioners Registration Council (Section 4 Health Practitioners Registration Act 1991) and, inter a\ia, maintaining continuity relating to registrat1on between the 1918 Act and the 1991 Act.

Not on\y do I find that the P\aint\H was registered-, I hnd that, in keeping with the c\ear and important statutory ob\igat'lons, her name was entered in the register under the 1918 Act.

'The registration was confamed by Cabinet (3 lune 1901, C.D. No.88), it wou\d seem. Quite w\\att\\e matter had \o do with Cabinet is, again, somewhat puu\ing. Unde1 the 1918 Act Cabinet did have a say in which other countries' qua\ifications should be recognised (Section 3-by adding \he country \o the Schedu\e to \he i\cl), in registeriny, unqua\itied \)ractitcmers (Sec\\on Ei \o 1Cl) andmdirec\ing\\\eremova\ o a name homlhe register (Section \1). '?.u\C.dl>ine\'nail, anu cou\u 'nave, no sa inregis\ta\\on o{ qua\il\ed practitioners. Iwi\\ comment on this aspect again \ater; but Cabinet involvement did not (and could not) affect the Plaintiff's registration.

The Plaintiff continued the practise of medicine here in Tonga. Dr Blersch did not. He left Tonga after about 6 months and I find that from about September 1987 on until the present trial the Plaintiff has operated the German Clinic, as a sole med ical practitioner. I will come to the size and substance of that practise later .

About one year further on (on 5 November 1988 - Exh..39) the Plaintiff married

Peter Douglas Macdonald, a lawyer then practising here, originally of Canada. Mr Macdonald gave evidence at the trial and I will return, later, to that evidence. Thereafter (in March 1989) the Plaintiff registered a change of surname with the German authorities - see the Certificate of change of surname to Schafer - Macdonald (from Schafer-Durst - born Schafer) at Exh.40/41. I note the continuity of changing names - "Schafer - Durst",or "Schafer -Durst born Schafer" or Schafer - Durst nee Schafer" had been the surnames used in various Exhibits earlier referred to (eg. Exhs 4/5, 617, 8,9-12, 13/14, 1 ., 16-26, 27/28, 29, 30, 31-35, 36/37-38, and even the then Aeling Directorof Healths lel of 4 February 1993 - Exh.51 - which refers to "Dr Helga Schafer - Durst later known as Dr Helga Schafer - Macdonald").

As the initial registration of the Plaintiff, in Tonga, purported to be "temporary• and limited to a term of 3 years (until 30 April 1990) the Plaintiff on 9 March 1990 wrole to the then Director of Health (Dr S. Foliaki) seeking full registration.

There seems to have been a four month (and to me quite inexplicable) delay in responcl .ng but on 6 July 1""90 (Exh.42) the Director of Health, by letter to the Plaintiff of tha' date, advised •' .,1s Majesty's Cabinet in its decision No.877 of 25th June 1990 appruved the grant of full registration as Medical practitioner under section 3 of the Medica l Registration Act for Dr Helga Schafer-Macdonald ..... You are therefore accordingly registered". On that phraseology 1 add to what I said earlier - if she was "accordingly registered " hername, perforce, must have been entered in the register. How else could she be registered?

Again I cannot see what this had to do with Cabinet. But that does not affect the validity of the registration , by the Director of Health, nor the recording of her name in the register, which he had to maintain.

The letter (Exh.42) of 6 July 1990 to the Plaintiff refers to a request by the Plaintiff, for "registration as a medical practitioner in Tonga for a further three years .....". On behalf of the Defendant it is argued that, when I come to them, that puts an immediate end to anyand all arguments of the Plaintiff as to theeffectof various provisionsin Section 15of the Interpretation Act (Cap. l) and Clause 20 of the Constitution (as to retrospective laws) because as at the time of the repeal of the 1918 Act and the coming into force of the 1991 Act (on 1July 1993) the Plaint iff's registration under the 1918 Act had already expired and as she had not had it renewed none of the above statutory or constitutional provisions (whatever their effect or meaning) could affect her position.

I reject that argument (on several bases) and therefore the Interpretation Act and Constitution issues must be decided on their merits.

First I reject the argument on the basis set out above - there was no power to impose conditions and/or limitations on "qualified practitioners". Secondly the Plaintiff was already registered (as from *I* May *1987). Thirdly* no addifonaJ *validity could* be *given by* dint of the fact *it* was *said that* the *Plaintiff only applied for 3 years* - she cannot *amend* statutory authority and power. *Fourthly* when was the three years to run from? - i.e. for example only from 9 March 1990 (her apparent application); from I May 1990 (the 'temporary• registration having "expired" 30 April 1990); from 25 June 1990 (the Cabinet decision); from 6July 1990 (the notification lo the Plaintif f): or some other dale being the date when she was "accordingl y registered". In the latter 3 instances what of the interregnum (cg. between 30 April 1990 and 25June 1990)? Had she been practising medicine without registration and therefore unlawfully? Uncertainty hcapedon uncertainty.

Fifthly the letter of 6 July 1990 conveying the Cabinet Decision did not refer to that decision and "grant of full registration" as being restricted to a term of years and nor did the notification that the Plaintiff was "accordingly registered". Why would it be called "full registration" if it was to be a limited grant. If it were to be limited in any way (and if it could be so limited, and in my view, as already expressed, it could not) it would have to be clearly spelt out.

What is of significance, and is worthy of comment at this stage, and as affecting some subsequent events and my findings thereon, is this - twice in a period of just over 3 years the Cabinet, and (given my view of the 1918 Act)- more importantly the Director of Health had considered the Plaintiff, her qualifications, her identification and, had approved her registration as a medical practitioner. For some 6 & 1/2 years (up until the crucial date of 1 July 1993 - the coming into force of the 1991 Act) the Plaintiff had practised medicine in the Kingdom as an approved and registered "duly qualified" medical practitioner. There was additional recognition of that status of the Plaintiff in the allowance by her as a private practitioner to utilize Ministry of Health facilities, including the main base Hospital, Vaiola (refer eg. Exh..43).

The Health Practitioners Registration Act 1991 was passed through the House on 15 August 1991 and gained Royal Assent on 25 October, 1991. It was not to come into force until a date appointed by the King in Council (S.1(2)). A new regime for registration of various health workers (and more categories of health workers than under the 1918 Act) was to be imposed and the 1918 Act (Cap.75) was to be repealed As I have said the 1991 Act did not, in fact, come into force until 1 July 1993 and I will deal with that delay and reasons for it, and effects of it, later in this judgment.

But that 1991 Act having been passed and assented to, the Plaintiff points to a curious event which occurred in 1992 - and which, I find understandably, has led her to view the post - July 1993 events, involving her registration and the new Act, with considerable suspicion.

The Plaintiff had become and remained a member of the Tonga Medical Association from her first commencing practise here. Yet in the 1992. SOth Anniversary Commemorative Publication of that Association (Exh 44-46) at page 16 her name is notably ommitted from the list of "Tonga Medical Association members who graduated from other medical schools", yet she is in the group photograph at page iii.

When the Tonga Government Gazette No. 22 of 31 July 1992 (Exh. 47-49) published the annual "list of the persons registered under this Act" (S.11, 1918 Act) as was required to be done as a matter of law, the Plaintiff's name was included as it had been in the past, in the list of "persons ..... registered under section 3 of the (Medical Registration) Act to practise as Medical Practitioners ....." - refer Exh. 49 - Gazette p.221781.

That publication is of some significance in that it lists the Plaintiff as "Dr Helga Schafer - Macdonald - M.D.(Germany)" - i.e. apparent recognition of her Doctorate in medicine. The Gazette is defined in S.2 of the Interpretation Act (cap 1) as meaning (inter alia) "the Tonga Government Gazette" and by s.50 of the Evidence Act (cap. 15), "The Court shall presume until the contrary is shown the genuineness (a) of every notice purporting to be a Govemn:ient notice in ..... the official Gazette of the Kingdom" . Those provisions apply here; nothing to the contrary has been shown (or proved - or indeed adduced in evidence at all-) here. Again official confirmation of both the Plaintifrs qualifications and registration.

In 1992 the Plaintiff became a member of the Medical Woinen's International Association (Exh.50) and has continued to be a member since then.

In 1993 the Plaintiff decided, responsibly, to undergo certain further medical education in Bavaria Germany involving a specialist course in general practice. She satisfied the requirements of that course- refer to the Certificat of the Bavarian Medical Association of 17 February 1993 (Exh. 52/53). At about the same time she became a member of the Medical Practitioner's Association of Bavaria and has remained a member since then

Importantly, I find, and obtained so that the Plaintiff could enroll for the Bavarian further education studies (para.42 above), the Plaintiff was given a letter of 4 February 1993 from, and signed by the (then) Acting (shortly to be permanent - and pennanent as at 1 July 1993) Director of Health, Dr S.T. Puloka which reads as follows (Exh 51):-

> "To Whom It May Concern
>
> This is to certify that Dr Helga Schafer-Durst later known as Dr Helga Schafer-Macdonald was granted temporary registration as Medical Practitioner in the Government of Tonga for 1 May 1987 to 30 April 1990. Her registration status was changed to full registration as Medical Practitioner on 25 June 1990.
>
> Dr. Helga Schafer-Macdonald during her entire time in Tonga was a full time private general medical practitioner. She is a medical practitioner of good standing.•

Significantly there was no mention in that certificate of the 'full registration" being for just a three year term (see paras. 33 and 34 above).

And again, signiricantly, this was a certificate confirming not only the Plaintifrs qualification and registration, but also her professional good standing in Tonga.

That certificate, it seems to me, is a certificate within the terms of S.5 of the 1918 Act. Section 5 provides: "There shall be issued to any person registered under this Act a certificate under the hand of the Director of Health stating the date of such person's being registered and the capacity in which he is registered and upon proof of the signature of the Director of Health to any such certificate the same shall be admitted in any Court or proceeding as evidence of the facts therein stated and of the person's qualification whose name appears therein". So before me (and as it transpires, before the First Defendant, al the relevant time, when I come to that) here was presumptive proof not only of the Plaintifrs registration as a medical practitioner but also (and more importantly from the point of view of these proceedings) of her qualification as a medical practitioner.

Within 5 months of that Certificate (Exh.51) the 1991 Act came into force. By section 24 the Medical Registration Act (cap 75) - the 1918 Act - was repealed; (I will consider in due course the effects of that repeal alongside provisions such as ss.15 and 23 of the Interpretation Act (cap 1)). There is no saving provision (a curious feature given what I will come to).

A new registration regime thereby was brought into being and force on 1 July 1993. A Health Practitioners Registration Council (hereinafter the Council or the First Defendant) was established (s3(1)); its composition spelt out (s4(1)- as I read it, and the s2 definition of "health practitioner", some at least 9 and up to 12 members with 3 other persons of the like health profession being co-opted for certain purposes including here, materially,

registration s.3(3)); a chainnan appointed (S4(1)- the Director of Health i.e. as at 1July 1993 the same Dr Puloka who had signed the certificate Exh. 51- paras 43-46 above); quorum, and minimum representation of the particular health profession under scrutiny, at a meeting of the Council established (s4(2)); with the Council lo have the duty, inter alia, to "(a) consider applications for and if approved admit persons to the relevant part of the register" (sic) (s3(2)).

Theregister(as defined ins2) "means the Registerof Health Practitionersmaintained under this Act", and by s5 the Registrar of the Council (appointed by the Minister of Health unders3(5)) "shall maintain the register.....". s9provides that "Save as provided in this Act, no person shall practise as a health practitioner .....unless (a) his name is on the register; (b) he has in force a valid health practitioners certificate". (Those certificates are annual certificates (s.11); and there is no question before me in relation to annual certificates). The Register is to be sub-divided into various sections (sl5) including "Medical".

Itis clear that something in the nature of a hearing or enquiry can, and should, be conducted by the Council in its exerciseof its duties (such as consideration of applications for registration). I refer to e.g.

(a) s3(2)(a) "..... consider applications for and if approved admit .....to .....:the register"

(b) s3(3) - power to co-opt "to assist the Council in reaching its decision".

(c) s3(4) - power to have this Court "issue subpoenas requiring witnesses to appear before the Council"

(d) s4(2) - "Decisions of the Council shall be by a majority, the chairman having a casting vote ....."

(e) sl9 - "All decisions of the Council shall be recorded in writing and copies made available to the health practitioners concerned".

(f) s8 - on refusal of admission to the register an applicant "may appeal against the Council's decision to the Minister (of Health) whose decision shall be final"; and he may affirm, reverse, amend or remit for reconsideration that decision of the Council.

For completeness, and before I move back to the factual account, I add that an applicant for registration has to give consideration to sections 6and 7 when applying for registration.

(a) s6: "An applicant for admission ..... shall make available to the Registrar such authenticated evidence of his professional qualifications as the Council may require. The Council shall have the right to approach such individuals and bodies as may be necessary to confirm the fitness of the applicant to be admitted ..... Applicants must be proficient in either the Tongan or the English language."

(b) s7: "As well as evidence of approved qualifications the applicant will be required to produce evidence of his good character and professional competence. Such evidence shall be that as may be required by the Council".

Leaving aside any co-opted members, the membership of the Council from July 1993 on is as shown on Exh. 102. i.e. only the 8 members as specifically nominated in

s4(1) and not "a senior representative of any other group of health practitioners required to eregistered" (and arguments weremadethat meant only 1additional member forthose 4 diverse groups - but a more likely interpretation would mean another 4 members i.e. 1 for each group) and therefore no representative or representatives of health officers midwives, traditional birth attendants and village health workers (see the definition of "he_alth practitioner" in s2). Thepresent Director confirmed thatduringcross examination, which l adsmeto hav considerable reservations asto the validity of theconstitution (and composition) of the FITS! Defendant Council (which both Defendants must give some urgentthought to, in my iew) bt i vie.w of my findings on theissues which were fully argued efore me (and this constitution 1Ssue was not - nor was it pleaded but was raised by ie with counsel and made the subject of written submissions)- I have determined that I will not take that matter further in this judgment. 1enlarge on that a little as follows: On 16 August 1996, saw Counsel, advised them of my concerns and sough! further argument n the questions of composition, validity of constitution and possible effectson both legality f the Concil and its actions (including registration of all practitioners) and the e_proceedings. Wntten arguments were supplied on 4 & 7 October 1996. (There was a d1fficuty. after.those \ritten submissions were filed, in locating the file and this has resulted in delay in relation to the issue of thisjudgment).

Despite the considerable time available for preparation for the new 1991 Act (i.e. from A.ugust 1991 or October 1991 - see above - until the coming into force on 1 July 1). it seems that no preparatory steps had been taken by the Minister of Health, the D1rectoro Heath or the Ministry of Health who were responsible for the implementation and adm1mstration of the Act. If,as is argued on behalf of the Defendants before me the 199 Act eff ted a complete repeal of the 1918 Act and, inter alia, for exampl all medical prachtioners registered under the 1918Act had to apply to be, and be, registered uner the new ct then, unless there was going to be an unfortunate (and, as it turned out, quite lengthy) interregnum vhen there wold be no registered health practitioners of any sort able to lawfully practise anywhere in Tonga, those responsible had to take all necessary steps to establish a Council and that Council had, inter alia, to lay down forms and procedures, and then call for and consider and decide on applications. S.23 Interetation Act (cap l? would haveallowed such steps to be taken but those steps would not have any effect until the Act comes into operation•.

Yet even if all steps which could have been taken under s23 were taken before the 1991 Act came into force it is hard, if not impossible, to imagine that there would not have bee_n soe gap or hiatus be\:een the 1991 Act coming into force and the proper reg1strahon of all health pract1honers 111 all 8 categories (see S.2 definition) who would have ben i practise under the 1918 Act and who also would have shown their eligibity for registration under the 1991Act (if that was indeed required, as will be come to in due course).

Which would mean health practitioners practi sing unlaw fully - the effect of ss. 1 1 and 12 of th_e 1991_Act - if the people of the Kingdom were to have any medical services of any sort 1mmed1ately post - 1 July 1993, and if all the arguments of the Defendants (al ready mentioned and yet to be come to) are correct. Can that be soas a matter of law? As a matter of fat it is patently absurd and potentially harmful. It is, however, a matter to be_borne 111 m111d when it comes to a consideration of the matters of statutory (and const1tut1onal) construction shortly to be undertaken.

In addition, and as it turned out, despite the apparent ability to take steps in advance of the 1991 Act coming into force, under s.23 Interpretation Act, nothing was done and on the evidence it was not until about March 1994 that the Council was appointed (there is no certainty of dates in the evidence before me) and steps taken over forms, procedure, applications for registration and soon (and advertisement seeking applications in all 8 health practitioner catergories was placed in March 1994 (Exh 54) presumably after the first Council meeting - although no dates, agenda, or minutes of such were produced to me- and the second 1994 Council meeting was held on 14 April 1994- to be found by referring to minutes of the third 1994 meeting of 11 May 1994 (Exh Dl AA). It was suggested that very first meeting may have been in October or November 1993, and therefore the second Council meeting (1194) must have been in early 1994.

So in fact there was an interregnum of some 8-9 months or so between the 1991 Act coming into force and, apparently, the start of registration procedures - for all health practitioners in all 8 categories. It is all very well for the now Director of Health to speak of the Council in effect allowing an "amnesty" period (my word) when people could continue practising until procedures could be put in place. That ignores the Act itself (and lhe illegality effect - ss 11 and 12, and it is noteworthy that very illegality is referred to in the Council's advertisement (Exh 54). The Council did not have any such discretion a claimed for it in evidence by the Director. What of (lawful) health services for the people of the Kingdom through that period?

After the advertising (Exh 54), or about the same time, the Plaintiff was spoken to by the then Registrar of the Council, who advised her that she needed to be registered under the 1991 Act. I accept that the Plaintiff was told that this was more or less a formality as her qualifications were already on the file (kept under the 1918 Act). Such a comment accords not only with the history as outlined above and also with the effect of the previous issued certificate of registration (eg. Exh 51 signed by the Director about a year before), but also with how Government Doctors were treated and certain of my conclusions of law (para. 148 below).

The form of application is Exh. 54A and a copy of the actual application, signed by the Plaintiff, was found and produced as Exh. D9. This fonn was completed on 22 April 1994, and taken by the Plaintiff to the Registrar at the Ministry of Health, Vaiola Hospital together with her cheque for $88.00 being for the registration fee ($50 - Exhs. 54 & 55) and the Annual Practicing Certificate fee ($38 - Exhs 54 & 55). The cheque was made payable to the Ministry of Health (s23 provides the "Council shall be financially sup(X>rted by the Ministry" and that "all sums received as fees ..... shall be paid to the general revenue ....."). That cheque was apparentl y banked on 26 May 1994 (Exh 56) and I will come back to that.

Havi ng lodged her application the Plaintiff then heard nothing from the Council for some 2 or nearly 2 and 112 months. Meanwhile, as before, she continued to practice - unlawfully in the stri ct terms of the Defendants' submissions. The now Director claimed a discretion in the Council, as I have said-wrongly claimed in my view of the Act. In cross examination the Director agreed that when the 1991 Act came into force the Plaintifrs practice was not closed down becal]se it was known that she was properly qualified under the old (1918) A ct and that she was not a risk to the public. That is, in my view, an important and significant factual concession and one that an objective person conducting a rational consideration of the facts set out above would also reach. It only counter points

the extraordinary (in my judgment) actions, shifting reasons, procra stination and delays which followed that 22 April l994 application by the Plaintiff. Objectively viewed those actions (or sometimes as will be come to, lack of action) are not only difficult to understand in some cases, but in others impossible to understand.

I should note, also, that the Plaintiff's application was fully filled out and contained reference to her original (1980) qualification in medicine and her post graduate studies, degrees and registration (1983 in Germany ; 1993 in Germany . It was accompanied by aquite comprehensive resume of her professional life (both qualifications and experience); her spt.cialist general practice certificate (Exh 53) and her Doctorate of 1983 (Exh 14); and the certificate of 4 February 1993 from the Director of Health (Exit 51). Given the history already outlined and, by then, her registration and work in Tonga as a medical practitioner for some, (over 7) years, objectively one would have thought that an amplitude.

So far as the Plaintiff was concerned nothing further happened for sorne time. However, and unbeknownst to her, the First Defendant held a Council meeting (3194) on 11 May 1994- see minutes (Exh DI AA). In those minutes at paras 2.1 and 2.2 it is clear that Ministry of Health staff were being dealt with in a different way to private practitioners. That was confirmed by subsequent evidence from the now Director of Health, Dr Maiolo. I will return to that evidence in due course - Ministry of Health employees in effect had to do nothing to be registered; private practitioners had to apply and supply various other documents. The Act did not allow such a distinction. If the First Defendant was a body independent of the Kingdom as claimed why did it act in such an uneven-handed way outside the prescription of its own legislation?

In para 2.2 of the minutes of 11 May it was noted that applicants were asked to "provide histories of their employments before a full review of their applications could be made." Dr Maiolo, in cross-examination was asked whether the "Experience" section of the Plaintifrs resume, attached to her 22 April 1994 application (Exh D9) was a history of the Plaintifrs employment as mentioned in para 2.2 of the minutes of 11 May. He replied that it was.

Then Dr Maiolo was referred to para 2.3 of the same minutes where it was stated: "The Registrar reported and noted by the Council that he had not yet received the employment histories of Drs. ..... and Helga Macdonald." He was asked, in cross-examination, how could that be correct given his reply (and the matters) set out above. Initially he said that was how it was reported to the Council by the Registrar but then in effect conceded that the resume admittedly attached to the Plaintif rs application must have been overlooked by the Registrar. And I add, by the Council - all members apparently - as well. Surely they had a duty to look at, and then decide on the merits of, each individual's application. I so find.

When asked why he overlooked this resume himself, as well, he said thathe did "not recall about it." Dr Maiolo in re-examination made a claim that not all the references required from the Plaintiff were available at that 11 May 1994 meeting. It is noted, however, that there is no reference to such in the minutes exhibited.

Nor was there any reference in the minutes exhibited to another claim made by Dr Maiolo in relation to this 11 May meeting namely that the Council was not prepared to grant the Plaintiff's application because her supporting (attached) degrees (Exhs 52 & 14) were in German, and needed to be translated (and he claimed the Council then directed

the Registrar to have them translated - this is to be compared with evidence I will come to shortly .

This stance flew in the face of all that had gone before as set out above, and in particular in the face of the certificate of 4 February 1993 (Exh 51).

This meeting of 11 May 1994 was not concluded on that day but was adjourned to resume on 16 May (the minutes Exh D lAA from page 5 refer). The Plaintiff s application was further considered on 16 May and there is noted, inter alia:

"Qualification: MD Luding Maximillians University,
Germany 1980 .....
History of Employment Medical Practitioner,
Germany 1980 - 1986: Medical Practitioner,
Nuku'alofa Tonga, 1987 to date."

By and large that was an accurate summary and on its face would satisfy aspects of both qualification and experience one would have thought

The minutes go on to record this: "The transcripts attached" (i.e. presumably the transcripts of qualification(s)- see the application form Exh D9) "to this application were all in German. The consideration of the application was deferred until the Registrar gets these transcripts translated into English".

Itis clear that no decision had been made on the Plaintiff's application at that stage so there could be no question of her being able to appeal under s.8 of the 1991 Act - there was no refusal of admission to the register to appeal to the Minister against Furthermore she was not told of the decision to defer, nor of any need to provide translations of her qualifications, nor of the steps taken to obtain translations. She was left in ignorance of what was occurring.

I now return to the Plaintifrs cheque for $88.00 (registration fee $50, annual practising certificate $38) as mentioned above, forwarded with the application of 22 April 1994 (Exh 09). That cheque was banked on 26 May 1994 i.e. while her application was apparently deferred. Why that should have been done, at such a stage, is quite unexplained by the Defendants or anyone on their behalf. It can be seen as yet another recognition by the Council that indeed the Plaintifrs application was both in order and acceptable; and was to be acted upon - anq an annual certificate issued.

Unbeknownst to the Plaintiff the Council met again on 7 July 1994 - the minutes are Exh. D lA, and in evidence Dr Maiolo confirmed those minutes. At p.3 of those minutes this is stated about the Plaiantiffs applicatfon:-

"The documents (qualifications etc.) submitted with this application were again reviewed by the Council and having noted that these papers did not include any reference to her primary qualififcation and that the authenticity of them all were not verified, the Council did not accept the application. Furthermore the Registrar was directed to write and advise her that she needs to produce the original of her primary medical qualification within two months from the date of receipt of the advise".

This marked a shift of position by the Council. Whether the documents in question (Exhs 53 and 14 attached to the application Exh D9) were in German or not the dates on them were clear and they clearly referred to the post graduate studies mentioned by the Plaintiff on the second page of her application. For something over 7 years of practice in Tonga here primary qualification had been accepted and acted upon without question.

Dr Maiolo was asked about the reference in the minutes Exh D lA to "the

authenticity ..... not verified". He said that referred to the 1983 post graduate degree (Ex 14) which was "unsigned". It is worthy of note, however, that that apparent problem of lack of signature on Exh 14 was not raised or mentioned in the minutes until the meeting of 2 June 1995 (Exh D 5).

Dr Maiolo was cross-examined about why the primary degree was required when the post-graduate degree was available and when, as he accepted, no such post graduate degree could be obtained or awarded unless the recipient (the Plaintiff here) held a primary degree. No satisfactory response was given to that.

On 8 July 1994 the Registrar wrote to the Plaintiff (Exh 57). I note that, importantly in my view, the letter was on Ministry of Health letterhead. The first paragraph, I accept, remains a mystery to the Plaintiff. It reads as follows:

"Thank you for the translation of your transcripts. Their availability had enabled the Council to reconsider your application in its meeting of yesterday 7 July 1994".

The Plaintiff had no contact from the Council. She had supplied no transcripts. Nothing, until then, had been asked of her. The transcripts had been obtained by the Registrar himself at the direction of the Council (see above). She did not know her application had been considered, let alone re-considered. It is pertinent to note here that at no stage, whether at this time or later, did the Council suggest hat the Plaintiff should come along in front of its members and give evidence and clear up (or attempt to) any ambiguities or unresolved questions. Given the duties and power of the Council (see above) one would have thought that such a hearing, given the claims of the Council as to its concerns, was required at some stage.

The letter (Exh 57) went on then to seek "two of the basic documents that must be forwarded before an application is processed further" and which had not been included with the original application viz "authenticated evidence of your primary medical degree and a birth certificate". This is the first mention of a birth certificate. If these documents were so essential in the Plaintifrscase (and they were surely not, given the history I have already recorded), but if they were, why was it some 2 1/2 months on before they were even mentioned. An additional shifting of position.

The letter (Exh 57) does not mention any defects in the appli cation as to employment history (yet see the earlier claimed concems_in that regard mentioned above - which were to resurface much much later in June 1995 - see minutes of meeting of 2 June 1995 (Exh D5 and D5 A) which will be come to indue course. Again illustrative of changing ground - ducks and drakes - with this Plaintiffs application).

Nor does the letter (Exh 57) mention any of the problems about the lack of authentication of and/or signature to the post-graduate degrees - see above. Why was that not raised if a conem?

As with the May 1994 Council meeting, so with thi s July one. There was no decision to refuse admission of the Plaintiff to the register from which she could appeal.

On receipt of that letter (Exh 57) the Plaintiff had her birth certificate translated by Mr Sanft (see Exhs 73n4) and made available to the Council. The Plaintiff knew that an authenticated copy of her primary degree had been made available to and kept by the Ministry of Health back in 1986/ 1987 w hen she first applied for registration .. Notwithstanding that however the Plaintiff contacted her sister in Germany to have a copy sent from there and. as well. she told the Registrar that he had her consent to communicate direct with the appropria te German authoriti es.

In the Government Gazette of 18 Jury 1994 (Exh 58159) there was published "for general information" a list of "persons holding Health Practitioners Certificates for the period ending 3lst December 1994". The Plaintiff's name did not appear in the list of 42 "Qualified Doctor". Such was done "pursuant to section 11(4) of the Health Practitioners Registration Act 1991", although I note s.11(4) requires such a list to be published in the Gazette in March of every year. A similar list to that in the Gazette was published in the newspaper the Tonga Chronicle. The omission of her name caused comment to be made to the Plaintiff and marked, I find, the commencement of the difficulties, embarrassment and consequent losses as pleaded variously in paras such as 10, 22 & 23 of the Amended Statement of Claim. To have both patients and fellow practitioners questioning your qualifications and your right to be in practice was, and would obviously be, very damaging (both financially and personally).

On 1 August 1994 the Registrar apparently wrote to the Bavarian Ministry of Health (full title: Ministry for works and Social Order, Families, Women & Health). Like many documents which should be in the Ministry's records or the Council's records this letter (or a copy of) has not been found and produced. But such a letter would be in ket'.ping with the authority the Plaintiff had given the Registrar and the date can be found in the Bavarian Ministry's reply of 10 August 1994 (Exh 60/61). Again, importantly, this letter of 1 August would seem to have been written on Ministry letterhead - see the reply of 10 August addressed to the Ministry.

The reply of 10 August 1994 one would have thought, reasonably, would have resolved this matter for once and for all. It clearly and unreservedly confirmed the Plaintifrs original qualification of 13 June 1980 (see Exh *6r7).* This letter (or certificate) seems to have been received in, at least, September 1994 because on Exh 60 (the English translation) can be seen Mr Sanft's name (signature) and a date of (possibly) 13 September 1994.

Dr Maiolo in cross-examination as to Exh 60/61 agreed that letter (of 10 August 1994) was in front of the Council at its meeting of 6 October 1994 and that the letter "confirmed she (plaintiff) was properly qualified".

Unfortunately the date of birth of the Plaintiff, in that letter of 10 August, was said to be 16 February 1949 - her actual birth date as already noted (and as e.g. recorded in Exh 73n4) was 14 February 1949. No other detail was incorrect. But a discrepancy seemingly to be seized on by the Council in due course, as will be seen shortly. Why the Council did not e.g. check (by facsimile or telephone) with the Bavarian Ministry to see if an understandable mistake possibly had been made was never explained. An easy solution one would have thought

But I have got slightly ahead of myself in this chronological account. Between the Registrar's letter of 1 August 1994 and the translation of the reply of 10 August a further Council meeting (No.5/94) was held on 8 September 1994 - the minutes are Eith Dl. The letter of 10 August, I infer, had been received by then the minutes noting that "the Registrar requested and approved by the Council that this matter (re the Plaintiff) be deferred for the next Council meeting as the translation into English of documents relating to the professional qualifications of the applicant was still being made. The documents were sent by the German Ministry of Interior from Munich and they were in Ge an ...•. There was reference then to the translation not being available from Mr Sanft until the next week.

Following the translation of the 10 August 1994 letter the Council met again (without notice to the Plaintiff) on 6 Oc.:tober 1994 - the minutes are Exh D2. The translation was tabled, and the minutes note that the letter was the response to the Registrar's request The minutes record that the Council (surprisingly to say the least given the past history and the unequivocal terms of Exh 60/61) "noted the letter but would not accept it as it was prepared on the basis of the Bavarian Mirlistry ..... records and not on the records of the training institution where Dr Schafer - Macdonald had her trainings. It was therefore decided that, firstly, the application ..... for registration .... be not accepted and secondly the Registrar wrote, and inform her of the above decision and that the Council would reconsider her case when she is able to provide the information the Council requires".

Curiously enough - and giving weight to the Plaintiff's complaints of the damage done to her, and in her practice, by the Council's actions - the Council whilst still considering the Plaintiff and her application, and not apparently being satisfied with the lists of registered Health Practitioners published in July 1994 (refer above) resolved to inform the public (i) of an "updated listing ... for 1994" and (ii) "that the Council would take legal actions ... on those who continue to practice without valid certificates". A heavy handed approach directed at least in some (considerable) measure _towards the Plaintiff and something of a pointing out or underlining in the public mind of her position (as "unregistered") by her continued omission from the updated list I add that at the next Council meeting of 19 December 1994 - the minutes are Exh D3 - it was noted that the list was published in 2 local newspapers in the third week of November 1994.

Again the question must be asked - why did not U1e Council employ the simple expedient of getting the Plaintiff along in front of it - give her an audience - an opportunity to explain if she could the qualification system and any discrepancies.

On 10 October 1994 (Exh 62) the Registrar (still on Ministry of Health letterhead) wrote to the Plaintiff noting (i) "what the Council really needs from you is the original or an accept certified true copy of your first degree from the institution of your training" and (ii) the discrepancy of 2 days between the birth certificate the plainti ff had forwarded to the Council and her application on the one hand, and the Bavarian Ministry of Health letter on the other. The letter goes on "The Council therefore decided that your application be not accepted" (whatever that means - not presumably a refusal - able to be appealed - under s.8 of the Act). "It would be happy to consider again your case when you are able to provide the information it requires".

The Plaintiff wrote to her sister, in Germany, as a consequence of Exh 62 asking again for her original qualifications and she received from there and forwarded on to the Council by letter of 10 November 1994 (for date see Exh 64 - again the Plaintiffs letter to the Council was not produced) her •Approbation als Artz" in the Certificate of State Approval (i.e. Exh *6n).*

On 19 December 1994 the Council met again. The minutes (Exh D3) record that the Registrar reported and the Council noted that the Plaintiff was "making conlact with the University in which she had her medical training to provide the required evidence". That minute does not accord with the Plaintifrsevidence or with the Council's letter (still on Ministry letterhead) of 20 December 1994, Exh 64. The Plaintiff's account does conform with the letter Exh 64. That letter claims that the Approbation als Artz was tabled at the Council meeting of 19 December and "that the initial decision of the Council on your application still stands" - whatever that means. The letter went on to say: This is

really what the Council needs - a transcript of your degree offered lo you by udwig-Maximillian) University at the end of your medical trainig there. 'Jase btam .. and forward ...for the Council will not consider your case agam unless it 1s aa1lable . Not an appealable refusal under s.8; no mention of difficulties ?ver dale of birth.

This letter, received by the Plaintiff just before Chnslmas 1994, resulted m her ringing the Bavarian University and she spoke to a Mr Huth tere on 22 December and faxed to him on 23 December asking for whatever documentation he could supply to be sent to her urgently.

That correspondence from the Plaintiff was followed up by two letter (on his fis letterhead) of 29 December 1994 by the Plaintiff s husband (and he gave evidence at t_n_al) the first (Exh 65) to the Council setting out a fair and objective summary of the position and trying to ascertain what the real difficulty (if ther was one? as; and_the s:cod (Exh 67) to Mr Huth at the Ludwig-Maximillian Univ s1t contmnmg a fair, objective a d detailed account of the Plaintiff's studies and quahficnt1ons, her appai:ent probles with the council, drawing comparisons with recognition in other _countnes and asking for either the •transcript" required by the Council or a full explanation of the_Grman.system of medical qualification and copies of whatever documents about the Plamllff wh ch they held. This letter was copied to the Council. The two letters (Exhs 65 & 7) sensibly and acceptably summarise the position 1find; and were written after the Plamtifrs husband had spoken, in person, lo Dr Puloka.

The Plaintiff, by now quite concerned as to her future practJce m Tonga and with some justification for that concern, lfind) decided to take steps to become registered as a medical practitioner in Canada, her husband's country of nationality. She had been trying to be registered in Tonga for almost 9 months, without success; others had been registered in very short lime.

To enable registration in Canada (or the U.S.A. or that alter) th Plamllff had to pass certain evaluating examinations for graduates of mternallonal n:ied1cal schools. The
1040 certificate as to her attendance at a required course m Los Angeles m Janary/February 1995 is Exh 70 (after the course she was examined and returned to Tonga 1Mar h 1995 -and received her (successful) results by letter of 4May 1995- Exh 90- which lwill refer to later). laccept that that cost her a sum of some $10,000 for fees, travel, food and accommodation; as well as for her absence from her Tongan practice - there was no locum tenens available.

on 23 February 1995 meeting 1/95 of the Council took place. The reference m the minutes (Exh D 3A) to the Plaintiff is brief. The letter (of 29 December 1994? from te Plaintiffs husband was discussed - "The Registrar was directed to reply to this letter .

The letter referred to in those minutes was not written until 23March 199 (Exh75) and lwill come to that shortly. The lmonth delay in writing is unexplamed, and inexcusable, in my view.

By referring to other later correspondence, it seems that Mr Huth at the Umvemty in Bavaria replied direct to the Council by letter of 7 March 1995 (refer to Exh 80 to see that reference). The Defendants (interestingly) did not produce that letter; nor the Council's own (apparent) letter of same date (7 March) in reply - again for_ref:rence to that see the Registrar's own letter of 23March 1995 - Exh 75 and Exh 80 which is a letter M Huth of 12April 1995 amdquotes the Council reference and dated 07.03.1995 (en
The absence of such correspondence and other documents was (at I an
1om na , is, o cor

to me. Much of the exhibits finally received (minutes, agenda, correspondence etc), which were in the control of the Council, was only lamely and falteringly produced as the trial progressed.

Of concern to the Plaintiff throughout this whole period (in 1994 and 1995) of being unable to be registered was the ease with which others were registered - see e.g. the minutes Exh D 3A at page 3 to the two doctors there; and a savingram of 7 March 1995 (Exh 101) showing a government employed doctor being allowed to enter into (part) private practice as well - and lhave already commented on the discriminator)' ease (and unwarranted discriminatory ease in terms of the Act) with which governmen t doctors were registered.

On 18 March 1995, whilst the Plaintiff was still in the U S, her husband wrote to the Bavarian Min istry of ..... Health (the letter is Exh 71) referring back to their letter of 10 August 1994 (Exh 60/61) and seeking correction of the birth date (from 16 to 14 February 1949 - see above). The Bavarian Ministry did not reply until 23 May 1995 (Exh 90A) when they not only apologised but they sent the corrected certificate (in English and in German i.e. the identical certificate as Exh 60/61 but with the date of birth correctly recorded) to both the Plaintifrs husband and the Tongan Ministry of Health.

lnow come to the letter (on Ministry letterhead) by the Registrar to the Plaintifrs
1<1!1.1 husband on 23 March 1995, Exh 75, (refe1red to earlier). At long last the reply to Mr Macdonald's letters of 29 December 1994 (Exhs 65 & 67). Again a piece of real dissemblance in my view. It refers to the unacceptability of the explanation of the German system by the Plaintiff - her explanation however (and her husband's, as well) completely accorded with, and was confirmed by, the World Health Organization book (Exh 99) which was at all times available at the Ministry's Hospital (I refer to what I have said above). It secondly referred to registration in England not necessarily resulting in automatic acceptance for registration in Tonga - but the Plaintiff was pointing to that English registration not for automatic acceptance but as part of the proof of her qualifications. It thirdly referred to the fact that "the first lot of documents submitted .... were photocopies. In addition, dates of birth differ in some of the documents • (something of an overstatement, I interpolate) "Being so their authenticity were questioned". The first time, I comment, that the first documents the plaintiff had submitted many months before were now said to be doubted because they were photocopies. Why was not that told the Plaintiff much earlier? It fourthly referred to the submission then of the original Approbation als Artz - and complained it came from the State and not the University •as expected".

Then the letter went on "The Council no longer doubts the authenticity of the
1100 documents submitted so far". Objectively given all the Council had as set out in detail above, surely there was enough then to proceed with registration. But no: "What is really (is) after now is a missing piece of information i.e. a transcript of her first medical degree ... or an explanation from an official source of why this is not available to us. Once this is made available to us, we can proceed with the consideration of the application". (Again lnote - no appealable refusal under s.8).

The Council met again (No.2/95) on 29 March 1995. The agenda papers of 28 March (on Government letterhead lnote) were before me as well as the minu tes (as Exh D4). This was less than a week after the letter, Exh 75, of the 2.. March but a very different
1110 tone was struck at this meeting; - and a very different tone as well to the assurances which

the Plaintiff said she was receiving from the Registrar that she could carry on working.

In the minutes the sending of the letter of 23 March was noted but "it was pointed out that (plaintiff) has continued to practice and that her clinic was still eig pened for service". I pause there - there is nothing in what I have seen or heard which md1c tes that the Plaintiff thus far had been told or warned in any way that she should not pracllce. The minutes also go on "The Council realises that it cannot claim that (the plaintiff) does not respect the law. Nor does it has the power to close the clinic for this has to be from the Ministry of Justice. It therefore resolved that the Chairman, as Director of Health, could firstly inform dispensaries not to accept prescriptions from her and secondly, rfer the matter to the Ministry of Police to handle". Decisions (and significant and dramallc ons) taken about her by the Council without any notice of any sort to her or any opportumty for her to make submissions. The agenda for that meeting has a handwritten note on it "Complaint to Police Department - through Director of Health but not through the Council".

Not only no advice in advance to the Plaintiff but also a curious delay in avising her of the resolutions of 29 March-it was not until 11April 1995(Exh 79) t,hatthe Director of Health (on Ministry letterhead and writing it would seem as Director and no as Chairman of the Council) wrote to the Plaintiff advising her to discontinue her medical practice immediately "as we have no authority to do otherwise but to refer yo_ur case lo the police". Why such a delay? Why no mention of refusal by pharmacies of her prescriptions? Why the "watering down" of the Council's 29 arch resolution tht the Director refer the matter to the Police? All unsatisfactory and quite wrong-headed m my view. I will return to that letter of 11April.

Why a "watering down". The explanation I believe lies in x77 a memoradum of 5 April 1995 made by the plaintifrs husband, for the Plamllff and fol owmg a conversation he had with the Director of Health on 4 April. Mr Macdonald confirmed the contents in evidence and said (as is shown in the memorandum) that the Director was "in favour of registration" and that in the conversation there had been no reference to closing down the practice or complaining to the police. In the conversation there was reference to an anaethetist (Dr Bernardi Tu'inukuafe) whose qualifications were German and who could explain the German system to the Council when they next met (at long last, I add!).

The Plaintiff s state of unease and concern was not aided by what she now seems reluctantly to accept (i.e. in evidence accepted) was an unrelated, coincidental event in late March/early April 1995 involving a patient of hers and that patient's treatment at vaiola Hospital in conjunction with the refusal to allow the Plaintiff acess to either patient or records in Vaiola. Despite the Plaintifrs accep.tane remam somehat sceptical about the events bearing as they doa marked correlation m lime - the resolutions of the Council of 29 March fall right in the middle of the period of 6 or so days when the Plaintiff was having these difficulties of access. Such barriers well accord with the resolution to e.g. cut off prescriptions, and ny in the face of the previously existing arrangements for the Plaintiff's use of Vaiola (-see above_ and Exh 43 - her. uthonty to use, and the terms on which she could use, Vaiola Hospital and other fac1ht1es of the Ministry of Health for her private patients since 31 August 1990).

I now go back to Exh 79- the Director's letter to the Plaintiff of 11 April 19?5askmg her to discontinue her practice or else the matter would be referred to the Polic e. That letter sought the Bavarian University qualifications; but no mention of e.g. problems with

photocopies or dates of birth. 11 is an important document.

No witness called before me for the defendants, was able to explain the differences between the Council's resolutions of 29 March and the letter of 11 April . Nor were the differences between that letter and the memorandum of 5 April (Exh 77) e11.plained.

In my view it was not coincidence that, at about this time, rumours about the possible imprisonment of the Plaintiff started to be aired. They got back to the Plaintiff and her secretary. More concern. And more still when in and through this middl pa11 of 1995another medical practitioner established a private practice right next door o the Plaintiff and indeed on the same 'api. All this at a time when the plaintiff was stmggling (and known to be struggling) to obtain registration and maintain patienis and a practice. Small wonder, as I find, that the Plaintiff was starting to feel some what paranoiac (and I use that term in a lay sense I hasten to add, in case someone thinks I am holding myself out in some other field).

By letter of 12 April 1994 (Exh 80) Mr Huth of the Unversity in Munich suppli ed to the Council Certificates showing the Plaintifrs record of studies at the University (Exh 81). This letter and Ulecertificates were faxed lo the Council. They confinnect her studies from 1974 to 1980 and her passing of her final state examinati on of 29 May-1980. They also stated clearly her date of birth - 14 February 1949. In the letter Exh 80 Mr Huth referred to his earlier letter of 7 March 1995which, I suspect, was of importance but was not produced by the defendants (nor the Councils own letter to Mr Huth of the same date, 7 March).

On 13 April 1995 the Plaintiff received the Director's letter of 11April 1995 (fah 79). She was shocked, frightened and felt severely threatened. Well she might. She felt shehad done no wrong. Sheimmediately sought legal advice (not from her husbanct).

The letter (Exh 82) of 13April from herlawyer to the Director followed. Itcontained a number of factual and legal assertions and summarised (in effect) the Plaintifrs present case and claimed that, as a matter of law, the Plaintiff was still registered as she h.dbeen so registered under the previous Act. Discussions were sought.

Discussions immediately followed - between her lawyer and the Registrar the same day and the resultant summary of discussions was recorded by the lawyer, faKed to both Plaintiff and Registrar, and produced to me as Exh 86 (of 13 April 1995).

The particularly relevant piece of Exh 86, confirmed on oath before me by the lawyer and not challenged by the defendants is this:

> "3. He (i.e. the Registrar) has been instructed however to inform me that they havereceivedcommunication from the University in Gem1any which hasnow satisfied the Director of Health, and himself, the Registrar .... as to the matter required by the Council, and subject to any other view of the Council when it will meet, they see no reason to refuse to approve your registration under the new Act; and that they therefore donot seeany necessity for you toclose your clinic down in the meantime, as advised in the letter from the Director on 11 April 1995".

The Plaintiff was much relieved; and relied on the assurance. The communication from Germany referred to in Exh 86was, of course, the letter (Exh 80) from Mr Huth and the accompanying certificates (Exh 81). All would now at last seem to be plain sailing.

As I noted above, in March a government doctor had been allowed to take upprivate practice as well, the same permission was gi ven another government doctor on 12 April

1995 - see Exh 100.

Plain sailing it was not to be. I come now to a crucial Council meeting of 27 April 1995. (Again the Plaintiff had no notice of and was not asked to attend before the Council). This meeting was and is quite vital. Yet there are no minutes. In the end I was provided with (as part of Exh 04) an agenda of 24 April 1995 (on Government letterhead) for the meeting (and including an item: "Application of Dr H. Schafer-Macdonald") and, reluctantly, 3 pages of handwritten notes taken in the meeting (Exh D4A) by (it is believed) the Registrar.

It would seem to have discussed several issues as to the Plaintiff. Doubt was cast
1270 on the Plaintiffs character because she had continued to practice and to "flout the law". It was resolved it seems, still not to register the Plaintiff, to translate the documents (Exhs 80, 81), and for the Director to forward the matter to the Police. This, in my view, was clearly wrongheaded.

Two letters of 28 April 1995 were written (both on Ministry letterhead) - 1 from the Registrar to the Plaintiff (Exh 87) and the other from the acting Director to the Plaintiff's lawyer (Exh 88). Significantly neither mentions lack of professional references, or problems about date of birth, or translation of Exhs 80, 81. Elth 87 says the Council needs to work on it (Plaintiffs application) further ..." (still no appealable refusal though); but
1280 it contained no reference to the decision to go to the Police. The second (to the lawyer) was solely about that aspect. There was no reply to any of the lawyer's arguments (is Jong Jetter of 13 April .Exh 82) - just that the matter was "being fonvarded to he ohce for their appropriate action". Devastation, an intense upset and angry reaction m the Plaintiff followed. So much for the earlier assurances to husband and to lawyer. Insecurity was understandably felt - and not helped by the sort of rumour already mentioned.

About this a further certificate (dated 3 May 1995 - Exh 89) became available to the Council confirming the Plaintiff's U.K. registration back in 1986. Quite why the Coucil
1240 members were still looking back to the UK registration (as they were - see the meeting notes of 27 April Exh D4A at p.2) remains a mystery. Much time was ting was taking place, it seems to me. . .

All news for the Plaintiff was not bad. At about the same time she received news of her pass in the Canadian medical evaluation examination (Exh 90). But that could not allay the Plaintiff's fears and concerns. . . . .

On 5 May 1995 these proceedings were commenced by the Plamt1ff; seeking certam declarations confirming or requiring her registration; an order directing the issue of a current certificate; an order of prohibition preventing any criminal prosecution; and for
1250 $10,000 general damages. An application was also made for interim orders (a) of prohibition of prosecution and (b) allowing the Plaintiff to continue to practice.

The result was that, on 11 May 1995, the Solicitor General on behalf of the defendants gave undertakings to the Plaintiff (copied to the Court) not to procee with any prosecution and allowing the plaintiff to continue practice. This was some relief t her.

On 23 May 1995 the Bavarian Ministry sent (to plaintiff and to the. Co nc_1I) the corrected certificate (as referred to above) i.e. with the correct date of birth m 1t, and apologising. See Exh 90A. .

The Council next met on 2 June 1995 - the original minutes are Exh D5. Dr Bernardi
1260 Tu'inukuafe was present "for assistance in the translation and to advise the Council on matters relating to the medical education system of Germany". By now the birth date issue was cleared up; the University papers were available; the U.K. registration confirmed. But, unbelievably, still hurdles were to be found. Even if I ignore the original minutes (Exh D5) entirely the eventually re-written and confirmed minutes (Exh D5A) still show the Council had "some concerns about the lack of professional references". falls 42 & 51 and the Cabinet decision of 25 June 1990 approving the Plaintifrs full registr tion were "only letters of good standing rather than that of professional competen- !... furthermore the Council was still not satisfied with the information provided as evidnce of her professional competence". This is extraordinary in my view. Letters of professional
1270 competence were not sought with the application for registration (see Exh 09) nor had they been since (of the Plaintiff by the Council). She had been in practice in a very sma:I medical community in Tonga for over 8 years. Dr Maiolo, in evidence, agreed that it had not been claimed she was incompetent. In any event does not a certificate (such a Dr Pulok:i's Exh 51) that "she is a medical practitioner of good standing" speak as lo, inter alia, .ompetence? I 1',,.' ve so.

At this meet:,1g 1eference was made to the fact that the Plaintifrs post graduate degree (Exh 13/14) was unsigned. A year on. One cannot but think any impediment was being looked for (c.f. the attitude in the letter of 23 March 1995 - j;:J1:h 75 - when with the
1280 post graduate degree before it, the Council said then that it no longer <loublecl the authenticity of the documents submitted).

Ultimately, on 2 June, no decision as to registration was macle but the mtter was deferred to 6 June "so that the members could study the papers" and the 1cference of the case to the Police was deferred until "the civil case .....has been dealt with by the Court".

Still, no suggestion (let alone invitation) for the Plaintiff to attend before the Council to clarify matters. On 6 June 1995 the Council met again - this time with yet further (German) references, the desire for such having been told to the Plaintiff. The references which she had - and always had available (but never requested before by the Council) -
1290 such as Exhs 9 - 12, 16 - 26, 31 - 34 - were given to the Council. Then, at 10•1g last and some 13 1/2 months after application was first made (and almost 2 year:; since the Act came into force) the Council approved by majority vote (and I stress majority, only) the Plaintiff s application for registration.

This decision was communicated to the Plaintiff by letter of 8 June 1995 (Exh 90 B) hand delivered by the then Director (- still on Ministry letterhead I note - a11d all these references to that use of letterhead, have siginificance when I come to the issu uf responsibility liability, if any, of the second defendant). Registration of the Plai11tiff had "effect from 6/6/99" - no post -dating I note. Her 1995 Certi ficate (under s.il) was also given to her (Exh 90 C) - presumably the annual fee of $38 the Plaintiff had paid back 011 22 April 1994 (Exh 55 and banked on 26 May 1994 - Exh 56) had b:>en used for the 1995 annual practicing fee.

That same date (8 June 1995) the Plaintiff filed an applicati JI to file an amended statement of claim. In the proposed amendments there was an amo1.111 !of re-pleadi!lg and some variations to the prayers; of significance is the increase of genernl damages claimed to $50,000 and a further (new) claim for $50,000 exemplary or punitiv e dalllages.

I intend finishing the chronological account of all events before turning to certain conclusions of fact and of law.

The Council next met on 13 July 1995 (Exh 06). There was some reference to the

Plaintiff and her present case including the fact that the case had been before a judge (Lewis J) in chambers that very day and been deferred to 6 October 1995 until the arrival of the new Chief Justice. On that day Lewis J (on his own motion) disqualified himself from further hearings of the case because of his knowledge of and contact with the Plaintiff and her husband. Ironically, given the history I have detailed, the Council on 13 July discussed the "shortage of medical doctors as a crisis in Tonga .... almost 50% of trained doctors has either left Tonga, resigned, dismissed, retired or died". Why such a performance with the Plaintiff therefore? I will return to this shortage of doctors shortly.

On 6 October 1995 I granted leave to file an amended Statement of Claim; and adjourned inter alia an application to strike out the second defendant from this action.

On 20 October 1995 the actual amended Statement of Claim - i.e. the claim before me - was lodged seeking in its prayers damages only (general: $50,000; exemplary or punitive: $50,000) the Plaintiff having pleaded her registration and the grant of her annual practising certificate. The amended Statement of Claim was in front of the Council on 29 November 1995 (Exh 07). At that same meeting approval of temporary registration was granted to a locum tenens from Germany to cover for the Plaintiff whilst she was in the U.S.A. doing the next (U.S./Canada) qualification or eligibility courses and evaluating examinations. There were no problems in achieving this temporary registration - it was granted immediately - an interesting contrast with the Plaintiff's situation. The Plaintiff had determined to continue the process of getting registered in Canada - given her treatment by the Council a wise precaution - and, jumping ahead she did the further course and took the next examinations in January - March 1996 in the US - refers Exhs 91, 92 and 93.

On 19 January 1996 the application to strike the second defendant out of the proceedings was heard. Although a final decision on the argument was to be deferred until the substantive trial I expressed a tentative view that the second defendant was properly a party. That ruling is appended to this judgment. What I expressed tentatively I now confirm. The Council is not a separate legal entity; overall responsibility (including financial responsibility - see s.23) for it rests with the Ministry of Health and, through the Minister, to the Kingdom. The Ministry kept demonstrating its responsibility in various ways as shown in the account above - e.g. the Plaintiffs cheque for fees ; letters for the Council on Ministry letterhead and Government savingrams (e.g., and not exhaustive).

The trial of this action was set for two days commencing 8 July 1996. Those days were used in trial and a further six days of trial (and considerable written submissions) were needed. On 17 July 1996 (the start of the fifth day of trial) having just discovered this I disclosed to counsel that on the previous two days, by telephone only, my wife had sought advice from the Plaintiff as to whether medical treatment should be being obtained for our youngest son (my wife earlier in the year, in circumstances of some urgency, having been attended by the Plaintiff for treatment herself. Fees had been rendered and paid for that). No treatment for our son resulted. No fees were rendered or paid. Other medical advice was to be sought for our son if that became necessary ; although almost inevitably any other Doctor consulted might be involved as well in some way in these proceedings (e.g. a Doctor with, whom we had become acquainted previou sly, had been a coopted member of the Council at some of the relevant times). I fully disclosed the situation. I allowed time for counsel to fully inform their clients, take instructions, and argue the matter. The defendants took objection and asked me to disqualify myself.

I ruled on the matter on 17 July, after hearing argument. The mtter and the ruling are set out in detail in my bench book No.5 at pp.52-53. In summary I concluded that the decision was mine; I was disinterested and without bias or preconceived opinions about the case; from the position which I had outlined no bias in me, objectively, should or could be perceived or assumed, applying the tests I enunciated. Itw& not as if the issue was whether the Cort should order the Plaintiff s registration - that had been decided by the first Defendant m June 1995 before I was even in the Kingdom. Did a real likelihood of bias exist? Would a reasonable, an objective, observer, think it likely or probable I would favour the Plaintiff unfairly at the expense of the other parties? (A suspicion of bias reasonably and not fancifully entertained by reasonable minds - Exp. ·Angliss Group (1969) 122 C.L.R. 546, at 553 (H.C.A.); the test of bias is whether there is a reasonable suspicion of bias looked at from the objective standpoint of a responsible person and not from the subjective standpoint of an aggrieved party - Whitford v Manukau City [1974] 2 NZLR 344 at 346). Applying those tests I answered no.

The matter could not be viewed in isolation from the circumstances in Tonga - a small community - limited medical practitioners (see above - "a crisis") - the necessity t be able to seek medic ad:ice - the only other judge already disqualified; Normally given the challenge or objection made a Court would lean in favour of disqualification. But although when there is a suggestion made of bias, a Court should not proceed if in fact there is actual bias or a reasonable suspicion of that (neither here on the tests), that is not to say that th Curt must desist from hearing a case because a party or "somebody wrongly and irrationally suspects bias" - B v Simpson (1983) 154 CLR 101 at 104 (H.C.A.).

The matter proceeded on, to its conclusion. I now express mine.

CONCLUSIONS

Even if the Plaintiff had to reapply for registration unde the 1991 Act (and I will comment on that very soon) the treatment of her application and of her, in the way detailed aboe by the First Defendant is in my view, not only quite extraordinary and unreasonable, but m an7 escts (as I have indicated in comments on the way through) disgraceful.

. F1rst1t sevident from all the matters set out, comprehensively, above that: (i) in my view the acons ?f the Firs Defendant were not only reviewable in this Court; but (ii) were and are (vanously) plainly wrong both in fact and most importantly in law; (iii) that te First Defendant has not only stepped outside the limits of it's statutory authority from hme to time but also, at others, acted without authority; (iv) that the First Defendant has actd (by anyone's standards) both unfairly and unreasonably towards the Plaintiff; (look for JUSt one example, at the position of the First Dfendant failing unreasonably to make a decision on the Plaintiff 's application for registration on the hand and at the same time saying you will be prosecuted for failing to be registered on the other); (v) that the First Defendant has failed (entirely, in some instances and, partly in others) to perform its statutory duties; (vi) that the First Defendant having functions requiring it to act judicially (both in the Act, and also in accordance with the rules of natural justice) has failed to do so (particularly the freedom from interest and the right to a fair hearing); (vii) that the First Defndant, in.exercising its statutory powers and discretions acted capriciously and (I realise the senousness of this finding, but all the evidence drives me to such a conclusion nevitabl) in bd fith, and, without regard to relevant considerations as well as bringin mto cons1deration 1rrelevant matters; (vii) that there was not, at any time, a refusal by the

First Defendant which the Plaintiff could appeal against under the Act (and in any event, even if it could be claimed that in these circumstances she had not exhausted her statutory rights of appeal, that would not prevent or circumscribe, in anyway, her right to apply (and successfully) for review in the circumstances shown here). The Plaintiff must succeed on this basis alone, if no other.

In any event I find there is force and validity to the submissions made by Mr Niu as to the provisions of the Interpretation Act (Cap 1). Given the absurd position which would otherwise result from the delay in administratively giving effect to the provisions of the new Act (s.15(a) and (b) of the Interpretation Act have effect. The new Act purported to repeal the old in whole; there was no express provision in the 1991 Act to the contrary so the repeal did not affect "anything duly done" under the repealed Act; 1.e. here both the registration of the Plaintiff under the 1918 Act as a medical practitioner; and the entry of her name in the register - s.15(a). So she remained a duly registered medical practitioner. The 1991 Act did not disturb that. Her name was on the register at all relevant times from 1987 on - and continued to be on the Register for the purposes of s.9(a) of the 1991 Act. And there was, as well, the Certificate, Exh 51 (see paras. 43 and 46 above) issued under the 1918 Act and before the First Defendant from the start (under the 1991 Act procedures (para. 61 above) confirming those things and proving those things. The Certificate a thing
1540 "duly done", and unaffected.

As to s.15(b) it provides, in the circumstances here, that the repeal of the 1918 Act did not affect "any right ... acquired ... under the repealed Act" - i.e. here the right, of the Plaintiff, on registration as a medical practitioner, to practice medicine in the Kingdom - subject to the taking out of annual practising certificates. So she retained her right to practise. The 1991 Act did not take that away - and I will comment on that further, in conjunction with cl.20 of the Constitution. soon.

Given the absence of any steps taken under s.23 Interpretation Act (as I have observed on the way through the narrative) and given the lack of a saving clause as in e.g.
1550 s.29(2) Law Practitioners Act 1989 (if registered under old Act and hel a valid annual licence "deemed to be enrolled"), the provisions of s.15 have real importance and application here - particularly in covering (as had to be covered, of necessity, for the sake of medical services in the Kingdom) the gap or hiatus I have referred to above between one Act being repealed and the provisions of the new 1991 Act being put into (and being able to be put into) practical effect. The Plaintiff was registered; as a matter of law (by operation of s.15) she continued to be registered. Once the authorities, and in particular the First Defendant, got the 1991 Act up and running she should have been treated as (in effect) automatically registered under the new Act i.e. treated as the Ministry of Health's
1560 doctors were). The actions of the First Defendant were not only plainly discriminatory, but wrong.

Much of what could be said in relation to s. 15 Interpretation Act has some validity also in relation to cl.20 of the Constitution. Cl.20 provides that "It shall not be lawful to enact any retrospective laws in so far as they may curtail or make away or affect rights or privileges existing at the time of the passing of such laws".

That provision is to a considerable extent declaratory of, and reflective of, the common law. The common law rules of statutory interpretation still operate in the Kingdom and if that long and well recognised rule that "statutes. shoul? be interpreted, if possible, so as to respect vested rights" is put alongside and used in conjunction with cl.20

and s.15 the Plaintiff's position and case is, in my view, supportable under this head as well.

I refer to what is said in Craies on Statute Law (7th Ed) at pp. 398-399: "it is not to be presumed that interference with existing rights is intended by the legislature, and if a statute be ambiguous the court should lean to the interpretation which would support existing rights. But it must be a "vested right" in the strict sense in order to raise the presumption ..... In Starey v Graham (1899] 1 QB 406 at 411 it was held by Channell J. that ... "right acquired" was "some specific right which in one way or another has been
1781 acquired by an individual and which some persons have got and others have not". It is not n "right" in the popular sense. The learned judge added: "Before the passing of the (Patents) Act, everybody had the right to call himself a patent agent, that is to say, the law did not forbid him to do so. A right enjoyed in that way is not within the meaning of this saving clause (i.e. "Nothing in this Act shall affect the validity of any act done, right acquired, or liability incurred before the commencement of the Act") a "right acquired" otherwise it is obvious that such a clause would nullify the operation of any Act in which the clause was inserted"'.

I note the similarity in wording between the saving clause in Starey and the provision
1590 in our s.15(b). It seems to me that the Plaintiff had a specific "right acquired" by her as an individual and which some persons had and others did not; and that was the right acquired under the 1918 Act to practise medicine in the Kingdom and that was a "right or privilege existing at the time of the passing" of the 1991 Act.

Not only was her position protected, therefore, by the ordinary common law rules of statutory interpretation, but her position was also protected by s.15 and by cl.20. Cl.20 has been considered from time to time and I find support for the views I have expressed or will express about it and its operation, and its protection afforded to the Plaintiff, in the circumstances here, from such as In re "Tonga Ma'a Tonga Kautaha" (1910) 1 Tongan
1tnl L.R. 5 at pp. 11-12 (Skeen C.J.); Fulivai v Kaianuanu (1961) 2 Tongan LR 178 al pp. 182-3 (Hammett C.J. in the Privy Council); and Bennett v Bennett (1989] Tonga LR 45 where Webster J held himself bound in the Supreme Court by the Privy Council in Fulivai and repealed Hammett CJ's words (at p 183) "Cl.20 of the Constitution does not even forbid the passing of retrospective laws. What it does do however is to forbid the enactment of laws which are both (a) retrospective in effect; and (b) affect the rights of persons which exist at the time the law are enacted. It is necessary to examine and consider the wording of the amendment to decide whether it is retrospective in effect".

Here given the terms, wording and provisions of the 1991 Act and the context of it, the circumstances surrounding it and its repeal of the 1918 Act and all that could
1610 (potentially) follow from that, I reject the Defendant's argument that "all rights acquired under the (1918) Act were repealed when the .... 1991 Act came into operation on 1 July 1993.". That argument would result, in my view, in all sorts of unintended unwanted, unwarranted and quite extra ordinarily disastrous circumstances (lack of any legitimate medical services - for 8-9 months at least being one of the gravest). That argument, if accepted, would mean that cl.20 might well have to be invoked, by this Court.

But I do not believe it has to be - i.e. the 1991 Act, given the ordinary mies of interpretation and given s.15 Interpretation Act, was and is not restrospective in effect - it did not take away the Plaintiff's existing acquired rights.

1620 But if I am wrong in that, and the Defendant's argument is correct, then I would not

hesitate to find, in this context and in these circumstances, that it would be in breach of cl.20 ("inconsistent with" cl.20-see cl.82 and "to the extentof thatinconsistency, be void' (cl.82). That would mean that the Plaintiffs pre-existing registration (her name on the Register) would continue despite the 1991 Act, as would continue her pre-existing right to practise medicine.

It seems to me that all I have said about these aspects of statutory construction is reinforced by this: The fact that there were no steps taken under s.23 Interpretation Act for20 months or so (from the passing in 1991 until the bringing into force of the 1991 Act on 1July 1993) woul'cl indicate that the responsible authorities (the Defendants) were satisfied that the 1918 Act would continue to cover the situation during the period between the time the 1991 Act coming into force and effect and the time all necessary steps, fonns and procedures to implement it could be laid down . Exactly the position as argued for by the Plaintiff and accepted by me.

RELIEF

The Plaintiff is now registered under the 1991 Act in any event but not without considerable damage to her practise and her reputation and not without considerable anguish and distress (as well as expense). I so find. I have commented on various aspects as to those matters as I have went . A sad, sony and unnecessary tale.

On the evidence the Plaintiffs patient numbers rising steadily through 1991to1993 inclusive, (with continuing rises reasonabl y expected) dropped markedly in 1994 and further in 1995 (lo almost 112 the 1993 total - Exh.94). No coincidence, I find, given the troubles and the publicacion of them - especially those public lists the First Defendant put out as I have referred to . The drop in patient numbers was confirmed in evidence by the Plaintiff s secretary and the Plaintiff s husband.

Exhs 95 and 98 (with attachments) give me the Plaintiff's accounts and tax returns for the years ending June 1992 to 1995 respectively. The gross practice income (from phannaceuticals and consultations) grew steadily from 1992 ($24,825.38) through 1993 ($25,941.27), 1994 ($29,232.30) principally by increasing consultation fees, but in the year ending 30 June 1995 and, as I find, reflecting the effect of these events and the Defendants' actions, dropped back to $24,487.52.

I accept that the downward trend well may have continued to some extent into the June 1996 year given the events outlined, but I have no figures as to that.

I find as well, as I have mentioned already that the Plaintiff expended moneys ($10,000) in qualifying herself for North America , in view of the. Tongan difficulties created by the First' Defendant's actions.

I find the First Defendant, and in view of my findings above, the Second Defendant aswell, join tiy and severally liable to the Plaintiff for general damages given the treatment meted out'to the Plaintiff here. The First Defendant had various statutory functions and duties to perfonn and the First Defendant has failed, lamendtably, to perfonn such here viz a viz the Plaintiff (and if for no other reason th breaches of therules of natural justice involved in the extraordinary delays over her application, the failure to properly infonn her, the fail ure to decide on her application, and the failure to allow her an audience or hearing, let alone the erroneous, negligent and unreasonable exercise of its powers duties and discretions, as I have found.

I assess general damages, on theevidence I have, in a total sum of $30,000.00 made up as to some $5,000 for loss of income (a conservative figure I believe) $10,000 for

moneys spent on North American qualifications, $10,000 for damage to reputation and $5,000 for distress and other suffering.

I do see it as a case where an award of exemplary or punitive damages should be made. The circumstances, as Ihave commented on them, were C:7'traordinary; the conduct of the First Defendant, outrageous soover and above actual losses, and tomark the nature of those events, laward her a further *$5000*.

Costs will (and must) follow the event in favour of the Plaintiff against both Defendants.

The Plaintiff will have judgm ent (and lso order) against each of the Defendants jointly and severally in the total sum of $35,000 - and costs as taxed or agreed.

ADDENDUM - EARLIER RULING: 19JANUARY 1996-

Ihave previously decided that all other aspects of the motion filed on behalf ofthe Defendants on the 12 December 1995 should await argument and decision until the time of the hearing (on 8 July 1996) of the substantive claim. Which left the question of the application to strike the Kingdom of Tonga out of the proceedings, as a fondant um

I have reached the view now, after argument, that a final decision on that application to strike out should await, as well, the hearing of the substantive proceedings.

The argument made by Mrs.Taumoepeau is that the First Defendant is a creature of statute, created by the Health Practitioners Registration Act 1991, and for which the Kingdom is not, and cannot be, vicariously liable.

Mr. Niu's response is to point to two things, basically. First other legislation which creates various statutory bodies and which spells out, quite clearly, that those bodies are separate entities atlaw with the capacity both to sueand to besued. The legislation in issue here is quite different, M(. Niu says,and with that observation I agree. Secondly Mr. Niu points to the terms of the legislation itself and in particular provisions some of which I will mention shortly.

The Act is designed to provide, inter alia, registration procedures for various health professionals. S.3 creates a Health Registration Council with quite restricted powers. It only can make rules with the consent of the Minister of Health (s.3(2)(f). The Minister appoints a Registrar (s.3(5)) who is a member of the Council. The other members (and the Registrar) are prescribed forin s.4(1) (5persons by reason of theirGovemmentoffices plus the Registrar, and 3 other persons appointed by the Minister) and in s.3(3) (3 additional persons coopted by the Council).

By s.5 the Registrar must maintain a Register of Health Practitioners available for public viewing at the Ministry of Health.

By s.8 an unsuccessful applicant for admission (i.e. unsuccessful before the Council) is given a right of appeal to the Minister, whose decision is final.

By s.10 the Council prescribes various fees but it is significant that all such fees "shall be paid to the general revenue of the Kingdom' (s.23(2)); and s.23(1) provides that "The Council shall be finanicially supported by the Ministry".

. S. 6 allow_s _the Registrar'. with the approval of the <;::ouncil, to permit temporary reg1strahon of VISltors to the Kingdom; but s.17 allows the Minister himself to exempt "short-term" visitors from compliance with the Act.

S.21 requires the Council to report annually to the Minister; and s.22 allows the

Minister, with the consent of Cabinet, to make regulations for the carrying out of the provisions of the Act.

All those matters lead me to the view, which is tentative only at this time, that the Council is really just a branch (a convenient administrative branch) of the Ministry of Health under the general aegis of the Minister of Health, set up for the perforn1ing of certain restricted tasks; and that the overall responsibility for the Council rests with the Ministry and the Minister. Which leads me, again tentatively, to the view that the Kingdom of Tonga therefore, is properly joined in these proceedings pursuant to the Crown Proceedings Act (Cap.13).

In the circumstances, and given the other arguments to be made at the substantive hearing (and in particular as to the earlier legislation - i.e. the Medical Registration Act, cap. 75 - and its effects on this present claim), I leave the Second Defendant in the proceedings. It may be that, not only the arguments yet to be heard, but some of the evidence (e.g. as to the actual composition of the Council at the relevant times involved in these proceedings) may effect this matter and my view of it.

I therefore defer making a final decision on this application until the substantive hearing. Costs are reserved.

1740

Health Practitioners Registration Council & Kingdom of Tonga v Schafer-Macdonald

Court of Appeal
Morling, Burchett & Tompkins JJ
App. 5/97

17 & 20 June, 1997

Tort - abuse of public office - misfeasance of office - state of mind
Damages - discount for benefit of additional qualification - exemplary

The facts are set out in detail in the headnote to the judgment in the court below (reported above).

Held:

1. The tort alleged and found established was abuse of public office or misfeasance of office.
2. Malice and actual knowledge (of acting in excess of power) are alternatives out both were found proved. A case involving the *tort* of misfeasance of office is not an ordinary case. Nothing short of malice or knowledge of invalidity will do. Knowledge for this purpose, will *not* be imputed upon some principle of constructive knowledge, but must be found as a reality. However, where the necessary facts were proved, the law must not hesitate to make the appropriate finding in order lo vindicate the citizen against abuse of official power.
3. The Kingdom was vicariously liable as well.
4. As lo damages an amount should be deducted from the sum awarded for the cost of obtaining an alternative qualification, reflecting a discount for the benefit so gained by the respondent; and the amount of exemplary damages reduced to a sum sufficient to mark the court's strong disapprobation of the conduct in question.

Cases considered : Auston *v* C.A.A. (1994) *50* F.C.R. 272
Dunlop *v* Woollahra M.C. (1982] AC 158
Bourgoin S.A. *v* Min. of Agriculture (1986] 1 QB716

Counsel for appellant Mr Cauchi
Counsel for respondent Mr Niu

Judgment

The respondent, a medical practitioner, obtained in the Supreme Court against.the appellants, the Health Practitioners Registration Council ("the Council") and the Kingdom of Tonga, a verdict for the sum of T$35,000 plus costs. The circumstances were most unusual, and in order to understand them, it is necessary to start at the beginning. The respondent came to Tonga in 1986 with graduate and post-graduate qualifications in medicine, gained in.her homeland, Germany. Her qualifications had been recognised in England, and were accepted in Tonga, so that she was able to go into a practice here. She married a Canadian lawyer who had also taken up the practice of his profession in the Kingdom, Mr Peter Macdonald.

After the respondent had been practising here for some years, the Health Practitioners Registration Act 1991 came into force, on 1 July 1993. Previously, the respondent's registration to practise medicine was pursuant to the Medical Registration Act 1918, under which her registrations had twice been approved. However, as from 1 July 1993, new registration procedures were due to be put in place, under the control of the Council on behalf of the Ministry of Health of the Kingdom.

Section 9 of the new Act barred any person from practising as a health practitioner "unless his name is on the register". Accordingly, the view was taken that it was necessary for practitioners to seek fresh registration under the new procedures. But for many months there were delays in the constitution and establishment of the Council. Of course, illness did not vanish from Tonga, and medical practitioners, of necessity, continued to practise. In the case of the respondent, she had obtained, just five months before the commencement of the new Act, a certificate from the Acting Director of Health that she had "full registration as Medical Practitioner", and that "she is a medical practitioner of good standing." Eventually, in about March 1994, the Council began to function, and the respondent was told by its Registrar that she should apply for registration under the new Act, although, as her qualifications were already on the file (ie. the Department's file kept under the previous Act), this would be more or less a formality. The respondent completed the form of application produced by the Council, and paid the required fee of $88 on 22 April 1994.

Thereafter, the respondent was dealt with, as the trial judge, the Chief Justice, has found, by a long series of delays, procrastinating requests and deferrals. An answer to one difficulty would lead to the raising of another. A minute discrepancy in the recording of the respondent's date of birth in a document from Germany was seized upon. A certificate from the Bavarian Ministry of Health as to the respondent's qualifications was rejected because it was based on the Ministry's records, rather than on those of the University at Munich where she had obtained her degree. Although the respondent had a post-graduate degree, much was made of a request for "a transcript of her first medical degree". It would be tedious to repeat, in these reasons, the numerous inconsequential difficulties that were raised. A reading of them suggests there is truth in the written submission of Mr Niu (for the respondent) that the "could not produce the 'required' documents because they were only required because she could not produce them!"

But by 23 March 1995, the Registrar was able to write that the "Council no longer doubts the authenticity of the documents submitted so far". Nevertheless, the Council met on 29 March 1995, and, although all this time no objection had been raised to the respondent practising while her application was pending, the minutes record the following:

"The Coucil realises that it cannot claim that [the respondent] does not respect the law. Nor. does 1t [hve] the power to close [her] clinic .... It therefore resolved that the Chairman, as Director of Health, could firstly inform dispensaries not to accept prescriptions from her and seondly, refer the matter to the Ministry of Police to handle."

. _on 11 Apn! 199, the Director of Health wrote to the resPQ_ndent, his Honour found, adv1smg h_er to discontinue her medical practice immediately "as we have no authority to do othe_rw1se but to refer your case to the police." The respondent received this letter on 1 Apl, an the same. day her lawyer replied, by letter and orally. He recorded his dscusson with the_Reg1str•r• and sent him a facsimile copy, also on the same day. In that 1scuss10n, the egistrar said that they have received communication frqm the University m Germany which as now satisfied the Director of Health, and himself, t he Registrar ... st the matter required by the Council, and subject to any other view of the Council when it will meet, they see no reason to refuse to approve [the respondent's] registration und r the new Act." The advice of two days before to close the clinic was withdrawn. e

. But when the Council met, without recording minutes, on 27 April 1995, obstruction continued. A long resolved discrepancy was raised again; a need of further reference was suggested; and the respondent's continuance in practice was treated as a flouting of the law. It was resolved not to reister her but to obtain translations of certain documents, and to refer t_he matter to the pohce. Letters then written to her and her lawyer, which made no menti?n of he references, the translations, or the discrepancy, but the Jetter to the la'".yer did advise the matter was "being forwarded to the police for their appropriate action".

. . n 5 Ma 1_5, the_ respondent commenced her action, seeking declarations, mJunctions and JUd1c1al review, as well as damages.

n 6 June, 1995, the respondent's application for registration was approved by th Council. e

Registrati?n hain en ranted just a month after action, the matter could not procee as la1m or JUd1c1al review. However, an objection was taken by the appellants that, as JUd1c1al review had been claimed, leave was required to maintain the proceedi By orders ade on 6 October 1995, the necessary leave was granted, and the respond: ; wa: also ?1ven leave to file an amended Statement of Claim, which was filed on 20 Oc_ober 1995. he amendd Stement of Claim abandoned all prayers for judicial review, declarat10s. and lnJUnctions. The relief it sought was damages, including exemplary an pumtive damages, and costs. The cause of action was not given a name, but th ssential facts were pleaded to found relief for the tort of abuse of public office or, as 111s often called, misfeasance of office.

.The ple ing_alleed that the requirement with respect to the respondent's primary medical uahf1cation ws used by (the Council] as a ground for the delay of the appoval , and that the actions of the Council with respect to the respondent (pleaded · detail as "wrongful acti_os") "have been unlawful ... arbitrary and oppressive". It w alleged hat the Co_unc1l was stisfied that the [respondent] was duly qualified to be entered mto the register but that Itchose to decline to approve her to be registered upo the ground that s_he had defed their advice to her to close her practice down". n

At the_h;anng, the Ch1e Justice, having found the facts recited above, reached the conclusions. that [_the Council] has failed (entirely, in some instances and, properly in others) to perform its statutory duties; ... that [the Council], in exercising its statutory

powers and discretions acted capriciously and ... in bad faith".

The Chief Justice's findings and conclusions establish liability in accordance with the principles relating to misfeasance of office. In Salmond and Heuston On the Law of Torts, 19th ed. (1987), at 43, it is stated:

> "There is a recognised tort of misfeasance in a public office. Therefore damage caused by the malicious or negligent exercise of statutory powers by a statutory corporation or public officer is actionable. But the defendant must be proved to have known he was acting *ultra vires*, or maliciously, otherwise every property owner damaged by an invalid planning resolution could sue."

In Austen v Civil Aviation Authority (1994) *50* F.C.R. 272 at 280, a Full Court of the Federal Court of Australia accepted that "the rule should be taken to go this far at least that if a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person.• The tort was described by Lord Diplock in Dunlop v Woollahra Municipal Council [1982) AC 158at 172 as "well - established". What must be shown to prove a case on this basis was considered by the Court of Appeal in Bourgoin S.A. v M ini stry of Agricu lture, Fisheries and Food [1986) lQ.B. 716 at 775 et seq. Oliver L.J. (as he then was) said (at 777): "If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who. it is known, will suffer them." Accordingly , he could see no distinction between an officer performing an act beyond power with the object of injuring a person (ie. maliciously), and the case where he performs an act, knowing it is beyond power, with someotherobject, there beinga foreseeable and actual consequence of injury to a person. Oliver L.J. referred with apparent approval to a statement of Sir William Wade that either malice or knowledge of invalidity was a necessary element of the tort of misfeasance of office.

In the present case, the findings of the trial judge fully establish the requirements of the tort. Itis apparent he was satisfied that the Council knowingly exceeded its powers, so as to act in bad faith in dealing with the respondent's application. As malice and knowledge are alternatives, he need not have gone further, but he found that the Council acted "capriciously" and that it acted towards th respondent in a manner that was "plainly discriminatory" . That is a finding of malice.

It should be emphasized that a case involvingthe tort of misfeasance of office is not an ordinary case. lmcompetence, even gross incompetence, will not suffice. Nothing short of malice or knowledge of invalidity will do. Knowledge, for this purpose, will not be imputed upon some principle of constructive knowledge, but must be found asa reality. However, where the necessary facts are proved. the law must not hesitate to make the appropriate finding in order to vindicate the citizen against abuse of official power.

Accordingly, the challenge to the Chief Justice's finding of liability fails. As the Council was acting on behalf of the Ministry, and with its authority, both actual and as clearly held out, the Kingdom of Tonga is vicariously responsible.

The next question is damages. The Chief Justice calculated the damages at $5000 for loss of income, $10,000 for damage to reputation, $5000 for distress anc.. other suffering, $10,000 for the cost of obtaining North American qualifications and $50VO for exemplary or punitive damages, a total of $35,000. Of these figures, the sum of $10,0flO

in respect of Noh American qualifications and $5000 exemplary or punitive damages came under particular attack.

.TThe'.e is a difficulty about allowing the whole cost of obtaining an alternative qa.hfication, \ihout any ?iscount for the benefit so gain d. The respondent is free to utihz her add1ti?nal qualifications as she may choose. Therefore, there should be substituted for this su.":1 an amount sufficient to compensate the respondent for bein comlled to seekadditional qualificationsshe might otherwise not have sought and Iha at a lime not of her choosing, a time forced on her by the respondent's actions 'For this $2000 seems a reasonable estimate.

Sofar as exemplary orpunitive damages areconcerned, thereisa principle that such an awrd shuld ave egard to the punitive consequences of the compensatory damages What is require. m th1 respect, isan award that marks the Court's strong disapprobatio of the conduct m question. For that purpose, a sum of $3000 seems sufficient.

Forthesereasons, the verdict should be variedby reducingitto$25000 0th the aI h Id b ct· ppea e s ou 1sm1ssed erw1se, quarters of the respondent's costs.

Fonua v Tonga'onevai

Supreme Court, Pangai, Ha'apai
Hampton CJ
Civ. App. 206/97

10 March, 1997

Affiliation _complaint-procedure-right to hearing-corroboration
Evidence - corroboration - affiliation complaint
Practice and procedure -affiliatio11 complaillt - hearing

The complaint took affiliation and maintance proceedings in the Mgistrates' Court The Magistrate part heard the evidence and then dismissed the complaint partly on th bas1s that proper procedure had not been followed (under te Mainteance of llleg1t1mat: Children Act and partly on the basis of lack of corroboration, for seemg the balance of th evidence to be called from other witnesses.

Held:

1. The appeal should be allowed and the matter remitted for heang.
2. The proceedings were valid, had been started by a complamt on oath, a summons had been issued and the respondent had answered it. A claim for a lump sum did not go to jurisdiction of the Court.
3. A decision should be made after hearing all the evidence.

Statute considered : Maintenance of Illegitimate Children Act

Judgment

I have reached a clear view of what has to be done about this matter and I well tell the parties now. In 1996 the Appellant, who was the complainant in the Court below, made a complaint on oath which is now before me, claiming that the Respondent, who was the defendant in the proceeding below, was the father of an illegjlimate child and seeking Affiliation and Maintenance Orders.

Summons was issued and came to a hearing before the Magistrate on lhe 20th of August 1996. Part of the reason for the dismissal of that claim on that day by the Magistrale was lhe fact that the proper procedure under section 2 sub-section 1 of the Maintenance of Illegitimate Children Act (Cap 30) had not been followd. I understand the submission made by Mr Fakahua who was representing the defendant was that no proper complaint on oath had been made under section 2 sub-section 1 and therefore the summons was incompetent and should not have been issued. I add that lhe Appellant, complainant in lhe Court below had conducted her own proceeding in the Court below.

The decision ir -- Court below is rather strange in the circumstances, objections having been taken oy Mr Fakahua for the defendant, the Magistrate then went ahead and heard the evidence of the complainant. At the end of her evidence there was an indication she had two other witnesses to be called and I am told they were the defendarrt's father and his mother's sister. The Magistrate indicated he did no want to hear them, indicating he knew what they might say and instead went ahead and dismissed the claim on the basis of the procedura l problems about the summons and on the basis of, it seems, the lack of corroboration. Referring to that question of corroboration, I assume it is a reference to section 6 sub-section 2 of Cap 30 which provides: "that no person should be adjudged the father of an illegitimate child upon the evidence of the mother ... unless the evidence is corroborated in some material particular ...".

It seem inevitable to me that this matter must be remitted for a proper hearing in the Magistrate's Court for a decision to be made there properly after hearing all the evidence, and I stress all lhe evidence, including the witnesses of the complainant.

On the face of it, from what I am told, it would seem that the proceedings were valid, there had been a complaint on oath, a summons had been issued, the defendant had answered the summon. And that hearing in fact had started by the evidence of the complaina'nt being heard. The claim, as was apparently made by Mr Fakahua on behalf of the defendant, that no lumpsum could be ordered in these particular circumstances does not go to jurisdiction but goes only as to whether a particular type of order can be made. It is clear to me therefore that this matter must go back to the Magistrate's Court for re-hearing and I so direct. Hearing will have to be started again with the complainant, represented or not, outlining her case giving evidence herself and calling Whatever other witnesses she wants to, and producing whatever exhibits she may want to, in order to try and satisfy the Magistrate as to her claim and as to corroboration of that claim, within section 6 sub-section 2.

Appeal allowed. No order as to costs in the circumstances.

Kulitapa v Minister of Lands

Land Court, Pangai, Ha'apai
Hampton CJ
L9/88

11 & 12 March 1997

IAnd - limitation - available land
Limitation - time runsfrom refusal

Theplaintiff applied for orders in his favour for the grant to him of a town alltment in Pangai, Ha'apai occupied by the Ministry of Agriculture and Forestry ad used, mter aha, as a town market The plaintiffs paternal great uncle had held both this town allotment and an associated tax allotment but upon his death in 1940 the plaintiff was only soe gyears of age and it was not until 1967 that the plaintiff applied for and was granted (m 1968) the tax allotment but not lhe town allotment.

Held:

1. Although the Ministry of Agriculture and Forestry had occupied te town allotment noneof theformal requirements of part IXLand Act, and particularly s 138, had been applied or complied with.
2. That •informal• occupancy had alsoextended tothe tax allotment, until 1twas granted to the plaintiff inl968.
3. That the plaintiff had applied for the town allotment as well m 1967 but was told to wait until the Ministry found other land and moved out, and that the grant would be made then. That was reaffirmed by the defen?8nt, who was also the Minister of Agriculture and Forestry at relevant limes, over the years.
4. ltwas not until 1987 that the plaintiff was told that he would not be granted the land and proceedings in the Land Court were commenced (in Ma, 19). The 10 year limitation period in s 170 Land Act could ot bar his claim therefore. The cause of action stemmed from that refusal m 1987.
5. The land is and was available and should be granted to him.

(NOTE - The defendant appealed and the appeal is reported next following).

Statutes considered — Land Act ss 138, 170

Counsel for plaintiff — Mr Paasi
Counsel for defendant — Mr Cauchi

Judgment

Thank you for your patience. As always I was grossly optimistic as tohow quickly I would be able to review the evidence and submissions and arrange my thoughts into a logical and sensible pattern.

But I have in the interval reviewed the notes, my notes of the evidence given by the Plaintiff and the 5 witnesses during the course of yesterday, and thesubmissions made to me, carefully, by both counsel this morning.

ltis important, as I said before I retired and after hearingsubmissions, it isimportant that when acourt, such as the Land Court comes on circuit but oncea year and hears a case such as this, that the parties themselves and those interested, if at all possible, should hear the result of the case.

The Plaintiff, now 65 years of age, gave evidence himself and called 5 other witnesses, including the Assistant Land Registrar, to give evidence on his behalf. The Defendant, the Minister of Lands, as is his option and his right, chose to call no evidence but relied, as Mr C;i•· j said, on the evidence, in particular, of the Assistant Land Registrar and of t11c records produced.

Time is a corrosive agent and it exercises power both over human beings and on the human memory. And given the period covered in this litigation, and in the evidence, of some 57 years, it is not surprising that corrosive effect has been demonstrated both by the removal from the list of the living of certain persons who would have been witnesses and by the effects on human memory of others who still live.

Those are general comments and need to be made, I think, to put some matters properly into context before I start on my findings.

The Plaintiff is a descendent of, and I find named after, the last registered holder of two allotments. Those two allotments being a tax allotment which is not really germane as such although relevant to the discussion of the evidence and this town allotment "Feletoa• which is in question here. That town allotment "Feletoa" is in the heart of, the centre of, Pangai township. The Plaintiff is named after a person who was his great uncle, on his father's side. That person died on 14th September 1940. When he died, he was the holder and had been theholder for some considerable number of years, (at least 15)of both the lait and town allotments which I have mentioned, both of them in Pangai.

There arc, I find, historical links of this family, the Plaintiff family, with this land, both tait and town allotments. Both are part of the Crown Estate. When the great uncle died, the Plaintiff was then about 8 years of age, he having been born in June 1932. He would have turned, that is the Plaintiff, he would have turned 16 in 1948. Leading up to that birthday, the 16th birthday, no one applied onhis behalf; nor in the 10 years following the 16th birthday did he apply (up until, as I come to it, 1967) for a grant of either or both allotments.

In particular, no application was made within the one year period under section 87 of the Land Act. The Plaintiff in tenns of the ladderof succession set out in the Land Act, section 82, can be found in para. (e) of section 82. When itcomes toit, at all relevant times the Plaintiff, as a male Tongan over 16, never had a town allotment fonnally granted to him, as is his right on application (and being the effect of sections 7 and 43 of the Land Act). But hedid have, and still has, thegrant and deedsof grant (J 6/44)of thc ta11allotment which had been held by his predecessor and which was registered in the Plaintifrs name in August 1968.

The original Statement of Claim reads this way in its relevant pa11:

"The Plaintiff claims the town allotment lr. 4p in Pangai, Ha'apai, Government Estate on the comer of the Holopeka Road in Pangai, and Fa'aui Road. The Plaintiff is a Tongan subject wilhout a town allotment. The allotment in question was granted by the Minister of Lands in 1967, together with a tax allotment to the Plaintiff, and the tax allotment was registered on 10th August 1968. Document 196 Block 153/138Lot 50. But the Plaintiff was asked not toregister the town allotment yet under claim until the Ministry of Agriculture, who were occupying it move out. The Plaintiff kept this grant up to 1987. The Minister of J..,ands (Hon.Tuita) that the town allotment would not be granted to him. The Ministerof Lands have repeatedl y told the Plaintiff that the town allotment will be granted to him and there was hope on thig matter.

The Plaintiff have already left an application forallotment with the Defendants' Govemorof Ha'apai Officein Pangai plus a birth certificate md theGovernor's Office refused the survey fee.

The Ground of claim:

One: the allotment was granted by the Minister of Lands in 1967.

Two: the Plaintiff has fulfilled the requirements of section 43 and the Defendant has caused great hope on the Plaintiff on this matter."

The Statement of Defence filed to that, first, denied that the town allotment claimed had been granted to the Plaintiff and, secondly, said that the allotment had been utilised or "has been utilised by Government as the headquarters of U1e (then) Ministry of Agriculture, Fisheries and Forestry in Ha'apai."

If in thisjudgm ent I refer to the Ministry from now on, or it may beunder the initials MAF, then it means either the present Ministry of Agriculture and Forestry or its predecessor, which included Fisheries as well.

Thepleading in this Statement of Defence went on tosay that the land, theallotment, was not available to be the subject of the grant and furthermore the claim was time barred under the present section 170 (formerly 148) of the Land Act.

As to that claim of a time bar, on 7 July 1989, Mr Justice Webster in this Court declined that application by the Defendant and said that:

"The Plaintif is entitled to the chance to prove his allegations,"

and he (the Plaintiff) was ordered to file further particulars of the allegations particularly as to meetings with the Minister of Lands.

The amended Statement of Claim giving those particulars was filed, and it sets them out in detail in some 13 paragraphs concluding this way:-

"That the Minister had promised registration to the Plaintiff on different occasions and the Plaintiff has expended money, time and things which he took to the Minister and is greatly aggrieved by his decision." And then it prayed for "an order directing the Defendant to register the town allotment i n question under (the Plaintiff s) name."

Itis thatamended Statement of Claim, and thatprayer, which has come to trial before me.

In general terms, I say this: That I have no reason to doubt the evidence of the Plaintiff and that heis doing, and hasdone, his honest best to recall events over a very long period of ti me. Nor do I have any reason to doubt the evidence or the best recall of the

other wtnesses an in particu lar the witness Sione Palu. And I note that nothing has been put gamst that evidence by the Defendant, no contradictory evidence to that And what lw.1ll .say about the evidence and my view of the evidence, is not just based on the Plamtifrs thoughts a d belie s hich .1accept he strongly holds that the land in question sould p1operly.be his. But 1s oased mstead on what lfind, acceptably (and acceptably p1oved) were thmgs that he was vanously told, assured, promised and, in effect, granted over the years.

. n the account, which I accept, there was a stringing along of him until finally, as lfmd'. n 1987 he was told in effect to take the matter to Court, that the Minister was in a pos1hon of conflict.

The Minister was bot Minister f Lands and Minister of Agriculture and Forestry, and MAF has ben occpymg the par\'lcular allotment for some years, but not occupying the allotment, I fmd, with any degree of assurance. And I note in particular the fact that there was no lease orlicence oreven any soi t of letter indicating occupancy by MAF. Let lone a y of the form:.requirements which Mr Paasi, on behalf of the Plaintiff, points to m r lation to t e provJS1ons of Part IX of the Land Act, "land for public purposes" and in particu lar sechon 133.

lnote that the Assistant Land Registrar told me that nom1ally a Government Department such as MAF indeed would enter into a lease, as seems to be the case with other land that MA F has here in Ha'apai. From what lam told it is unusual for a Government Departm ent not to havea lease of land thatitoccupies, and that, tome, points up what I have said to be the lack of assurance in terms of the occupancy by MAF of this land. And that may be seen toaccord or agree with the account which the Plaintiff gives.

As does(and I donot put any great weight on auy of this really), asdoes the evidence of the 3prsons called, employees, current orpast, of MAF with their suggestion of a shift t som time from this piece of land to other land in Pangai. All indications of, as it were, m ecunty of tenure; none fit contradictory to and indeed can be seen to be in accordance with, the account of the Plaintiff.

No lwa nt to go back a little to 1967. The Plaintiff says in 1967 he applied for the grant to hun ?f oth town and tax allotments. He said in answer to me, that there wasju st the one aphcat1on for both. When it comes to it and llook at the application that was made for the tax allotment (and it is in Er.h.4), lfind that the application was just for the fall allotment and there was not a mention of the town allotment. There are two different forms required for the two different types of allotments. One's memory can play tricks on one, asto what one did 30 yearsago; undoubtedly. Ifyou are not versed in Government red tape and forros i might ell be that you could think you signedjust one application 30 years ago when, m fact, 1f w.hat you are saying is correct, two would be required.

o I do not see ny .great importance or significance in the Plaitiff stating that he adeJUstthe oneapphcatton. Whathesaid in evidence, and has always said consistently, 1t seems to me, is that he applied for both tax and town allotments to be granted to him in 1967. t tat time AF, and indeed perhaps other Government Departments, were occupying, mformally 1t seems (and lmean inform ally in terms of no leaseorother formal docu1ent, or.wtten document of any sort) both tax and town 'api.

f he Plamttff was .then about 34 years of age. He had no 'api, whether tax or town, and he knew of the family history with regards to this land. And when I say laiid I , mean ot1 p land, tax and town. He, in accordance with custom in such ieces o matters,

approached the Minister and when J mention custom, the subsequnt approaches tht I will talk of were also in accordance with Tongan custom and practice I find, on advtc.

He approached the Minister and was told in effect to oahead nd aply and obtam registration of the tax 'api but to wait, he would have to wait, for reg1stra1t on of the town 'api until MAF moved out and then he would be registered.

on the evidence before me, MAF moved out of the tax 'api and all the evidence accords with that. The plaintiff applied in 1967 and was registered in 1968. As tothe town 'api, the Crown says, look at the record, and nothing has been produced to show any such application for grant of the town 'api to the plaintiff in 1967. And from that, the Crown says, no application in fact was made, let alone any oral indication that the grant would be given.

The crown points tothe fact, in support of thetrsubm1ss1ons about the lackof record of the 1967 application, the fact that there was a record of a 1959 application for the same town 'api by a different person which was turned down.

I find that the absence of a 1967 applicat ion in the materials produ ced to me, .1s not detenninative of this action. That not only the plaintiff s account, but the whole history which I will come to, indicatessupport for the plaintiff's claim, that he did apply, he was told to wait until MA F moved out, found other land, and that the grant would be made to him then.

That! find, was the effect of what the Minister said tohim back in oraut 1967 and on many occasions subsequently. He had, in 1967, neither town nor x 'ap1s: Both town and tax 'apis he was interested in obtaining grants for were, h1stoncally, lmk d to hts family. No reason at all has been given to me, or suggested by the Cron tn cross-examination or submissions. why the plaintiff would not apply for both 'apts when they were and had been linked together in the way they had in family history.

He had no tax 'api. He applied for one with historical links. It was granted to hu. Why at the same time would he not apply for the town 'api? He did not have a town 'apt.

I find on balance, he did apply for both 'apis. Both went together and had en seen as linked together, not just by his predecessor, his great uncle, but lso.1nteresmgly ?Y MAF, which had used both of them aswell. So, there was an interesting hnkage m family mind and as well, and importantly, in public mind.

So, I find he applied for both to be granted to him. But, insofaras the town ap1 was concerned, he was told, though, that he should wait until arrangements were made for MA F to move out. And given the generality of the evidence I have heard from the pres nt and or ex MAF employees about that time, 1find some steps were taken towards shiftmg (in some respects) towards the other allotment that MAF held on the outskirts_of the town.

And on which allotment, interestingly, some rather more permanent bu1ldmgs were erected than present on the allotment in question inthe centre of tow '. So, all theev'.dence before me, I find, ; consistent with and points to the acceptability of the plamttfrs account.

In the 70's he kept referring themattertothe Minister from timeto time, (and I accept the difficulties for an ordinary citizen in Ha'apai to get to Tongatapu and make representations to a Minister) but when he did ?e was tol to.wait. H \ as t ld.to wait until MAF moved out and in effect it was re-affirmed to htm, 1.e. the M1111sters d1rect1011 of the grant of the land to the plaintiff.

The visits to the Minister included the 1975 visit. There was, I find, some confusion

in the account, at least initially given, by the plaintiff in evidence, between that visit and the 1987 visit (which I will come to) but it was clarified and I find that there was only one time that he was told by the Minister to go ahead and sue, and thi s was in 1987, and 1will come to that in due course.

Meanwhile whilst still waiting for MAF to move and the Minister then to finalise matters (and these events again accord or agree with the plaintifrs account) this happened. The plaintiff was given temporary possession by the Governor, of a piece of land in the village of Koulo, until he could get his own grant back in Pangai.

This would seem to be in the late 1970's. Itwas temporary possession, there was no grant of land to him, he did not apply for such. That I find is important. That is, the fact it was a temporary arrangement without any formality, no security of tenure of any sort for the plaintiff . Itassists the plaintiff and verifies in my mind what he said, namely he was ju st waiting fo1 his own 'api to become available, and he was being given really a temporary place to settle. Given land tenure matters generally in Tonga and the importance of land to occupy, such casual informal arrangement was unusual to say the least. He built on this land at Koulo, it would seem, just a Tongan fale, in keeping with the temporary nature of arrangement.

In the 80's, I accept there were further trips by the plaintiff to Tongatapu. He was re-assured; he was very patient. He accepted the word of a noble aiid a Minister. Patient and accepting people can be used, if not abused, and care must be taken. And when I say "used" and "abused" I do not necessarily mean in any deliberate way but their patience and their acceptance can, in themselves, be seen as compliance and in effect be taken advantage of.

Then, adding to the plaintifrs misfortunes as it were, in the mid 1980's the land at Kouloon which he was, was required for the purposes of extending the aerodrome (as was other land). The Minister held a "Fono"; apparently re-allocated land to the 10 or so persons who were having to be shifted out, for the Airport development .

Itwould seem that land was re-allocated around and in Koulo, but the plaintiff was not re-allocated land, he was not a Koulo man. He was not a holder of land there, and he was not re-allocated land there. There was no evidence to show anyone else was discriminated against; others got land, he did not.

Why not? Well I see the answer as simple and in agreement oraccord with what the plaintiff has said. That his connections were with the land in Pangai. He was told to see the Minister the next day to get registered in Pangai.

Mr Palu who I referred to, confirms that this was said. Public assurance given the plaintiff. The next day he sees the Minister, who was with the Town Officer in Pangai. But then the attitude seems to be different and that may well renect, I find, the connict that the Minister had between his land "hat" on the one hand and his Agriculture and Forestry "hat" on the other.

Once again, and consistent with what the plaintiff says throughout occurred, he was told to wait; that the Minister would have to go back to Tonga, lo consider the position. The Government, presumably MAF, wanted the land.

If the Government did want the land, or MAF did want the land, there is much in what Mr Paasi says. Why did not they take steps to register a lease themselves. He wsa told to wait again, that there was no land available in Pangai (and presumably, although this is equivocal, that meant for MAF, available for MAF to shift to).

Equivocal also is the entry in the Minute Book Exh.5, the entry for 17th October 1985, relating to this land. The later part of that Minute says that:

> "but according to the Minister, still no, they wiU wait and in the meantime, see if there is another piece of land."

As I say, that could be seen as equivocal. It could well accord with what the plaintiff says he was told by the Minister a couple of months or so before, and with his general account.

That is, for him to be patient, to wait in the meantime, the Ministry would try and find another piece of land to move to. No evidence is offered by the Defendant to explain, expand on in any way, that Minute of October 1985.

As I say, that could well agree, that Minute, with the plaintiff's account, that in public he was told yes, he would be registered; then when he sees the Minister in private, he is told "no" he will have to wait, MAF will have to shift, if they can find the land, but they have got to look for some in the meantime. That Minute of October 1985, some 2 months or so after the "Fono", accords with what the plaintiff has said, namely that he was told that the Minister will go back to Tonga and consider and let him know.

And so the plaintiff was strung along, I find. I have considered him with care when he was giving his evidence. I find him a patient and humble man, an ordinary man accepting of what he was told by those in authority and power over him. He was but a humble supplicant until finally, in 1987, when he again went to Tongatapu, saw the Minister and was told in effect of the conflict in the roles of the Minister ("land hat•, •Agriculture and Forestry hat") and the Minister said to take it to Court.

I find that was the first indication of a refusal of the plaintifrs application (that is the application for the grant to him of the town 'api "Feletoa"). And on which application he had repeatedly, orally, been assured that the grant would be made to him.

In 1987 he was told, for the first time, he would not be registered; he should take it to Court, it was for the Land Court to decide.

I find the plaintiff straight forward, direct, an honest man giving a credible account. And that he has been the subject of much stringing-along and, ih the collequial, 'duck-shoving" as it were, putting off, playing on his patience.

In 1988 (and I am not sure whether it was under advice or not, it is not clear, but perhaps with an abundance of caution if nothing else) he filed in March of that year a further application in relation to the grant of this town 'api. Indeed in the original statement of claim, there seems to have been a reference to that application in the last sentence of the body of the claim before we get to the stipulated grounds of claim.

I find that March 1988 application of no great relevance and it is not the subject of proceedings, as such, before this Court.

Given that account of the history of the matter, it seems to me that the limitation section, section 170 (originally 148) has no application here.

It was not, in effect, until 1987 that the plaintiff was told that he was not going to get this 'api, and would have to go to Court. As compared to all the assurance and re-assurances that had gone before, for the past 20 years, when he had been told on numerous occasions that the grant would happen, he would be registered.

It seems to me any cause of action stems from that refusal, from that advice, in 1987 and action was taken in May of 1988. It is unfortunate indeed that there have been further delays, at whose instance I am not sure, and I make no findings as to who is responsible;

but it may be a reflection of the lack of circuits by this Court to Ha'apai.

Although there may not be a great volume of work for either the Supreme Court or the Land Court in Ha'apai, it is important that the Court comes here, and comes here regularly, and that it is known to the citizens that this Court and the Supreme Court are available to them.

Contrary to the Defendant, I find that the land in question is available and was at all material times available. It is not leased, tied up in any way, whether to a Government Department, MAF or otherwise.

The Crown, in relation to this piece of Crown Estate, has made commitments promises and assurances over many years to the plaitiff. And in my view in ust now honour those obligations it made.

That is going to be the direction I make, in just a moment, in order to have the the Crown meet those obligations and to do justice within the provisions of tt.e Land Act

I therefore make an Order directing registration of the allotment in question "Feletoa' in the name of the plaintiff forthwith which is in accordance with the indications, orally given, of a grant of that allotment to the plaintiff. There will, and can, be no Order for Costs in these circumstances.

Minister of Lands v Kulitapa

Court of Appeal
Morling, Burchett & Tompkins JJ
App. 9/97

17 & 20 June 1997

Land - when land is available - required for governmelltpurposes
Limitation - accrual of cause of acton - land

The facts are set out in the headnote to the Land Court judgment reported above. On appeal.

Held:

1. There was no basis on which the factual findings could be successfully challenged.
2. Rejecting the appellants submission that the 10 year limitation period ran from the time of application (ie 1967), the respondent was seeking an order directing the registration of the town allotment in his name and he could not bring such an action until the appellant gave the decision (in 1987) declining the respondent's application. The right of action accrued when the decision was made and conveyed to the respondent.
3. The land reverted to the Crown 12 months after the death of the last holder in 1940 (s.87 Land Act) and s.88 Land Act applied i.e. the land should be available for grant "unless required for Government purposes" . The court below made no express finding as to that.
4. The difference in the phraseology in s. 138 from that in s.88 is significant. It is and was therefore a question of fact, to be determined by the Minister of Lands or the Land Court, whether the land is required for government purposes. If it is the land cannot be allocated under s.88. A finding must be made that the land is not so required before the Land Court has jurisdiction to make an order directing registration in the name of the respondent. That had not been made and that issue was remitted to the Land Court for determination, the order directing registration (made in the Land Court) being quashed. (The subsequent Land Court judgment follows next).

Statutes considered Land Act ss 43, 170, 87, 88, 138

Counsel for appellant Mr Cauchi
Counsel for respondent Miss Tonga

Judgment

The respondent, the plaintiff in the Land Court, applied to that Court at Ha'apai for an order directing the appellant, the defendant in the Land Court, as Minister of Lands to register a town allotment at Pangai, Ha'apai in his name. The application was opposed. Following a hearing in the Land Court at Ha'apai, Hampton CJ, in an oral judgment delivered on 12th March 1997, made an order directing registration of the allotment in the name of the respondent forthwith. He made no order for costs. The appellant has appealed against the order made.

The Sequence of Events

The respondent was born on 26th June 1932. At the time of the hearing of the claim, he was aged almost 65.

The town allotment, the subject matter of the claim, and also the tax allotment to which we later refer, were registered to Sateki Palatea Kulitapa Senior on 01 November 1925. He died on 14 September 1940 leaving no issue. He was the eldest brother of the respondent's grandfather. The respondent is named after him. No claim to the allotment was made at or about that time by any person on behalf of the respondent, he being eight when his great uncle died, so the allotment reverted to the Crown in about 1941.

In 1967 the respondent applied to the appellant in writing for the grant to him of the tax allotment previously held by Kulitapa. That application was granted, the tax allotment being registered in August 1968. The respondent said that at the same time he also applied for the town allotment. It was then, and had for time before been, occupied, apparently informally, by what was then known as the Ministry of Agriculture, Fisheries and Forestry, now the Ministry of Agriculture and Forestry ("M.A.F.").

The Chief Justice found that also at about this time, the respondent approached the appellant about the town allotment, and he was told that he would have to wait until M.A.F. moved out and he would then be registered. The appellant having said that to him in or about 1967, repeated it on several occasions subsequently. He also found that during the 1970's the respondent kept referring the matter to the appellant, but he was told to wait. He referred specifically to a visit in 1975 to that effect.

In the late 1970's, the respondent was given by the Governor of Ha'apai temporary possession of land in the village of Koulo. This was without any formality or security of tenure. In the early 1980's the respondent made further trips to Tongatapu when he was again reassured by a noble and a Minister.

In 1985 there was a proposal to take land at Koulo required for the purposes of extending the aerodrome. The then Minister held a Fono at which the respondent was present. Land was re-allocated to persons whose land would be affected by the extension, but not to the respondent, apparently because he had no legal right to the occupancy of land in Koulo. On the day following the Fono, the respondent saw the Minister and he was again told to wait.

The Chief Justice referred to an entry in the Minute Book for 17 October 1985 relating to this land, the latter part of which states

> "... but according to the Minister, still no, they will wait
> and in the meantime see if there is another piece of land"

The Chief Justice commented that this entry was equivocal. It is consistent with what the respondent said he was told by the Minister, that M.A.F. would try to find another piece of land to which to move.

In 1987 the respondent again went to Tongatapu, saw the Minister and th was tld that if he wished to proceed with his claim, he should take it to Court. Th C 1ef Justle found that this was the first indication of a refusal of the respondent's apphcahon for this town allotment. In March 1988 the respondent filed with the appellant a further application seekingthe grant of this town allotment. These proceedings were commenced in October 1988.

The Chief Justice found the respondent lo be a straight forward, direct, honest, humble, and patient man giving a credible account of the events that had occured.

Submitting the Application

Section 43deals with the grant of a tax or town allotment. The relevant parts of that section provide:

"43. (1) Every male Tongan subject by birth of 16 years of age not bemg m possesion of a tax or town allotment shall be entitled lo the grant of a tax or town allotment or if in possession of neither to the grant of a lax and town allotment.

(2) The grant shall be subject tothe provisions of the 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) ..

The appellant contended in the Land Court: and in this Curt on appeal, that n application as required by that section was made m respectof this town allotment until March 1988.

The Chief Justice found otherwise. He accepted that the apphcatton that was produced to the Court wasfor the tax allotment, ad there was noention in it of the town allotment. The respondent said in evidence that m 1967, heapphed for t_he rnt of both the town and the tax allotment. The Chief Justice, for reasons he set out m hisJUdgment, found that in 1%7 lhe respondent did apply for both allotments. The absence of the 1%7 application for the town allotment in the materials produced to him was not, he considered, determinative.

He held that the 1988application was, perhaps, filed out of an abundance of caution, but he regarded it as •a further application" in relation to the grant of the town llotment. For that reason, he did not consider the 1988 application to be of releance. 1'.ISHonour had beforehim theevidenceof the respondentdetailing hisdealingswith the Mm1stry and the various Ministers. Itwasopen tohim to accept, as hedid, that evidece. We nd.no basis upon which the factual finding that the respondent had made a written apphcal!On for the''town allotment in 1%7, can be successfully challenged on appeal.

The limitation submission

The appellant submits that, even if there were an application for the town allotment loedged in 1967, the respondent was, by s. 170 (formerly s 148) of the Land ct (Cap 132) ("the Act"), barred from brining the action directing the appellant to reg1ser the to n allotment in his name. This issue was raised before Webster J on an pphcat1 11 to s_tnke out the claim, that was dismissed by him on 7 July 1989. But he did not afftrmt1vely decide that the application was not time barred, but rather that it was not appropnate to strike the claim out on that ground.

Section 170 of the Act provides that no person shall bring any action "... but within 10years after Ute time at which the right to bring such action shall have first accrued ...•

Mr.Cauchi for the appellant submitted that, if the Court found that the respondent had made a proper application for the town allotment in 1967, the limitation period ran from that time. These proceedings werecommenced in October)988. As this was more than 10years after the lodging of t11e application in 1967, it was barred by s.170.

The Chief Justiceheld that the right to bring the action firstaccrued at the time when the Minister expressly refused to grant the allotment to the respondent and told him that he would have to go Court. That was not until 1987. That statement contrasted with the assurances that he found the respondent had been given, when he was told on numerous occasions that he would be registered in respect of tllis town allotment.

We agree with the Chief Justice. The proceedings commenced by the respondent sought an order directing the appellant to register the town allotment in the respondent's name. The respondent could not bring such an action until the appellant had given his decision the respondent's application. Had it been commenced before the decision, it would have been met with a plea that it was premature, as the application was still being considered. Itwas the malting of thedecision that gave the right to bring the action. That right accrued when the decision was made and conveyed to t11e respondent.The action was, in effect, a challenge to that decision. Since the action was commenced about a year later, it was well within the limitation period.

Was the land available?

Section 87 of the Act provides, *interalia*, that, if no claim toa tax or town allotment has been lodged within 12 months from the death of the last holder, the allotment, if situate on Crown land, "shall revert to the Crown.•

Section 88 provides:

"88. Where any tax or town allotment shall revert "to the Crown under the preceding provisions of this Division, such allotment unless required for Government purposes shall be granted out by the Minister in accordance with such regulations as may be made under this Act."

The last holder died on 14 September 1940. No claim was made by any person on behalf of the respondent, who was then only 8. Pursuant to s.87 the allotment reverted to lhe Crown. However, the Minister was enabled by s.88 to grant out the allotment to the respondnt on his application, and the Court on proceedings brought to it could do likewise, unless the land was required for Government purposes.

In thecourseof hisjud gment, the Judge considered the manner in which M.A.F.had used the land in the past. But he made no express finding whether, at the time of the hearing, the land was required for Government purposes. He said:

"Contrary to the Defendant, I find that the land in question is available and was at all materia l times available. It is not leased, tied up in any way, whether to a Government Department, M.A.F. or otherwise."

Miss Tonga submitted that land is not required for Government purposes within the meaningof that phrase in s 88,unless it has been reserved unders 138. That section reads:

"138. The Minister shall w ith the consent of the Cabinet reserve such portions of Crown Land as may from time to time be required

for roads, public ways, commons, cemeteries, school sites, playgrounds, public health purposes and for use by Government Department or for other public purposes and may grant a lease of land to trustees to be used as a cemetery for Europeans."

We donot accept that submission. The difference in the phraseology from that used in s 88is significant. Had the draftsman intended the phrase in s 88to be read in the way Miss Tonga submitted, the section would either have referred expressly to s 138, or, as was done in s 140, have used the phrase "Crown land reserved for public purposes", which is clearly a reference. to Crown Land reserved pursuant to s 138. Further, the restricted meaning for which Miss Tonga submitted may not accord with the statutory purpose of the section. We were informed from the bar that there are numerous examples of Crown land that is being used for purposes related to the Government, that has not been reserved under s 138. It may well have been the intention of the legislature that such land should not be granted out to an applicant for an allotment while it is required for those purposes.

Ittherefore becomes a question of fact to be determined by the Minister or the Court whether the land is required for Government purposes. Ifit is, the land cannot be allocated under ss 88.

At the hearing, evidence was given by Mr Soakai, who was then the Senior Agricultural Assistant with M.A.F. He had been employed by M.A.F. from 1968until the present. In his evidence in chief he described, but only in a general way, the buildings on the land. He explained that M.A.F. had not otherwise built on the land because of some uncertainty concerning it. He said that the primary activity on the allotment is the market, which had been in operation from the 1970's. He did not say whether the market is operated by M.A.F., or whether it was operated privately by the stall holders.

To the Court, he said that there were 3 fales on the land, that he described as office, accommodation, and home economics used by women. He did not state expressly who used the office, but it is a reasonable inference from his evidence that it was used by M.A.F. He did not say by whom the accommodation was used, nor that he say whether the home economics activity was run under the auspices of M.A.F. or some other Government department, or privately. Nor did he give any evidence expressly directed to whether the land was required for Government purposes, in which case one would have expected him to say what were the nature of those purposes.

We were informed from the bar that, in the course of the hearing, the Chief Justice inspected the site, and was therefore in a position to make his own assessment from what he saw, of the uses to which the land was being put.

It is clear from s 88 that a finding that the land was not required for Government purposes is necessary before the Court has juri sdiction to make the order directing registration in the name of the respondent That finding has not been madeon any proper basis. Land that has not been leased or tied up to a Government Department could still reasonably be required for Government purposes. In view of the general nature of the evidence to which we have referred, and in the absence of any clear evidence on behalf of M.A.F. orany other Government Department that the land is so required, the Court is not in a position to make such a finding of fact. This issue will have to be determined in the Land Court.

The Result

The findingsof the Chief Justice that the application by the respondent for this town allotment was properly made in 1967, and thatthese proceedings are not statute barred are onfirmed. The orer directing registration of the allotment in the name of the respondent ts quashed. Te 1ss_ue whether the allotment is available to be granted to the resndent, which will depend upon the Land Court's finding on whether the land is require or Government purposes, is referred back to the Land Court for determmation.

There will be no order for costs on the appeal.

Kulitapa v Minister of Lands (No.2)

Land Court, Pangai, Ha'apai
Finnigan J
L9/88

13 & 14 March 1998

Land - when available - required for governmentpurposes
Evidence - whether land required - letterfrom Minister

This is the hearing on the referral back to the Land Court for determination of the issue whether the land is required for government purposes . A letter from the Minister of Lands was produced, from the bar, stating the land was required by the Government as an office and market place.

Held:

1. The letter was recognised as being signed and sled by the Minister.
2. There was still no lease or registration or anything formal done about government occupancy of the land; and the defendant accepted, that there was a lack of government assurance in occupying the land.
3. The government may want the land but that isdifferent to the issue of whether under s 88 Land Act, the Government has required it for its purposes.
4. Both use as an office and as the market could constitute government purposes.
5. The onus of proving the requirement is on the defendant, on the balance of probabilities.
6. Proof by certificate by the Minister is not allowed. The letter was the first time a requirement had been claimed and was different to the pleading in the Minister's statement of defence.
7. The other site was available for use by the Ministry of Agriculture and Forestry.
8. It had not been proved by the defendant that the 'api in question was needed by M.A.F., i.e. required for government purposes.

(A subsequent Court of Appeal judgm ent immediately follows).

Statute considered Land Act s.88

Counsel for Plaintiff Mr Paasi
Counsel for Defendant Mr Cauchi

Judgment

The Land Court is sitting in order to decide an issue which was stated for it by the Court of Appeal. I am reading from page 8of the Judgment of the Court of Appeal. "The issue whether theallotment is available tobe granted tothe respondent, that istheplaintiff, which will depend upon the Land Court's finding on whether the land is required for Government purposes, is referred back to the Land Court for determination."

So, the question is this: ls the land, the town 'api known as Feletoa required for Government purposes? That issue is an issue of fact as the Court of A ppeal has said. I'm reading from page 6 of the Court of Appeal Judgment. "It therefore becomes a question of fact to be determined by the Minister or the Court whether the land is required for Government purposes."

There is further help from the Court of Appeal at page7 of thatludgment: "It is clear from section 88 that a finding that the land was not required for Government purposes, is necessary before the Court hasjurisdiction to make the order directing registration in the name of therespondent i.e. the plaintiff. That finding hasnot been made on any proper basis. Land that has not :.ieen leased or tied up to a Government Departme nt could still reasonably be required for Government purposes. In view of the general nature of the evidence to which we have referred, and in the absence of any clear evidence on behal f of MAF or any other Government Department that the land is so required, this Court is not in a position to make such a finding of fact. This issue will have to be determined in the Land Court.•

Now what is the evidence about that issue of fact? The evidence is under a number of headings.

(1) There are the findings about facts which were made by the Land Court that are relevant to this issue. They are in the Judgment of the Chief Ju tice, dated 12 March, 1997, subject to whatever was said about those findings by the Court of Appeal.

(2) Second there is the evidence of the witnesses heard yesterday, so far as it is relevant.

(3) There is a letter from the Minister of Lands, Exhibit l which was tendered at the hearing by Mr Cauchi.

(4) For what i t may be worth, there is a view which the Court and Counsel took not only of the one 'api Feletoa but the other 'api which was referred to by the Chief Justice in his Judgment and referred to yesterday i n evidence.

First so that my Judgment is complete, I will read some passages from the Judgment of the Chief Justice. These are findings of fact which are relevant and which are not contested. I read first from page6, "The Minister was both Ministerof Lands and Minister of A griculture and Forestry, and MA F had been occupyi ng the particular allotment for some years, but not occupying the allotment, I find, with any degree of assurance. A nd I note in particular the fact that there was no lease or license or even any sort of letter indicatingoccupancy by MAF. Let alone any of the formal requirements which Mr Paasi, on behalf of the Plaintiff, points to in relation to the provisionsof Part IX of the Land Act, *"Land for Public Purposes"* and in particular section 138. I note that the Ass istant land Registrar told me that normall y a Government Department such as MAF indeed would enter into a lease, as seems to be the case with other land that MAF has here in Ha'apai . From what I am told i t is unusual for a Governmen t Department not to have a lease ofland

that it occupies, and that to me, points up what I have said to be the lack of assurance in tenns of the occupancy by MAF of this land.•

The next passage of the Judgment is on page 8, the last paragraph of which is as follows: "Not only the plaintifrs account, but the whole history which I will come to, indicates support for the plaintifrs claim, that he did apply, he was told to wait until MAF moved out, found other land, and that the grant would be made to him then."

I read next from page 9, some of the words in the last two paragraphs as follows: "Insofar as the town 'api was concerned, he was told, though, that he should wait until arrangements were made for MAF to move out. And given the generality of the evidence I have heard from the present and/or ex MAFemployees about that time, I find some steps were taken towards shifting (in some respects) towards the other allotment that MAF held on the outskirts of the town. And on which allotment, interestingly, some rather more pennanent buildings were erected than are present on the allotment in question inthe center of town.•

J move to the page 11of the Judgment where there are more findings of the same sort On page 11, there arefindings about the Fono held atthe establishment of the Airport andthe re-allocation of land to villagers from Koulo. At the bottom of the page in the second last paragraph the Chief Justice found, "He was told to see the Minister the next day to get registered in Pangai.• However as the Judge found on page 11& 12the Minister was wearing two hats and was unable to consent to his registrati on. He found at page 12, "The Government, presumably MAF, wanted the land." At the bottom of page 12 the Judge found the plaintiff was told to be patient to wait in the meantimethe Ministry would try and find another piece of Land to move to. There was an entry in the Minute Book for 17th October, 1985 which was equivocal (unhelpful).

Finally, at page 15, the Chief Justice found in the second paragraph and I'm quoting: "Contrary to the defendant, that is the Minister, I find that the land in question is available and was in all material times available, it is not leased, tied up in any way, whether to a Government Department, MA F or otherwise."

That is a finding which was made by the Court, because that is the issue, which was stated for the Court in its Statement of Defence by the defendant. The defendant did not plead that the land was required for Government purposes, but pleaded instead, that the land is not available to be the subject of a Grant. The proper issue at law, however, is the one now being decided by this Court.

The next source of evidence, and the anchor point of the Minister's case is a claim in a letter written subsequently by the Minister, which was tendered as Exhibit l. That letter is as follows: (In part)

> The land in question is required by His Majesty's Government to be retained for a Government office and a market-place in accordance with section 88of the Land Act.
>
> J do hope that this will give evidence to the Court that the land in question is required for Government purposes.

The letter is recognized by the Court as bearing the signature and the seal of the present Minister of Land, Survey and Natura l Resources.

The crucial distinction for the Court is the finding of the Land Court made at page 15of the Chief Justice's Judgement, which is highli ghted by the Court of Appeal in page 6 of its Judgement, when that court stated that the Chief Justice had made no express finding whether at the time of the hearing the land was required for Government purpose. He had found only that the land was available and it was at all material times available.

For the third source of evidence, the Court looks now to the evidence given yesterday by Makafilia Taungatu'a, the Assistant Land Registrar. He gave evidence, that the 'api is the Crown's Land - 'Api Pule'anga. Itcame back to the Crown after there was no claim for it upon the death of Sateki Palatea in 1940. The Crown took back the land in 1941. The witness said also, thatMAF has other land apart from this land and they used it, and he said, that new offices and/or new buildings of MAF are situated on the other allotment. There was evidence also from two other witnesses, one was Seilala Fe'ao, but he told the Court he can add nothing to the evidence because he left MAF in 1993. The only other witness wasthe plaintiff who gave evidence only of his passion, and his earnest desire to possess the 'Api Feletoa. His passion was warmly acknowledged by Mr Cauchi in submissions. But, as for evidence he knows and cares nothing about whether the land is required by the Government for Government purposes.

So, that is the evidence which the Court has upon which to make its decision. There is still no lease or registration by MAF and nothing fonnal has been done, even since the Judgement of the Chief Justice, about the Governm ent occupancy of this Land.

In this hearing , following the Judgement of Court of Appeal, the Minister of Land accepts the findings of both this Court and the Court of Appeal about the lack of Government assurance in occupying the land.

The only item that has been added to the evidence since the hearing in this Court, 12 months ago, is the letter of the Minister, which l forgot to note, was dated 30 September, 1997.

Both the plaintif and the defendant accept the Supreme Court finding, that unti l now, the Ministry of Land had "wanted" the land. However, the issue for this Court now to decide is whether, pursuant to Section 88 of the Land Act, the allolment is "required" and if so, required for Government purposes. The meiming of the words 'Government Purposes' was considered by the Court of Appeal. Itmeans more than "Public Purposes" in Part IX of the Act. It is a wider and more general term. Well within that term is the building on Feletoa which is bei ng used as the MAF office for Ha'apai. That seems to be so, also for the other item mentioned in the Minister's letter - The Market.

. There has been no evidence so far as I know about the market as a Government purpose, except that there is evidence of usage. The market was there from about 1970 as I recall. There was no evidence before the Land Court in 1997 whether a market is a Government purpose so far as I can ascertain from the Judgement. The only evidence before me is the Minister's Certificate in Exhibit 1, that it is a Government Purpose plus the fact that for perhaps 28 years, the Government has provided the site for the market, first on Feletoa for about 27 years and since the Land Act Judgement on its other 'Api. Jn my opinion, a public market may well be a government purpose and may even be within the narrower tenn "public purpose" used in section 138, but I have heard no argument about this. For present purposes, I find it is a Government Purpose.

The only question remaining is; Has the Minister estabished in thi s hearing that Feletoa is "required "as the site for that office and that market. A nother word for required is needed.

Primarily, the Minister relies on hisown statement as evidence. I\s MrCauchi stated in tendering that letter, it speaks for itself. It is not sworn. The Mi nister slates that he

hopes it will be evidence that the land in question is required for Government Purposes.

It is only a statement of the very fact which the Minister in defence to the Plaintiff's claim, is praying the Court to find established by the evidence. As the statement of the Minister himself, it is accorded respect and evidential weight. It is not formal document executed by the Minister. However, in these proceedings the Minister as defendant assumes the onus of establishing on the balance of probabilities by evidence that the land in question in required. Unless the law allows proof of facts by the Minister by certificate, the Minister must prove his claims of fact as a litigant.

This letter of the Minister dated 30 September, 1997, written after the Court of Appeal stated this issue for determination, seems to be the first time in these proceedings that a Minister of Land has made this claim, that the land is required under section 88.

In the Minister's statement of Defence filed on May 31, 1988, the defendant's relevant pleading was the one I have mentioned, that the land is not available.

Bearing in mind that the onus on the Minister is to establish only on the balance of probabilities, I still do not think that the evidence before the Court at this hearing establishes what the Minister now states. It is the Court's function, in respect for both parties to decide the issue only on the evidence.

The only evidence which I have not yet mentioned is the evidence for what it is worth, of the view which the court took of the two allotments used by MAF in Pangai.

Feletoa is presently the site used for MAPs Ha'apai office. The office is in a building situated on the 'api. As well, there is a wooden residence occupied although not at present by the MAF clerk. There are other structures not presently used, both are old buildings. One was the site of the Home Economics classes mentioned in earlier Judgements. It is still usable, but presently stands empty. There is another small unused concrete block building. The market is no longer there. The office buidling although central, occupies well under one-quarter of the area of the 'api.

The market was moved by MAF and I accept that was in compliance with the Chief Justice's Judgement. The court saw that site on MAPs other 'api, or at least on a part of that 'api which is used by the now distinct Department of Fisheries. That site there may be regarded as temporary until this case is decided. It has been there for some months it seems, and could stay there if MAF so decide, although it is less convenient as a site. It is a short distance from Feletoa which I suggest is about 300 meters, but the Chief Justice was accural ein saying that it is on the outskirts of the town. The only current use of Feletoa for which necessity is claimed is the office. There has been little evidence about the office as the Judgements show, but this court has seen it. For MAFs Ha'apai office, there seems to be room on the other 'Api for a small new office building, if one of the existing buildings can not accommodate the office.

And all the other functions in Pangai of the MAF site or most of them appear to be on the other 'api; there is a training center, there is a machine shed and there is a residence. The market could be where it is and the office could be there if that was what MAF wanted alongwith the training centre, residence and the machine shed. That is a reasonable view in my opinion, and one reached easily on the balance of probabilities.

After careful consideration of the Ministers' statement and after giving it the weight which it is due, I can not find it proved even on the balance of probabilities by the evidence before this court, that the 'api in question is needed by MAF i.e. is required for Government Purposes.

I therefore make the order sought by the Chief Justice on 12 March, 1997 A y ep amlJ. m the tnns that were settled by Appeal, each party should pay its on c v1ously m boU1 this Court and the Court of

Minister of Lands v Kulitapa (No.2)

Court of Appeal
Lewis CJ, Burchett & Tompkins JJ
App.4/98

29 July & 8 August 1998

Land - when available - required for government
Evidence - whether land required.

Facts are in the 3 preceding judgments.

Held:

1. On us of proof lay on Government to prove that the 'api was required i.e. was reasonably needed or reasonably necessary for government purposes.
2. That onus was not satisfied, and the letter from the Minister of Lands was an unsatisfactory means of endeavouring to discharge the onus.

Counsel for appellant Mr Cauchi
Counsel for respondent Ms Tonga

Judgment

The respondent, the plaintiff in the Land Court, applied to that Court at Ha'apai for an order directing the appellant, the defendant in the Land Court, as Minister of Lands, to register a town allotment in Pangai, Ha'apai in his name. The application was opposed. Following a hearing in the Land Court at Ha'apai, Hampton CJ, in an oral judgment delivered on 12 March 1997, made an order directing registration of the allotment in the name of the respondent forthwith.

From that judgment the appellant appealed to this Court. In a decision delivered on 20 June 1997, this Court confirmed the findings of the former Chief Justice that the application by the respondent for this town allotment was properly made in 1967, and that the proceedings were not statute barred. The order directing registration of the allotment in the name of the Respondent was 4uashed. The issue whether the allotment was available to be granted to the respondent, which depended upon the Land Court's finding on whether the land was required for Government purposes, was referred back to the Land Court for determination.

That issue came before Finnigan J in the Land Court at Ha'apai on 13 March 1998. In an oral judgment delivered on 14 March 1998, the Judge held that he could not find it proved.even on the balance of probabilities, by the evidence before the Court, that the 'api in question was needed by the Ministry of Agriculture and Fisheries, i.e. was required for Government purposes. He therefore made the order sought by the respondent in the same terms as the order made by the former Chief Justice on 12 March 1997.

From that decision the Minister has appealed.

Background

. The factual background is set out in detail in the judgments of the former Chief Jusllce of 12 March 1997 and of this Court of 20 June 1997. The following is a brief summary.

At the time of the first hearing in the Land Court the respondent was aged almost 65. _The tow allotment the subject matter of the claim was registered 10 Sateki Palatea Kuhtaa Senior on 10 November 1925. He died on 14 September 1940 leaving no issue. No claim to the allotment was made at or about that time by any person on behalf of the respondent, he being eight when his great uncle died, so the allotment reverted to the Crown in about 1941.

. In 1967, th respondent applied to the then Minister of Lands in writing for the grant o him of the ap1. It was then, and had been for some time before, occupied, apparently mform ally, by what was then the Ministry of Agriculture, Fisheries and Forestry now the Ministry of Agriculture and Forestry ("MAF").

The former Chief Justice found that the respondent approached the then t-.finister to have the 'api registered, but was told that he would have to wait for registration until MAF moved out and then he would be registered. He found that the then Minister told the respondent in about 1967, and on many occasions subsequently, that the respondent should wait until MAF moved out and found other land. The grant would then be made to the respondent. This finding has, as we find later, a direct bearing on the issue now before the Court.

The statutory provisions

Section 87 of the Land Act (Cap 132) provides, inter alia, that, if no claim to a tax or town allotment has been lodged within 12 months from the death of the last holder the allotment, if situated on Crown land, 'shall revert to the Crown.•

Section 88 provides:

> "88. Where any tax or town allolmeP-t shall revert lo the Crown under the preceding provisions of this Division, such allotment unless required for Government purposes shall be granted out by the Minister in accordance with such regulations as may be made under this Act.•

In this Court' judgm nt of 20 June 1997, it held, after referring to these provisions, that _the former Chief Jushce had made no express finding whether, at the time of the heanng, the land was required for Government purposes. It rejected a submission by Ms Tonga fo ded on s 138 of the Act. It held that it is a question of fact to be detemiined by te Mm lster, or, on application to the Land Court, by that Court, whether lhe land is eu1rcd_ fr Government purposes. If it is, the land cannot be granted out under s 88. If it is not, 11 1s clearly appropriate, having regard to the history of this 'api, that it be granted to the respondent.

Finnigan J held, we agree, and Mr Cauchi accepts, that the onus of proof rested on the Minister to establish, as a matter of fact based on acceptable evidence placed before the Land Court, that the 'api is now and is likely in the future to be required for Goremment purposes. What the appellant was required to prove in lhis case wns that the 'api was

It was not sufficient to show that the 'api had been used by MAF in the past. To discharge the onus of proof the appellant needed to show that the 'api was reasonably required by MAF now and in the future.

The evidence before the Land Court

Mr Cauchi, who appeared as counsel for the Minister at the hearing before Finnigan J in the Land Court at Ha'apai, called only one witness, Makafilia Taungatu'a, an Assistant Registrar of Lands. He said that the 'api is commonly used as the office for MAF. He was unable to say for how long the Ministry had used and occupied the land. By referring to the register, he gave the Court the history of the 'api. He referred to another piece of land occupied by MAF on which it has new offices. He did not know whether MAF was about to vacate the land subject to the hearing before the Court. This is not surprising since he is not a MAF official. No doubt for the same reason, he did not give any evidence on the crucial issue of whether the land was required for Government, that is for MAF, purposes.

When this evidence had been given, Mr Cauchi tendered to the Court a saving ram dated 30th September, 9n signed by Hon. Fakafanua as Minister of Lands, Survey and Natural Resources. It was addressed to the Solicitor General. It reads;

> "I refer to your saving ram No JC599/97 SG/C. 19 on the 10th September 1997. The land in question is required by His Majesty's Government to be retained (for a Government Office and a Market Place) in accordance with section 88 of the Land Act
>
> J do hope ths will give evidence to the Court that the land in question is required for Government Purposes'.

The letter alone, without any further evidence either from the Minister or from any official from MAF, was an unsatisfactory means of endeavouring to discharge the onus of proof on the Minister to establish that this 'api was required for Government purposes. We recognize, as did Finnigan J, that a formal letter executed by the Minister should be accorded respect and can be given some evidential weight. But its probative value, without any supporting evidence, is slight. The letter does not in any way elaborate oo why the 'api is so required by explaining what is the nature of the iequirement, and why this 'api is necessary to satisfy that requirement. This may well be because the letter was written by a Minister who was not the Minister of the Ministry for which the 'api was claimed to be required.

Mr Cauchi accepted that there is no statutory provision relating to the evidenti value of a letter signed by a Minister. Section 94 of the Evidence Act (Cap 15), concerning the mode of proof of particular documents, does not aid the appellent, as none of the categories of documents set out in the section includes a letter signed by a Minister.

The lack of any such evidence is all the more significant in the light of the findings of the former Chief Justice to which we have already referred. He found, as we have set out above, that former Ministers had told the respondent in or about 1967 and on many occasions subsequently, that the respondent would be granted the land when MAF had moved out and found other land. This history strongly suggests that, at least at that time, the land was not going tO be required for Government purposes in the future. There wal no evidence placed before the Land Court that this situation had changed.

Finnigan J viewed this 'api and the other currentl y occupied by MAF. That view is somethin g that the Judge was entitled to take into account. He noted that for MAP1 Ha'apai office, there seemed to be room on the other 'api for a small new office building

if one of the existing building could not accommodate the office. A ll or most of the other MAF functions in Pangai appeared to be on the other 'api; there is a training centre, machine shed and a residence. The market could remain on this other site.

Mr Cauchi submitted that the Judge was in error in taking into account the Government use of the other 'api. We do not accept that submi ss-ion. Parti cularl y in view of the paucity of evidence tendered on behaJf of the Minister, it was appropriate for the Judge to take the view, including what he saw of MAF activities on the other 'api, into account as explaining the evidence when deciding whether the respondent had satisfied the onus of proof resting on him.

Mr Cauchi also submitted that the Judge was in error in not having regard to the residence which is on the 'api, the subject of these proceedings. Mr Cauchi informed this Court, and no doubt the Judge observed as it is referred to in his judgmen that there is a residence there and that it is occupied on an occasional basis by employees of MAF. Thre was no evidence concerning this residence and the extent to which it is regarded as important to the Ministry. Significantly, the letter from the Minister makes no reference to the 'api being required as a residence for MAF personnel. The Judge was right to place little weight on this aspect.

Conclusion

Finnigan J was correct in his conclusion that the evidence before the Land Court failed to establish that the 'api was required for Government purposes. The appeal is dismissed with costs.

R v Moala

Supreme Court, Pangai, Ha'apai
Hampton CJ
Cr 197/97

13March, 1997

Bail - conditions - sureties -forfeiture - obligations
Criminal law - bail - conditions - sureties -forfeiture - obligations

The accused was charged with unlawful caranl knowledge of a girl under 12, and indecent assault. He was committed to the Supreme Court for trial, allowed bail. but absconded. Proceedings were taken against his two bail sureties to forfeit the amounts of their bail bonds.

Held:

1. For serious alleged offending (as this) significant and appropriate monetary tenns, and conditions, of bail must be imposed. The greater the potential penalty, the greater the risk of an absconding .
2. It is entirely inappropriate and indeed, improper for a police officer (let alone as here the investigating officer of the particular alleged crime) to stand bail as a surety. The potential conflicts of interest which arise are aggravated when the police officer is a relative of the accused.
3. The whole of the security of the accused be forfeited to the Crown.
4. The sureties were persuaded to enter into bail bonds in quite a casual and light manner. But sureties have important obligations the primary one being to try and ensure that the accused person answers his bail and appears in Court when required. Sureties must use their best efforts and endeavours to achieve that. It is a positive obligation.
5. In each case the bonds of the sureties were forfeited to the Crown.

Statutes considered Bail Act 1990

Counsel for prosecution Mr Cauchi
Sureties in person

Judgment

From what is on this file, it seems that the accused person Losepeli Moala had summonses issued against him on 20th September 1996, to appear in the Magistrates' Court Ha'apai on 26th September last year on two charges, both under the Criminal Offences Act, one being for unlawful camal knowledge of a girl under 12and the other being for indecent assault.

It would seem that the preliminary inquiry took place in two stages before the Magistrate. The first on 12th December 1996in this Court building and the second again in this Court on 6th January 1997. After the hearing, or the part hearing, on the 12th December, the accused man was allowed bail to appear again on 6th January for the resumed hearing. His bail was on his own bond of $200 and two sureties, each of $150.

I assume he had bail before then, and I want to make some comment as to bail generally before I look first at the bond entered into in December and then, more importantly for this hearing, at the bond entered into in January.

Here was a man facing, from anybody's viewpoint, serious charges; the indecent assault carrying a maximum penalty of up to 5 years but, more importantly, the unlawful carnal knowledge of a girl under 12, carrying a potential penalty of up to life imprisonment.

That latter charge is, by it's penalty, one of the most serious in the Criminal Offences Act. Accepting all that the Bail Act says, and accepting all that the presumption of innocence means, nonetheless for offending alleged of this grave nature, if bail is to be allowed then significant and appropriate terms of bail, both as to (i) amount of own bond and amount of sureties; and (ii) conditions as to where a person lives, what they do with their passport and how often they report to the police; must be imposed and I stress (for the benefit of the Magistracy) - must be imposed.

I am not trying to lay down (and it would be foolish of me and wrong to try and lay down) a general prescription as to bail and terms of bail but I implore Magistrates to take the greatest care and to impose appropriate tenns of bail, if bail is to be granted.

One of the matters that any Court must always consider on questions of release on bail and on questions then of tenns of bail if release is to be made, is the nature and seriousness of the offending alleged.

It hardly needs saying. in my view, but obviously the greater the potential penalty that an alleged offender faces (and here this man faces up to life imprisonment) then the greater is the possibility that an alleged offender might well abscond rather than face the charges.

Those are general comments which I will ensure are distributed amongst the Magistracy of the Kingdom.

If I turn now to the bond that was entered into on the 12th December last year in relation to this particular matter. Given the potentia l seriousness of the matters the bond for the accused in the sum of $200 and the two sureties of $1.50, it seems to me, were quite inadequate when, as well, therewere no specialconditions as to place tobe lived in, for example; surrender of passport, for example; or reporting to the police or, at the very least, to someone in responsibility on the island on which this man lived. When i t comes to it, the same comments can be made in relation to the subsequent bail that was entered into on 6th January because that was on the same monetary tenns and lack of special conditions.

The other thing I want to comment about the bail of 12th December is this (and in

fact this has already been drawn to the attention of the Crown and I understand that the Senior Crown Counsel has taken it up with the appropriate police authorities): from what I had seen on the file, and it has been confirmed today in evidence, one of the sureties who stood bail as a surety on 12th December was a police officer. Not only that, he was the very officer, or one of the police officers, who was involved in this investigation, including the interview of the accused. And indeed in the preliminary inquiry he gave evidence as the 6th witness.

It seems to me that it is entirely inappropriate that a police officer, let alone an investigating police qfficer (and I mean investigating the particular alleged crime) should stand bail as a surety for the accused. In fact I would put it stronger; it is quite improper.

The potential conflicts of interest which might arise I do not need to spell out. But the potential is aggravated as well when, as I learn today, this officer was not only an investigating officer but he is also a relative of the accused.

I trust I will not see this sort of event happening again and that the persons who are enabled, as a matter of law to take the bonds of recognizances of persons who are going to stand bail as a surety, take note of what I have said.

Those people who are named in section 10(4) of the Bail Act 1990, are a police officer either of the rank of or over the rank of Inspector, or an Officer-in-Charge of a Police Station, a Magistrate or a Registrar of the Supreme Court. Those people have obligations under the Bail Act to be satisfied about a surety's suitability.

Again, I will have this judgment circulated so that it's provisions, that is the provisions of this judgment , will be brought lo the attention of the persons who have that responsibility as to the suitability of sureties.

And I would express the hope that the Police Commander will make sure that it goes down through the ranks, so that it is clear to all his members, that I consider it not only inappropriate but improper for police officers, especially investigating officers, to enter into bail bonds in this way.

I turn then to the particular bail papers of 6th January 1997 executed after the completion of the preliminary inquiry when the accused person was committed to this Court for trial. The accused person was committed on the two charges I have already mentioned, but when this Court started it's circuit in Pangai, Ha'apai, at the start of this week and, again, when the matter was called specifically yesterday, there was no appearance on the part of the accused and a bench warrant for his arrest was issued.

The information placed before this Court would indicate that the accused is in all probability in New Zealand, having left the Kingdom on or about the 20th February 19'J7. Yesterday I made an order, pursuant to section 10 sub-section 7 para. (a) that the whole of the $200 security of the accused be forfeited to the Crown. Yesterday I also made an order that the two sureties who entered into bonds or recognizances should be summonsed to this Court today, to show cause as to why each of them should not have forfeited the $150 security which they had entered into. That is pursuant to section 10 sub-section 7 para. (b) of the Bail Act. (No.27 of 1990).

Summonses were issued; they have been served; each of the sureties have appeared before me today and, on oath, offered explanation as best they could and been examined both by Mr. Cauchi, of Counsel for the Crown, and by myself.

The two sureties are both related, in different ways, to the accused and each of them were called upon to sign bail perchance as it were, and each of them approached to do

that by the same inesligating police officer I have already referred to in this judgment ga n I am not entirely happy with his role in the matter although I am not making any fmdmg, because he has not been put on notice, has not been examined and has not been offered the chance to make explanation. But if what I am told by each surety is correct (and I have no reson.to doubt what they say, from their pers.Pectives, at this time), he ?pproahed thm mqwtea casual "bytheway" mannerand in factpersuaded them toenter mto bail, lbeheve quite lightly.

. Both sureties sytey had explained to them their obligations which included, most unprtl\ntly, the obligations to try and ensure that the accused person answered his bail, that ts appear m Court when required.

" lstress that because tat when al is said and done tilat is the prim ary obligation of a urety. They are undertaking to the Court that U1ey will use U1eir be:i t (and I stress best) efforts nd endeavours to make sure that the person appears.

Itt a solemn and se1ious undertaking U1at they entered into and I will not have it tteatd lightly by anyone. or wiH Ihave it said tl1at obligation is fulfilled simply by s1gmg a bond and then domg nothmg else. It is a positive obligation that is cast, and which thetal e up. They not fulfil it bsimply shutting their eyes and doing nothing.

• I\gn, I menthatth1sJUgment be circulated to the various peopleand organisations nvolved m.the JUshce and pohce systems, but also intend, if itall possible, to have this Judgment given general publicity so that people who are thinking of entering into bail bonds understand what is involved.

The xpeence of tis Court in the last few months has indicated far too many people absonding wlulst.on bat l, and far too many sureties not bothering to try and take steps to ptevent uch thmgs occumng. No more. This Cou1t will set it's face sternly against such behaviour.

tum to th individual cases of the two sureties before me. I have consiaered each of lhetr eitplanahons serately and given quite separately. In neither case do lsee an ground at al !wh the amount of secwity given, that is the $150 bond in each case, shoul not be forfeited m whole to the Crown. I order, accordingly, that in each case the whole of the $150 bond be forfeited to the Crown.

Haing said that, I recognise a difference in position, in terms of ability to pay between the surety Loisi Veikosoon the one hand and the svrety Polutele Niupalauon th olher.

In th case of the lnlter, I am of the view that he has the ability to pay this bond within a shorter tune then le has said. It may impose some hardship on him l>ut so be it; that is part of lhat undertakmg that he had entered into in January of this year. In his case I direct payment to.be mae. of the $150 in full, by the end of 2 months from today. Payment to be made into this Court, to the Sub-Registrar in this Court, and then to be forfeited to the Crown.

. In th case of e former surety, thal is Mrs Veikosol recognise as have said, some tfference mherab1lty to pay, given her obligations particularly to her family as the only mcome earner. I thmk she may well have over-estimated her ability to pay and lam pepred to allow her 4 months in which to make payment. So the full amount to be paid wlhm 4 months from today. Payments to be made again to the Sub-Registrar of this Court..

Fua v Sifa (and Manu v Taufa)

Supreme Court, Pangai, Ha'apai
Hampton CJ
C. nos. 15/94 & 33/96

14 March 1997

Divorce - adultery - damages - jurisdiction
Magistrates' Courts - damages - adultery - JUTIS

In these 2 cases claims were made in the Magistrates Court at Ha'apai by wives for damages from women who had committed adultery with the respective plaintiffs husbands.

Held, observing that the ensuing judgments were null and void:

1. Claims for damages for adultery are exclusively the preserve of the Supreme Court refer to s.13 Divorce Act. Id have Jurisdiction in such matters.
2. A Magistrate never had and never could have jurisdiction and the orders set aside.
3. The judgments in the two matters were quashed.

Cases considered: Afa v Tali & Sika [1990] Tonga LR 185; Ua\esi v Tukutoa & Ngalu [1974-80] Tonga LR 83

Statutes considered: Divorce Act (and Rules).

Judgment

Whilst on annual circuit in Ha'apai it has come to my attention that the Magistrates' Court here, in the last 3 years or so has been hearing and determining as civil actions, claims made by disaffected wives against other women who are alleged to have committed adultery with the lawfully wedded husbands of the Plaintiffs.

Two such claims have come to my attention in addition to those cases so recently decided (in 1994 and 1996). I have learnt, as well, of a third case in which a summons has been sought from the Magistrates' Court, but a summons has not been issued yet.

I hereby direct that a summons shall not be issued in the Magistrates' Courts in such matters. Claims for damages for adultery are exclusively the preserve of the Supreme Court and that is clear from the provisions of the Divorce Act (Cap.29). In particular I refer to s.13 of that Act which is the only basis for the award of such damages.

It is clear from that section that such a claim for damages (for adultery) can only be made as part of a petition for divorce (on the grounds of adultery) and that the maximum amount of damages which may be claimed from, and awarded against, the co-respondent (the alleged adulterer) for adultery with the husband or the wife (as the case may be) is $1000. For a discussion on the section and on the principles applicable and to be considered by the Supreme Court before any award at all is made see Webster J. in 'Afa v Tali & Sika [1990] Tonga LR 185 and Hill J. in Ualesi v Tukutoa and Ngalu [1874-80] Tonga L.R. 83.

I add that the "court" referred to in s.13 is the Supreme Court - see s.3(1) Divorce Act - so the Supreme Court is the only Court with jurisdiction.

The Divorce Rules 1991 also make these matters clear - see e.g. rules 4(2), 5(1), 15(2)(i), Form 1 (Petition - particularly prayer iii (damages for adultery) - & Notice to Respondent and Co-Respondent) and Form 3 (Decree Nisi - para 3 (damages for adultery).

Having had the 1994 and 1996 cases drawn to my attention I cannot ignore them. In both case judgments in favour of the disaffected wife against the other woman have been given, in the 1994 case for *$500* damages for adultery and in the 1996 case for $1000 damages for adultery.

In each of those cases the judgments are null and void and are, and can be, of no effect. The Magistrate never had, and never could have, jurisdiction in such matters. I am not sure what the status of the "judgments" are i.e. whether they have been paid or not, enforced or not.

There has not been sufficient time to have the 4 persons involved in the two cases brought before me. What I intend doing is to have this Judgment translated into Tongan and a copy of both the Tongan and the English versions served on each of the four persons involved in the following two Magistrates' Court civil actions:-

(a) 15/94 Tupoutu'a Fua (of Pangai) v. Kalonikakala Sifa (of 'Uiha) - judgment 30 June 1994 for $500 damages for adultery and costs $29.

(b) 33/96 Laukau Manu (of Holopeka) v. Pepetua Taufa (of Koulo) - judgment 6 August 1996 for $1000 damages for adultery and costs $21.

As I have said each of those judgments are, in my view, made without jurisdiction, are null and void and are unenforceable. Those judgments are therefore quashed and set aside.

Any one of the four persons involved can make representations (whether in writing or in person) to the Supreme Court, within 28 days of the service of this Judgment on them, as to anything mentioned in this Judgment or arising from the findings that the Magistrates' judgments are null and void and of no effect.

R v Fonokalafi

Supreme Court, Nuku'alofa
Lewis J
Cr 328//96

7 April, 1997

Criminal law - sente11ce -forgery -falsification of accounts - delay
Sentencing -forgery - delay - guilty pleas in trial

The accused pleaded guilty to 18 charges of falsification of accounts.an knowingly .d ealing with forged documents. He pleaded guilty part way through his tnal.

Held:

1. The accused had committed the offences in 1990-91 and they involved $1902.70 of which $1500.00 had been repaid.
2. Cooperation with authorities from an early time will produce a sentencing discount of sometimes up to one third of the head sentence.
3. The accused had no prior convictions; no explanation was forthcoming from the prosecution for the delay in investigation'.
4. Long delay in awaiting trial is a factor effecting the structure of a sentence. Here it caused the sentences (of 2 years imprisonment, concurrent) to be suspended.

Counsel for prosecution Ms Simiki
Counsel for prisoner Mr Niu

Judgment

Latu Fonokalafi you have pleaded to 18 counts of breaches of the Cnmna 1 Off enes Act. The two classes of offending are falsification of accounts and knowingly dealing with forged documents. Two counts were withdrawn by.the Crown_ Prosecuor on technical grounds associated with the number of charges which my e included in one indictment. There will as I understand the position be no furtherac!Jon in respect of those matters.

In the beginning you pleaded Not Guilty. You were given advice by your coun.sel and if I may say so, sensibly elected to plead Guilty to each count on the 4th day of tnal. The evidence called by the prosecution is overwhelmingly strong. Indeed you I a'.11 told implicated yourself in an unchallenged series of admissions to Polic. Not onl did you confess but you made restitution of the greater part of the sums which came mto our hands. The outcome of your trial was inevitably that you would have been found gmlty, from what I am now told.

The Crown case is that you were a civil servant employed in the salaries division of the Ministry of Finance - the Treasury. Your duties required you to check documents known as salary and overtime vouchers. There are some 10 such vouchers involved in this Indictment Your job required you to check the accuracy of the indentity of the employee the appropriate salary and overtime rates for the employee against a record known as the salaries book.

You created fictitious employees, entered them into the system, certified the accurac of the fictitious emplyee's indentity and drew the money yourself. By this method m the years 1990 and 1991 you obtained by false entries and forgery for yourself (for present purposes,) 10 vouchers approved which netted you $1902.70.

You have repaid approximately $1500.00. What you have however caused is the expense inconvenience and difficulty experienced by the witnesses, indeed by all of us who have had to sit through this matter for the four days it has occupied.

I should make it clear that co-operation with the authorities from an early time by those charged will produce a sentencingdiscount of sometim es up to one third of the head sentence.

In sentencing you I take into account that you have no prior record of offending and that you are genuinely sorry for what you have done. No explanation is forthcoming from the proscutingauthorities as towhy it is you were not interview ed by Police and why this roseutin was not got n with since the offending was nearly seven years ago and the investigation was not senously undertaken until 1993.

d ot suggest thatthe delaywas caused by the Counselin chargeof theprosecution Ms. S1m1k.i. The lower court documents were not delivered into this court until April 1996. hereer.the responsibility for the delay rests, people should know that Jong delay m awa11Jngtnal in a factor effecting the structure of sentence. Here an immediate effect is to cause the sentences to be suspended. It would be wrong in my opinion to cause the sentences o be carried into effect knowing that you have now made restitution, your personal circumstances have changed and you have pleaded guilty some nearly seven years since the offences.

This has been a most serious breach of the trust imposed upon you in your work Fonokalafi. You have certainly had plenty of time to await this moment of sentence. I doubt that you will reoffend. I take into account your age your background and the submissions of your counsel when fixing the head sentences.

In respect of each of counts 1 - 10, 12, and 14 to 20 you are sentenced to imprisonment for a period of two years concurrently on each count. The operation of the sentences of imprisonment is suspended for a period of two years on condi tion that you do not re-offend in that period. If you are convicted of any criminal in the next two years rom thisdate you will be brought.here charged with brea ch of your undertald ngand you will serve the two year sentences I have imposed.

:a v Filimoehala

Supreme Court, Nuku'alofa
Hampton CJ
Cr 260/96

9 April 1997

Crirninal law - trial - delays - adjournments
Practice and procedure - delay - criminal trial

The accused was charged with sexual offences. The prosecution sought to adjourn the trial because of the absence of the complainant and other witnesses.

Held, refusing the application for adjournment.

1. The Crown and the police have a duty not only to the Court but also to the people involved in a case (and especially complainants), to maintain contact with those people about the impending trial, advise of trial dates, and issue subpoenae in good time.
2. The pre-trial callover system, otherwise, is a waste of time.
3. To allow an adjournment would result in a further 6 to 7 months delay of trial.

Counsel for prosecution Mr Maiolo
Counsel for accused Mr Kaufusi

Judgment

It is in the interest of everyone in the criminal justice system, that prosecutions proceed as soon as possible. Insofar as this matter it was set down on 29th of October 1996. That means a date for trial was set 5 months ago now and it may be as Mr Maiolo says, and as I accept, that the police were notified of the date. But the Crown and the Police have a duty, not only to the Court but also to the people involved, the witnesses (and complainants especially), to maintain contact with those people, inform them of dates of trial, so that the people can organise themselves and their lives well in advance, so they know when they have to appear in Court. Perhaps it is, that the Crown should look at issuing subpoenas much earlier than they do now.

In this case it appears, that this was not done until 24th of March this year. That means it was only about 3 weeks or so before trial that the request was made to subpoena witnesses. Subpoenas were issued on the 25th of March.

It is simply not good enough at pre-trial callover to say that Crown is ready to proceed, that it has 5 witnesses, all proofed but not yet subpoened. And to tell the Court that the matter will proceed and will need a trial of 3 days.

Again that is a failing in the duty owed to the Court It means that the pre-trial system is, actually, a waste of time.

Having heard through the Registry that there were difficulties about witnesses, I asked that the matter be called on before me today, so that I knew in advance what was going to happen tomorrow. I am told today that of the 5 prosecution witnesses, 3 of them are not available, 2 of them because they are out of the counnj, one of those 2 being the complainant

There is a considerable backlog in this Court, before me somewhere between 6 to 7 months between the setting down for trial and a trial taking place; in Justice Lewis' Court, a greater period than that. I am not going to have the trial process" mucked around and I use those words deliberately in this way.

If the prosecution (that is between the Crown and the Police) cannot get their act together in 5 months than so be it. I am not going to allow further time. That would mean towards the end of this year, before this matter then was set down for trial, with no real assurance in my mind, from what has been said to me today, that the complainant is then going to be available to give evidence anyhow.

So the matter will proceed tomorrow, and I do not think I should make any further comment as to that. But I ask Mr. Maiolo, that you report these remarks back and I, perhaps, should have them typed, so that they can be reported back officially. Because the Crown is only a part of the criminal justice system Mr Maiolo, and the whole system has to be looked at, and this Court will not countenance this sort of performance in the future. I am going to draw the line. So tomorrow, we will see what sort of case you have Mr Maiolo.

R v Tokai

Supreme Court, Nuku'alofa
Hampton CJ
Cr 260/96

9 April, 1997

Criminal law - sentencing -principles - multiple offences
Sentencing - multiple offences - dealt with separately

The prisoner appeared for sentence on a charge which pre-dated an earlier sentencing.

Held:

1. Ifthe offence had been before the previous sentencingcourt the same sentence would have resulted.
2. That matter should guide the present sentencing.

Counsel for prosecution Mr Malolo
Counsel for defence Mr Tonga

Judgment

Notwithstanding Ms. Grigg's disappointment and also my d1sappomtrnent from what I am told by Ms. Grigg, about your perfonnance since the 3r Deeber last ear, I approach the sentencing of you on this charge guided by certain rmc1ples which I believe are applicable. The first one of which is that if this offence, which pre-dates your sentencing of 3rd December last year, had been before the sentencing court in Decemr. then I am sure that the same sentence of probation with tenns would have been applied

Q

Itis not as if this is offending by you committed subsequent to the sentencing of 3rd December. So I am guided by that principle and I donot intend to inteere wit? the 2 year period of probation imposed on 3rd Decembe 1996. But I tel you this: t?at if you keep abusing the probation I will expect the probahon officer to bnng you stra1gt back hre, and you to be sentenced on this charge, and the others last year, and you will go to Jail. And you will go to jail for a long time, do you understand that?

(The judge then considered matters of detail in relation to the sentences and to compensation.)

Spoutz v Police

Supreme Court, Nuku'alofa
Hampton CJ
Cr App 323/97

11 April, 1997

Criminal law - appeal - importing cocaine - increased sentence
Drug offending - sentencing - principles

The appellant pleaded guilty in the Magistrates Court to importing into Tonga and possessing cocaine. He was sentenced to a total of one month's Imprison ment. He appealed against that sentence.

Held

1. This was the first time the Supreme Court had dealt with a cocaine offence.
2. The penalties for drug offending (in the Drugs and Poisons Act)need looking at by the Legislature and the maximum line in particular might be seen as a derisory amount.
3. The appellant, a United States of America citizen was a mature businessman, experienced in the world. He was not a person with the impetuosity and experimentation of youth.
4. Tonga is not a state where people can come and go with impunity with drugs.
5. Forfirstoffenders the clang of the prison doors, the realisation for the first time of the loss of freedoms that comes with imprisonment, is a salutary and sobering experience and the length of the sentence of imprisonment is not all that important.
6. But there were other factors here. There was no error of principle in a sentence of imprisonment here. Nor was one month manifestly, or clearly, excessive. Indeed it was a very very lenient one and without interferingin any way with the important principle, that a sentencer is given a discretion which includes the application of mercy and leniency when the circumstances call for it, the sentence was so light it was manifestly wrong.
7. One of the risks of appeaJing against a sentence (and appellants and their advisers should have regard to it) is that the sentence is open for review in the appellate court. A court can, and will, in appropriate circumstances impose a greater penalty. The courts will move to deter such offending.
8. Sentence increased to 6 months imprisonmenl, concurrent, on each charge.

NOTE -The appellant successfully appealed to the Court of Appeal and the report of that judgme nt immediately follows).

Counsel for appellant Mr Tu'utafaiva
Counsel for respondent Mr Cauchi

Judgment

This case is important in various respects, but primarily it's importance attaches to the fact that, as I am told, this is the first time that this Court has had before it a case involving the prohibited drug cocaine.

Cocaine is regarded the world around as one of the moreserious of illegal, unlawful, drugs or substances, and is frowned on by the authorities in various countries, as Mr Cauchi for the Crown has put it to me today.

In many common law jurisdictions, there are gradations, there is a scale of seriousness of various types of drugs, or the seriousness with which particular types of drugs are regarded

In the Kingdom, andnodoubt reflecting the factthat historicall y drugs have not been a difficulty, a problem, in the Criminal ju stice area, there is no such gradation - unfortunately, and I stress the word "unfortunately". It is something that perhaps the legislature should give attention to. Here in the Kingdom, there is simply a blanket provision in relation to drugs of whatever nature and character.

There is a need, in any event, for the legislature to look at the punishment provision which is contained in the Drugs and Poisons Act (Cap.79) section 43 sub-section 2. It would seem that sub-section has not been looked at for the last 22 or so years; and again there was force in what Mr Cauchi said as to the maximum penalties and in particular as to the monetary penalty;the maximum fine that is able to be imposed. $2,000 ?nly might be seen to be a derisory amount in some circumstances. Certainly it is too small in my view.

In those common law jurisdiction s where gradations are made as to the state of seriousness of drugs, cocaine is ranked as one of the most serious. Itis known, in various jurisdicti ons, as a "Class A category drug". In somejurisdiction s dealing with trafficking, importing, such a drug carries with it life imprisonment.

Here the penalty provisions stop at a maximum of 10 years imprisonment. That is still a substantial imprisonment and shows something of the seriousness with which the legislature regards such offending.

I am making these remarks to put what!am going totum to soon into proper context, in my view. Also to put it into proper context, I note what Mr Cauchi has said about a presumption in some states or countries of possession of *5* grams or more of cocaine, as being seen then as being a quantity in possession for the purpose of supply to others.

I add to thatthis. That in the common lawjuri sdiction most known to me, that is New Zealand, the presumptive limit for cocaine is much lower. You are deemed to be in possession of cocaineforsupply if you have possession of half a gram or more of cocaine.

Here in these proceedings, this appeal before me, I am told that the quantity of cocaine in question was 1.56 grams, one and a half grams. A distinctly useable, a distinctly significant, quantity. I note what has been said on behalf of the appellant, that perhaps a fourth of thequantity which hesays he purchased in Fiji was used, sohe brought the other 3/4 with him or the other 3/4 were in his possession when he arrived in Tonga. That only a quarter had been used of the amount purchased, indicates that a considerable other useable quantity was left to him.

This is an appeal against the sentences of imprisonment of one month (possession of cocaine) and two weeks concurrent (importation of cocaine) imposed on the appellant in the Magistrates' Court on 9 April 1997.

The appellant arrived in the Kingdom on the 5th of April 1997. He is a citizen of the United States of America. He is *45* years of age. He is a businessman. Sohe is a man of mature years, and a man, it would seem, with experience in the world. His position is to be contrasted, as I put it to counsel in the course of hearing submissions, with someone in their teenage or early twenties who, with all the impetuosity and the experimentation of youth, may well involve themselves in a fool-hardy way in involvement with drugs. That is not the case with this appellant.

While the appellant was in Fiji (I am told as part of a wedding celebration for friends who had travelled alsotoFiji from the United States, as I understand, it and who were then to travel together with the appellant after the weddingtoTonga, and to holiday for a time, alltogether in Vava'u), at this wedding celebration in Fiji, the appellant was offered and purchased a quantity of cocaine. He says he was somewhat intoxicated. Whatever, it indicates something about him, the fact that at age 45, he is prepared to enter into such transactions and purchase what he knew to be an unlawful substance. He then used it, he says for his own purposes.

It is I suggest somewhat naive to submit to the Court below and to this Court that having purchased a significant quantity of cocaine, havin outlayed money to do so, and then used some of it within a few hours, that when it came to travel from Fiji to Tonga, he had completely forgotten about the cocaine in his trouser pocket.

On arrival at Fua'amotu Airport in Tonga, it would seem from what I am told, that the appellant by his own actions drew some attention to himself. A drug-dog sniffed at him, the cocaine was located, and he then admitted to the authorities his possession and the circumstances in which he said he came into possession of the drug.

If there is any view abroad that Tonga is an easy mark, that drugs can come easily in and out of Tonga, then this incident would show that is not the case. It is not as simple as some might think - that this is a simple country in the middle of the Pacific into which people can come and go with impunity and take substances through with impunity.

The authorities (and the Court in it's role will back those authorities) have set their face against the importation (or indeed the exportation, the use of Tonga as a transitting station) of drugs into this Kingdom. The fact that this is the first occasion in which a prosecution has been taken in Tonga for cocaine possession, might be seen as an indication of the success of the authorities in trying toprevent serious and "hard' drugs, as they are sometimes described, from coming into the Kingdom.

This appellant was treated more seriously on the possession charge than on the importing charge by the Magistrate in the Court below. I can see and understand why the Magistrate may have dealt with it in that way. He in effect accepted that the appeallant had not brought the drug in as a commercial or trafficking operation. Accepted that this was drugs in his own personal possession. So that the possession was the more seriously regarded by the Magistrate, rather than the importing (and on the possession charge, leaving aside the fine of $600, one month's imprisonment was imposed, and on the importing charge a concurrent 2 weeks imprisonment was imposed).

It was clear and deliberate possession and that was, in reality, the substantive offence which the Magistrate dealt with. The appellant was arrested on the 5th of April. He spent the weekend in custody. He says now, he bemoans, that he does not like the experience of life behind bars. Two days is not life behind bars, but it is enough to give one a taste, I imagine, of what life behind bars might be like.

There is something to be said for first offenders, that the clang of the prison doors behind that first offender when he first goes tojail, and realises the loss of freedoms ihat comes with the clangof the doors, is a salutary and sobering experience. So that, it is said, the length of the sentence of imprisonment is not necessarily all that important for a first offender, because it is the effect of imprisonment for the first time, that has the real sting.

But there are other factors to be weighed in this particular case. First, this is an appeal. It is an appeal against the sentence of imprisonment Given the drug involved, given the circumstances involved, given the quantity involved, I am not persuaded that there was anything wrong in principle with a sentence of imprisonment as imposed by the Magistrate. So there was no error of principle in my view.

Theother general ground of appeal in relation to appeals against sentence is whether the sentencewas manifestly excessive, clearly excessive. Can one month's imprisonment be said to be manifestly excessive? The answer I give is "no'.

MrTu'utafaiva valiantly argues the personal circumstances of this man and says that they are special enough to make a month's imprisonment execessive. And he said, in the course of making submissions, that in any othercircumstances, the sentence might be seen as a lenient one. To some extent the prosecution is of the same mind. They describe the sentence as being a quite lenient sentence, and suggest it is one that is so lenient that in fact it needs to be corrected.

Far from being manifestly excessive, itis indeed a very, very lenient sentence. And without interfering in any way with the principle (which is important - the principle that any sentencing officer, whether Magistrate or Judge, is given a discretion and as part of that discretion, there is an ele!Jlent of application of mercy and leniency when the circumstance s call for it) so without interfering in any way with that principle, I have reached the view that this sentence is so light, that it is manifestly wrong.

One of the risks of appealing against a sentence (and appellants should have regard to this, and their counsel should have regard to this) is that the sentence is open for review by the appellate court. And a court can, and in appropriate circumstances will, impose a greater penalty. Because of the circumstances here (i.e. the bringing into the Kingdom of cocaine in a small but still useable amount, by a mature man who knows full well what he does, and the affects of what he does) a sentence that clearly marks out to the world that Tonga will not countenance such offending, the Courts will move to deter such offending, a sentence of far more than one month's imprisonment is required.

I have reached the view that each of the sentences of imprisonment imposed should be quashed and in substitution for those sentences of imprisonment.

1. On the charge of possession, a sentence of imprisonment for a term of 6 months should be imposed.
2. So far as the importation of cocaine is concerned, a sentence of imprisonment for a term of 6 months imposed.
3. I have decided that the terms should be concurrent but the appellant should consider himself lucky as to that.
4. A total of 6 month'simprisonment on the charges is the result.

I make no other orders. It is over to the appropriate authorities in the Kingdom as to what happens to this man, as to whether he serves all or any part of his sentence here, or whether he is deported and serves all or any part of his sentence in the United States of America.

Those that come as tourists from America or any other part of the world can be sure tat this is not soft option; somewhere in the Pacific where you can do what ever you hke. And tht 1s the message that this Court on this appeal is giving.

I add this - pursuant to s 43(2) of the Act this Court Orders that the cocaine seized be forfeited to the Crown and be destroyed.

Spoutz v Police (No.2)

Court of Appeal
Morling, Burchett & Tompkins JJ
App 7/97

16 & 20 June 1997

Criminal law - appeal - sentence - increase - no cross appeal - double jeopardy
Statutory interpretation - construction - abolition of common law rights

The facts are set out in the headnote of the case in the Court below, reported above. The appellant applied for leave to appeal to the Court of Appeal on a point of law against the increased sentence on the basis the Supreme Court had no jurisdiction to increase the sentence, in the absence of a Crown cross - appeal.

Held:

1. The sentence imposed in the Supreme Court should be quasheo and the sentences in the Magistrates' Court restored.
2. Although the word •amend' in s.80(1) Magistrates' Courts Act in its ordinary meaning and taken on its own would give a power to increase as well as decrease a sentence, yet s.80 have to be looked at in the light of s 75(1) the Court is hearing the appeal brought by the person sentenced.
3. S.80(1) should not be interpreted to give the Supreme Court jurisdiction to increase a sentence in theabsence of clear language conferring thatjurisdiction, that principle involving the rule against doublejeopardy (a common law rule).
4. In the absence of such express statutory power, to increase a sentence on an appeal by the person sentenced offends the rule against double jeopardy. Itis a well-established rule of construction that a statute should not be taken as abolishing ormodifying fundamental common law rights unless it uses words that point clearly and unambiguously to that conclusion. Such a power cannot be read into s.80(1) as it now is.
5. Even where there is express power it should not be exercised without giving notice to the appellant to enable him to decide whether to withdraw the appeal or to continue with the opportunity to make further submissions on why the sentence should not be increased. To increase the sentence without notice is to deny the appellant an opportunity to be adequately and fairly heard.
6. There is a need for firmly deterrent sentences in cases of importation, supply and possession of hard drugs. This decision is not intended in any way to detract from the Chief Justice's clear warning.

Cases considered
E. v Tait (1979) 24 ALR 473
Whittaker v B (1928) 41 CLR 230
Thompson v Mastertouch TV (1978) 19 ALR .547

Statutes considered
Magistrates' Courts Act ss74(2), 80(1), 74(1), 75(1), 81
Court of Appeal Act s.17(3)
(N.Z) Summary Proceedings Act 1957 s.121

Counsel for appellant — Mr Niu
Counsel for respondent — Ms Tapueluelu

Judgment

The appellant has applied forleave to appeal on a question oflaw, pursuant tos74(2) of the Magistrates' Court Act (Cap 11) ("the Act") against the judgment of the Chief Justice delivered on 11 April 1997, whereby concurrent sentences of one month's imprisonment for possession of cocaine, and two weeks' imprisonment for importation of cocaine, were each quashed and increased to six months imprisonment, also concurrent.

At the conclusion of the hearing we gave judgment allowing the appeal, quashing the sentences imposed in the Supreme Court, and restoring the senter:ices imposed in the Magistrates' Court. Thejudgment affirmed the order made by the Chief Justice that the cocaine be forfeited. These are the reasons for that judgment.

The sequence of events

The appellant, aged45, is a citizen of the United States. He entered Tonga on 5April 1997 via Fua'amotuairport. He was found to have 1.56grams of cocaine in his possession. He said that he had purchased it in Fiji, and that it was for his own use.

On 9 April 1997, he pleaded guilty in the Magistrates ' Court to one charge of possession of cocaine, fonvhich hewas sentenced to one month's imprisonment and fined $600, and to one charge of importation of cocaine, for which he was sentenced to two weeks' imprisonment to be served concurrently.

He appealed against the sentence. The appeal was heard before the Chief Justice onll April 1997. The Crown did not appeal. No notice was given by the Court that a more severe sentence was being considered. However, in deliveringjudgment, the sentences of imprisonment imposed in the Magistrates' Cou were quasd. Sentences of six months imprisonment were imposed on each charge, to be served concurrently.

He applied to the Supreme Court for leave to appeal to this court on a question of law. On 3 May 1997 that application was refused by the Chief Justice, who held that there was no question of law to be taken on appeal, as s.80(1) of the Act is wide enough to authorise the Supreme Court to increase the sentence imposed by the Magistrate. On 20 May 1997 the appellant applied to this Court for leave to appeal on the same question on law.

The question of law

There are two questions of law for determination. First, whether, on an appeal against sentence imposed in the Magistrates'Court, brought by theperson sentenced, and in the absence of a Crown appeal, the Supreme Court has juri sdiction to quash that sentence and impose a more severe sentence.

Secondly, whether, if the Supreme Court does havejurisdiction, is the Court, as a matter of law, required not to increase the sentence on an appeal by the person sentenced, without giving notice to the appellant of its intention to consider such an increase?

The answer to the firstquestion turnson the proper interpretation of s.80(1) Act, read in the context of Part VII, relating to appeals. Itprovides:

> "The Supreme Court may adjourn the hearin g of the appeal and may upon the hearing thereof affirm reverse or amend the decision of the magistrate, or may remitthe case with the opinion of the Supreme Court thereon to the magistrate, or may make such other order (including any order as to the payment of costs by either party) as it thinksjust and may by itsorder exercise any power which the magistrate may have exercised."

Put shortly, the issue is whether, read in context, the provision in the subsection

whereby the. Supreme Court may "affirm reverse or amend" the sentence the subject of the appeal, gtves the Supreme Court the power to impose a sentence moresevere than the sentence imposed i the Magistrates' Court on an appeal by the person sentenced.

Al o elevant is s.74(1) of the Magistrates' Courts Act. It provides inter alia, that in every cnmmal case, any party, that is either the accused or the Crown, shall have a right of appeal to the Supreme Court from the sentence of a magistrale. Thus an accused can appeal on the ground that a sentence is too severe,or the Crown can appeal on the ground that a sentence is too lenient.

. Howver, s74(1) ds not relate nly tocriminal appeals. Itgives a right of appeal m every c1v1l case and m every cnmmal case triable summarily . The power of the Supre'.11e.Court to determine appeals, conferred by s.80(1), therefore appiies to both civil ad cnmmal appeals. The words in question should be interpreted in the context of this wide power.

The submissions on the appeal

.Mr Niu submitted tha an appeI against sentence is either an appeal by the person convicted that the sentence imposed m the Magistrates' Court is too severe, or an appeal by te Crow that the sentence imposed is not severe enough. He drew attention to the requirement imposed by s.75(1) of the Act, requiring the appellant to give notice of the appeal within ten days, with the general grounds of the appeal.

He also relied, by way of comparison, on s.17(3) of the Court of Appeal Act (Cap 9). It provides:

> "?n an appeal against sentence, the Court of A ppeal shall, if they think that a dfferent sentence should have been passed, quash the sentence passed at the tnal and pass such other sentence warranted in law by the verdict *(whether more or lesssevere)* in substitution therefore as they think ought tohave been assed, nd m any other case shall dismiss the appeal." (Emphasis added)

Mr t u submitted that th xpress power given to the Court of Appeal to impose a sent nce ore or less severe ts to be contrasted to the provisions in s.80(1) of the Magistrates Courts Act, where no such express power is given. If the legislature intended the Suprem Court to have the power to increase, he submitted, it would have expressed that power m the same way as it did in s.17(3) of the Court of Appeal Act.

He further relied on s.81of the Magistrates' Courts Act that requires that every appal "shall be decided on its m:ri ts nly". Ithas the effect, he submitted, that an appeal against sentene can only be decided m accordance with the merits of that appeal on the grounds stated m support, so that where theappeal is by the person sentenced, the Supreme Court can only confirm the sentence, or impose a lesser sentence.

1so . . 1.e further submitted that in the absence of an express provision in the section m?1ctmg that a m re evere sentence may be imposed, if there is such a power, the pnnc1ples of natural1usllce are to be followed, requiring notice tobe given to theappellant that a more severe sentence may be imposed.

Miss Tapueluelu submitted that, on their ordinary meaning, the words "affirm everse oramend" mean that the Court may either not change, or reduce, or change, that s mak:any change, to the sentence. On that reading of the words,the possibility of mcreasmg a sentence is included.

urther, she su?mitted, and this is confirmed in the judgment, that the Crown submitted at the heanng that the sentence was lenient and should be corrected. Jn that

event, it is difficult to understand why the Crown did not appeal on the ground that the sentence was too lenient, seeking a more severe sentence, as it undoubtedly could have done.

Conclusion

The ordinary meaning of the verb "to amend", taken on its own, gives a power to increase as well as decrease the sentence. The Shorter Oxford English Dictionary, volume 1 page 58 gives one of the meanings of the verb "to amend" as "to free from faults, correct, ... to recify". In that sense, the Supreme Court is rectifying or correcting a sentence it considers to be inappropriate. Thus, in the event of a Crown appeal, it is the power to amend that enables the Court to increase the sentence.

But when considering the power to amend on an appeal by a person sentenced, there are other considerations. When the Supreme Court comes to exercise its power under s 80(1), it does so ... "upon the hearing of [the appeal] ...", that is the appeal brought by the person sentenced in respect of which he has given the grounds of the appeal pursuant to s 75(1), It is not hearing any other appeal. Section 80(1) should not be interpreted to give the upreme Court juri sdiction to increase the sentence in the absence of clear language conferring that juri sdiction. Such clear language is to be found in s 13(3) of the Court of Appeal Act, and, to give another example from New Zealand, in s 121 of the Summary Proceedings Act 1957, which gives the High Court power on an appeal against sentence, to "Quash the sentence and ... pass such other sentence warranted in law (whether more or less severe) in substitution thereof ..."

Even where there is express power, it should not be exercised without giving notice to the appellant to enable him to decide whether to withdraw the appeal, or to continue, with the opportunity to make further submissions on why the sentence should not be increased. To increase the sentence without notice is to deny the appellant an opportunity to be adequately and fairly heard. In the New Zealand text, Adams on Criminal Law, Ch 3.6.15, the authors say:

> "A sentence which is manifestly inadequate may be increased on a defence appeal. The Courts generally intimate that the sentence might be increased and give the offender the opportunity to withdraw the appeal instead."

There are good reasons for concluding that the power can only be exercised if expressly conferred. In accordance with the common law principles governing the administration of justi ce, the Crown has no right to appeal against an acquittal, nor against sentence, in the absence of express legislative authority. In Australia, this principle has been held to involve the rule against double jeopardy. Thus is the context of sentence:: "The freedom beyond the sentence imposed is, for the second time, in jeopardy on a Crown appeal against sentence. It was first in jeopardy before the sentencing court: *Reg* 11 Tait (1979) 24 ALR 473 at 476-477. Or, as it was put by Isaacs) in *Whittaker* 11 *The King* (1928) 41 CLR 230 at 248, a prosecution appeal puts in jeopardy "the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal."

The common law rule, of course, can be overridden by express statutory power, as it has been in many jurisdicti ons, including Tonga, in the case of Crown appeals against sentence. Similarly, the right to increase a sentence on an appeal by the person sentenced can be given by express statutory power, as it has been in the examples we have given. But in the absence of such express power, to increase a sentence on an appeal by the person sentenced offends the rule against double jeopardy. It is a well established rule of

construction that a statute should not be taken as abolishing or mod'f . f d common law rights unless it uses words h . 'ymg un amental conclusion: *Thompson* 11 *Mastertouch TV* 1 nd unambiguously to that power cannot be read into s 80(1) as it now is. 7, Deane J at 556. Such a

The answer to the first question of law is "no" Th. k . the second question. But it will be appare t f . hisma es it unecessary to answer necessary, the answer would have been n rom w at we have said that h d "t be "yes". . a I en

We add this further observ f W about the need for firmly dete = - s degree Ith the coments by the Chief Justice possession of hard . en ences m cases of importation, supply, and l I k drugs. As he said, the sentence in such cases should be one which • eer Y mart out to he world that Tonga will not countenance such offending • O CISIOn m is case is not intended in any way to detract from this clear wami -

Spoutz v Taufaeteau Tu'utafaiva

Supreme Court, Nuku'alofa
Hampton CJ
Cr App 323//97

30 May, 1997

Costs .Jaw practitioners ·solicitor clie11t costs ·taxation
Law practitioners - taxation - solicitor client costs

The.applicant applied successfully to tait a bill of costs received by him from the respondent legal practitioners.

Held:

1. The court had statutory jurisdiction to tait costs (s 26 Law Practitioners Act) and the procedures, powers, criteria and other matters contained in Order 29 Supreme Court Rules 1991 then come into play.
2. It is healthily right and proper that the Court does have jurisdiction and power in such matters. It is both appropriate and necessary.
3. A court has to assess how much time has been reasonably and necessarily spent on the case and allow a fair hourly rate, depending on the compleitity of the case and the efficiency of its conduct.
4. Here two counsel on occasions had charged their full time for the same attendance when the attention of both to the particular aspect was neither necessary nor reasonable nor eitpressly or impliedly approved by the client. Nor was there any justification for inflating the hourly rate for wo k done "after hours". Nor is it appropriate and reasonable to charge a chent for dispensing sympathy and "hand holding".
5. As a final check the court considered and weighed whether the total figure allowed fairly reflected the compleitity of the matter.

Judgment

This Court has clear statutory juri sdiction to tait costs (refer tos.26 Law Practitioners Act 1989) and the procedures, powers, criteria and other matters contained in 0.29 Supreme Court Rules 1991 come into play (refer particu larly to 0.29 r.4(2)).

Far from being some "bad precedent" as put tome by Mrs.J'aufaeteau, it is healthily right and proper that the Court does have juri sdiction and power in such matters. It is both appropriate and necessary.

The applicant's objections were put in written and in oral form and I do not intend repeating them here. The bill of costs in question was in detailed form sufficient to allow of taitation (under 0.29) and Mrs Taufaeteau spoke to it, to the objections and canvassed other matters.

I have in mind and apply where appropriate the matters spelt out in 0.29 r.4(2) and in particular.-

> "(ii) There shall be allowed all such costs, charges and eitpenses as were incl' ed with the eitpress or implied approval of the client.
>
> (iii) Unless there are eitceptional circumstances there shall not be allowed:
>
> (a) any costs incurred or increased as a result of negligence, mistake or over caution;
>
> (b) any unusual eitpense, unless the lawyer obtained the eitpress approval of his client to such eitpense before it was incurred."

I also have in mind and apply here, where appropriate, the comments of Martin CJ in Sanft v Johnson (1991) Tonga LR. 1(L7/81 & 14188) that a "Court has to assess how much time has been reasonably and necessarily spent on the case (which may be considerably less than th time actually spent) and allow a fair hourly rate for that time. An additional amount may be allowed if the case is exceptiona lly compleit or it has been conducted with unusual efficiency.• (I interpolate - in my judgment neither of those last 2 factors .complexity, unusual efficiency - applied here). ...." It "(an hourly rate· as set in PD 2/92$_1$ I add) also assumes that he will conduct the case efficiently and not waste time on irrelevant matters. A taiting officer knows from his own experience in practice what work was requir<'d to be done, and how long it should have taken to do it, He will disallow any time claimed in eitcess of this ..... . As a final check after taxation, it is necessary to consider whether the total figure allowed fairly reflects the complexity of the action.•

The costs in question relate to receiving instructions in an importing of drngs prosecution in the Magistrates' Courts, obtaining bail, deciding on plea and making plea in mitigation on a plea of guilty, deciding on whether to appeal against sentence. doing so, obtaining bail pending appeal, considering a cross appeal filed against the grant of bail, arguing the appeal in the Supreme Court, together with all the necessary matters relating to those events. I do not in any way try to understate (or overstate) the matter and what was involved in it. and I will return to this summary when conduc ting the "final check".

The costs claimed in the bill of costs come to a total of $5160-50 for fees and a further $25 for disbursements. The disbursements are not challenged.

Some general remarks on the fee breakdown first. There has been, in my jud gment, a degree of double charging in effect at various stages of the services rendered - both

Mrs Taufaeteau and MrTu'utafaivachargingtheir full time forthe sameattendance, when the attention of both to the particular aspect was neither necessary nor rea onabl or approved by the client (expressly or impliedly). Jn addition.given the bass fr f 1xng hourly rates (seee.g. Martin CJinthe Sanftcase at para 5) there 1s not hereanyJUSllfica1on for inflating the hourly rate forwork done "after hours" whetheron Sunday or late atmght or whenever. The matters of overheads and a margin for a fair return on the lawyer's learning and expertise remain the same.

There are some 23 individual amounts listed in the bill of costs and I will deal with some of them in this ruling (and refer to them by the number in which they occur in the bill): (I mention the matters objected to):-

1. claimed $450- includes a component for "after hours service (i.e. "about 5 hours" would equal $90 per hour as opposed to Mrs Taufaeteau's own accepted hourly rate of $75) and, in my view, excessive time claimed. Fee allowed $300-00

4&5. a claimed $525 total and some 7 hours for a Magistrates Court appearance to obtain bail and arrange sureties - even allowing for the difficulties explained by Mrs Taufaeteau, an overcharging in my view - and it is not appropriate and reasonable to charge a client for dispensing sympathy and "hand holding" in the way as put to me by Mrs Taufateau. Fee allowed $225-00

8. Iaccept time and fee as reasonable and appropriate in the circumstances.

9&10. claimed a total of $350 (2 lawyers for 2 hours a piece) to draft a notice of appeal i.e.a printed standard form with gaps to be completed. Iwould allow 1person a generous 112 an hour. Fee allowed $37-50

11. a claimed $500 for seeing the applicant at Central Police Station and not at Prison, as claimed, to get instructions to appeal and sign the appeal notice - 5 hours claimed at Mr Tu'utafa.iva's own accepted hourly rate of $100. A simple and relatively straight forward task, although Iaccept advice to the client would be appropriate and some time should be spent on that Fee allowed $100-00

12. Iaccept.

13&14. a claimed total of $350 and 2 lawyers for 2 hours apiece to goahead and file an appeal (why not a clerk?), receive and consider the cross appeal re bail (1 page of standard form) advise client and prepare for an appeal hearing I would allow one lawyer for a total of 2 hours - but given the tasks, 1of the hours at the lesser rate. Fee allowed $175-00

15&16. a claimed total of $1050 and 2 lawyers for a full court day to argue an appeal against sentence. That matter, (before me) took a short while only, but allowing waiting time counsel would have been occupied, reasonably, for a half day. Iallow Icounsel, at the higher (senior) rate for that 1/2 day. Fee allowed $300-00

17, 18&19 a claimed $575 and some 6 hours (although the fees and hours do not match in any way) to receive instructions and draft, write and deliver a 112 page letter to Minister of Police re deportation. Iallow 1hour, at the lesser rate - the letter although signed by Mr Tu'utafaiva, seems to have been prepared and delivered by Mrs Taufaeteau. Fee allowed $75-00

21&22 a claimed $450 for what is shown in the bill as only 2 hours (with an "after hours" component) for receiving and considering a 1 112 page letter from Minister of Police and advising of the client on it, by telephone Iallow 1hour (generous, Ibelieve) at the lesser rate. Fee allowed $75-00

23. a claimed $350 i.e. 2 counsel for 2 hours apiece to travel to prison to discuss the client's concerns with him - including his concern as to his lawyers' performance. Iallow Ilawyer for 2 hours (given travelling time) at the higher rate. Fee allowed $200-00

The total amount to be deducted from the total fee of $5160-50 claimed is $3187-50 leaving a balance fee which Iallow at $1973-00 which, with the accepted disbursements of $25-00 comes to a total of $1998-00.

Idirect that the Registrar issue a Certificate of Taxation in the prescribed form (No.14 SCR) accordingly.

Iadd that, before leaving the matter and as a final check, Ihave considered and weighed whether the total figure allowed fairly reflects the complexity of this matter. I consider it does.

R v Heleta

Supreme Court, Nuku'alofa
Lewis J
Cr 50/97

15 April, 1997

Criminal law - sentencing - suspended sentence - subsequent offending
Sentencing - principles - youth - suspended sentence - subsequent offending

The defendant was given a sentence of 9 months imprisonment suspended for 2 years, in the Supreme Court. Subsequently he was convicted and sentenced to 3 months imprisonment in the Magistrates Court. On application to lift the suspension.

Held:

1. The defendant, aged 16, would be serving the sentence of imprisonment in an adult environment with inmates convicted of far more serious crimes. What he will learn is likely to plague the community for years to come.
2. Almost universally prisons separate children from adults for good reason.
3. The court had no alternative however having regard to the provisions of s.24(3)(c). Criminal Offences Act, but to lift the suspension and direct that the 9 months be served cumulative upon the 3 months.

Statutes considered Criminal Offences Act .24

Counsel for prosecution Ms Bloomfield
Defendant in person

Judgment

Katalisi Heleta aged 16 years (born 23 February 1981) was convicted and sentenced on 9 December 1996 of five counts of Housebreaking and theft. He was sentenced to 9 months imprisonment on each count concurrently. The operation of the sentence was suspended on his giving an undertaking to not re-offend within two years of sentence. In addition he was ordered to undertake 100 hours of Community service to be completed on or before 31 March 1997.

He is one of 5 boys charged with similar offences in relation to a number of premises. He played a principal role in the offending. The Crown alleged, and Katalisi admitted, relevant prior offending by Katalisi. Those offences were taken into account in the fixing of sentences, together with his youth and other factors personal to Katalisi which were obtained from a social enquiry report.

Katalisi admits that on 11 February 1997 he was convicted before a Magistrate of the offences of running from Police and escaping custody and sentenced on each count to 3 months imprisonment concurrently. He was further subject to a charge of housebreaking and theft which at last report was part heard before a Magistrate. A certificate of convictions is before this court.

I have obtained a progress Report from the probation officer who said among other significant things:

> "Katalisi's community work had begun well and his supervisor was pleased with his attendance and standard of work. He completed 21 hours before he was arrested."

In a further Report the probation officer informed the Court that Katalisi had completed 21 hours of the 100 hours imposed on him by the Court by the 31 March, 1997. Today the position I am told that he has been in custody since then and no further community service has been done.

It must be remembered that Katalisi is a very young person (in the context of the Criminal Justice system). The probation officer remarks:

> "Katalisi seems to have very limited ideas about right and wrong. He seems to need very close supervision and guidance for his own sake ahd to protect the property of others. It is unfortunate that he was not able continue his Community Service as he may have developed some maturity and self esteem by achieving success in this."

It is to be remembered that if sentences imposed upon Katalisi are carried into effect as a result of today's Orders, he will be serving the sentences in an adult environment where there are inmates convicted of far more serious crimes. Katalisi will spend time with recidivists, child molesters and competent teachers of crime all of whom will be, I am sure, interested in the arrival in their midst of Katalisi.

It should be remembered by all involved in the justice system that prison work practices, imposed on adults, will be imposed upon Katalisi. If he is shown leniency in the exercise of some discretion to allow for his tender years, which the prison authorities see themselves as having, such leniency will be properly resented by adult inmates, such resentment generating in turn its own sanctions against him.

Notions of the separation of Juvenile offenders from the adult criminal popu lation are not new. Almost universally prison s separate children from adults with good reason. I express my concern that Katalisi should be sent to prison where any hope of his obtaining close supervision and guidance of the kind referred to by the probation officer is non existent. What he will learn is likely to plague the community here for years to come.

Having said those things it is now necessary to consider the course to take. First it should be noted that the reference to suspension of sentence in the Criminal Offences Act appear at s.24(3):-

> "3. (a) It shall be lawful for the Court when imposing a sentence of imprisonment to suspend the whole or part of such sentence for any period up to 3 years.
> (b) Such sentence will be conditional on the offender not being convicted of an offence punishable by imprisonment during the period of suspension.
> (c) In the event of the offender being convicted of an offence punishable by imprisonment during the period of suspension he will thereupon he sentenced to serve the term of the suspended sentence in addition to the

punishment imposed for such subsequent offence.

I find that Katalisi Heleta has been found guilty of offences punishable by imprisonment during the period of suspension imposed upon him by this court on 9 Decmeber 1996. Accordingly this court has no alternative having regard to the provisions of the Criminal Offences Act s.24(3)(c). Therefore the sentences of 9 months imprisonment for the offences of Housebreaking and theft imposed in this Court on 9 December 1996 are to commence at the conclusion of the sentences imposed upon him by the Magistrate.

As a matter of practice I would suggest to the prosecution that matters in which a suspended sentence is about to be called up and application made for the lifting of the suspension, all matters connected with the application should be referred to the court where the suspended sentence was first imposed.

Lonitenisi v Tu'i'onetoa

Supreme Court, Neiafu, Vava'u
Hampton CJ
App 709/95

1 May, 1997

Animals - trespass by - killing of - duties owner
Pounds & Animals Act - obligation 11S - owner and finder

This was an appeal against a judgment in the Magistrates' Court ordering the appellant to pay to the respondents one half the value of their pig which the appellant trapped on his allotment.

Held:

1. The Pounds and Animals Act was important and, although not cited, supported the Magistrate's view.
2. An owner of animals has a duty to fence and properly secure them.
3. An owner of a plantation has a duty to fully fence and secure his crops, particularly where, as here, the appellant knew destruction of his crops in the past by pigs.
4. A person in the appellant's position does not have the right to kill the trespassing animal. His duty is to seize it and turn it into the nearest pound; and then it is for the police (supervisors, of pounds) to take steps under the Act. The appellant can recover compensation for damage done by the animal.
5. So there are proper procedures and remedies. The Magistrate was right to find fault on both sides.
6. Appeal dismissed.

Statutes considered Pounds & Animals Act

Counsel for appellant Mr Paasi
Counsel for respondent Mr Piukala

Judgment

On 25th July 1995 in Magistrates Court in Neiafu, Magistrate Pifeleti gave a judgment in favour of the respondents in this Court, the plaintiff's in the court below for $325. That judgment for $325 was on the claim for $750 for the loss of a pig, a sow and 10 unborn piglets the sow belonging to the respondents and having been killed by the appellant on the 5th June 1995. I do not intend to spend a lot of time on this and I do not intend, as Mr. Paasi has suggested to me, that I should lay down some high sounding precedent for all citizens and in future, what to do about pigs.

I deal with the matter on the simple basis that it has not been shown to me, in submissions, that the Magistrate in the court below was wrong. It is not a matter with constitutional importance, or indeed touching on any aspect of the Constitution, as the appellant claimed.

No authorities were cited to me and apart from a provision in the Criminal Offences Act, in effect no legislation pointed to in submissions. But it seems to me that the Pounds and Animals Act (Cap 147) is of importance in this area. Perhaps it is little known and used, but it does support the view that the Magistrate came to.

I do not intend to review the facts. The findings of the Magistrate are clear. He is an experienced Magistrate, familiar with local conditions.

The pig killed was found within the appellant's property. It was trapped. It being caught he then put it to death.

The Magistrate found duties or obligations on each side. First, in relation to the respondents, the owner of the pig, not only to care for but to fence and properly secure their animals. He is quite correct in that and section 16 of the Pounds and Animals Act is to the same effect. It says that any person who is the owner or occupier of land, who keeps various types of animals including pigs, and neglects to enclose them within a fence or otherwise secure them, shall be guilty of an offence.

So there was a clear obligation. As to the appellant, the Magistrate found that there was an obligation, a duty to care for and maintain and fence his crops.

In the context of the local community, I agree with the Magistrate about that. Each side, the Magistrate said, failed in their respective duties. First the respondents let out their pigs from the sty and let them wander loose despite warnings from others about that in the past, including the appellant.

Secondly, the appellant, knowing the situation and the claimed trespass by animals in the past and destruction of his crops, failed to fully fence and secure his plantation. The Magistrate found it was not fully fenced and secured and in particular there was no gate and he relied, in relation to that, on the evidence of an independent witness.

The Magistrate found that the pig having been trapped inside the appellant's property, that did not allow the appellant, he did not have the right, to kill the pig immediately but using the words of the Magistrate, he omitted to notify the owner of the situation and have the pig in effect removed. There was no need to proceed and kill it straight away or indeed to kill it at all. It seems to me there was force to that and the force is underlined again by the provisions of the Pounds and Animals Act which provides, particulary in section 5 and 17, for remedies available to a person in the appellant's position, and remedies that do not involve killing animals.

Section 5 says the owner or occupier of any cultivated or pasture land or of any enclosed land may seize any pig found trespassing on such land, and then turn it in to the nearest pound.

And then it is for the police, who have the supervision of the pounds, to take steps under the Act. Now that is the proper remedy of someone in the appellant's situation.

In addition, under section 17 of the same Act, he is given the right, if his land is trespassed upon by a pig, to recover from the owner or a pet-son in charge of the pig, compensation for the damage done.

So first there were proper procedures; secondly there was a remedy available. The appellant did not counter-claim in the court below for damage done to his crops and that of course was entirely over to him.

The Magistrate in effect found fault on both sides and, in a quite sensible way, reduced the claim by half. I am not persuaded to interfere with that judgment. He was in the best position to assess the matter, given the local situation and local conditions. Indeed the appellant, may have been lucky to escape with just half the claim.

The appeal will be dismissed. The respondent, it seems to me should be entitled to costs.

Tauvaka v Police

Supreme Court, Neiafu, Vava'u
Hampton CJ
Cr App 74&195 & 218197

2 May 1997

Criminal law - appeal against sentence - delay - behaviour
Appeal - sentence - behavioural offending - overcharging
Practice & procedure - prosecutors duties

The appellant appealed against sentences of imprisonment (totalling 21 months) on a variety of behavioural offences, on Niuatoputapu.

Held:

1. The prosecution should not make improper remarks during the course of a defended trial, nor on sentencing, which might, wrongly affect the view of the presiding Magistrate.
2. To charge an accused under s.57 Criminal Offences Act for abusive drunken swearing is to charge too serious an offence, when s.3 Order in Public Places Act is available and appropriate.
3. The sentences of imprisonment were inappropriate in all the circumstances, including the time lapse; and in one case imprisonment could not be imposed as a matter of law.
4. Imprisonment quashed; and fines substituted.

Statutes considered: Criminal Offences Act ss.57, 178
Order in Public Places Act s.3

Counsel for appellant: Mr Vaipulu
Counsel for respondent: Mr Cauchi

Judgment

I do not intend to go into the matter in any detail. I preface myjudgment by saying that because I do not want to spend a lot of time on it, and there are some areas which I could get drawn into and say things about, that might have some value in the future but I simply do not want, today.to get into these areas.

There are in effect two separate appeals in front of me today brought by the appellant, both being appeals against sentences of imprisonment imposed upon him by the Magitrates'Courtsittingin Niuatoputapu. Thefirst sitting being in March 1995where, on four charges, the appellant was sentenced to a total of 13 months imprisonment, and the second being in February 1997 where, on two charges, he was sentenced to 8month s imprisonment.

As I read the records, on the March '95 matters, he immediately appealed andWas bailed the same day. On the February '97 matters he had, perhaps, some 3days in custody as I see the record before he was bailed on the 21st of February. The appellant isnow 27 years of age, and I stress the "now" because of the passage of lime between the offending and with him being dealt with in the Magistrates 'Court, letalone onappeal here. He is now married, has one child, a second on the way, still lives in Niuatoputapu and is a planter or a grower.

Itis said on his behalf, and was said in February '97 on his behalf, that he is settling down, showing some signs of maturity, in effec and I hope that is so at age 27.

The charges he faced in 1995 were four of a whole series of some 9 matters. The other 5 matters were dealt with by way of monetary penalty. The four that are before me involved offences brought under the Criminal Offences Act, three under section 57 wh ich is in effect using threatening or abusive or insulting language towards a government officer, and the fourth relating to intentional damage of some louvre windows.

The first two of those charges, both under the Criminal Offences Act, section 57, relate to the same incident on 17th October 1992, and I stress the date, and quite why it took such a length of time to get it to the Magistrates' Court is of some concern to me, although I note the suggestions made in the middle of the defended hearing about the appellant avoiding the authorities. That should not have been said during the course of the defendant trial, by the prosecution.

Put shortl y on that date in October '92, apparently the appellant had got drunk, had been disorderly, the authorities were notified. When they came to find him, that isa police officerand a town officer, they found him on his land, sleeping. They woke him, they took him away and it was whilst they were taking him away, that he called them 'arseholes". That Jed to these charges brought under section 57.

I am concerned with the use of section 57 in these sort of circumstances. Itseems to me there may well be some element of overcharging or charging too serious an offence in relation to such as incident and I am sure that there are other provisions, for e11:ample in section 3 of the Order in Public Places Act, that may be more appropria te to such circumstances.

The Criminal Offences Act charges carry a maximum of 2 years imprisonment or 500 fine, or both, which are serious penalties. On those 2 charges, the appellant was given 6 months imprisonment on each, concurrent.

I find that sentence was not only excessive, as put to me on behalf of the appellant, but in fact was inappropriate in all the circumstances.

The third charge related to a separate incident in December 1993. Another charge under section 57 of the Criminal Offences Act It related to the same town office.a separate incident. He was drunk. He swore at the town officer using a similar, or the same, word as previously. He was dealt with on this occasion by the Magistrate by 3 months imprisonment, cumulative on the 6 months on the first 2 charges.

Again I find imprisonment inappropriate in the circumstances.

The fourth charge, brought under section 178 of the Criminal Offences Act, related to an incident that occurred between the appellant and some relatives, I think an uncle and cousin. There was some sort of contretemps between the family members. The result was that, the appelianfagain drunk, hit with a piece of wood a louvre window and broke the louvres. I am told the damage, $30, has been paid. The complainants expressed their satisfaction with the apology that had been made, and they expressed that to the Magistrate at the time. They were, as I have said, all related.

That offence, given the amount of damage involve ($30) carried a penalty of 6 months imprisonment, maximum. On that charge, he was given 4 months imprisonment, cumulative upon all the others, so making up to the total of 13 months, I have mentioned To give 4 months imprisonment for such damage in such circumstances, where the maximum is only 6 months, again not only excessive as submitted to me, but I find inapropriate to have sentenced him to imprisonment at all.

It may be that the learned Magistrate was influenced by some of the things that were said to him by the prosecution, which were far from objective and, in my view, went too far.

I should add that last offence was in January 1994 It seems to me that the learned Magistrate may well have over reacted somewhat, himself, in view of the remarks made to him by the prosecution, when one looks at his remarks on sentence, the serious way with which he characterised them all and his view that, for what I consider to be relatively minor behavioural matters, the appellant should be removed from the rest of society. So in my view, overall, I have reached the view that a sentence of imprisonment was inappropriate.

I should add that another feature that occurs to me that, perhaps, was not, or does not seem to have been, given consideration by the learned Magistrate was the time lapse that had occurred. These were behavioural offences back in '92 and '93 and the very start of 1994.

If the charges brought under section 57 of the Criminal Offences Act had been brought under the Order in Public Places Act, then they would have been dealt with by, could only have been dealt with by, way of fine and in default imprisonment terms. It seems to me that was indeed the appropriate way to deal with these 4 matters, as the other 5 matters were dealt with, which was by imposition of various fines between $20 and $50 on each and in default certain terms of imprisonment.

I intend to quash the sentences of imprisonment on each of those 4 charges and in lieu thereof, substitution for those terms of imprisonment, intend to impose on each of the section 57 charges fines of 50 in default of payment, on each 1 months imprisonment. So on each of those 3 charges, Mr Vaipulu so you are clear $50 on each and on each in default of payment of $50 , 1 months imprisonment.

On the 4th charge under section 178 of the Criminal Offences Act, I take the view that not only was the imprisonment inappropriate and should be quashed, but that in the circumstances, no further penalty should be imposed. It should be a conviction only, without any penalty on that charge. And I take account of the payment of compensation and the apology expressed and the acceptance of that, in the context that this was a family matter.

As to the 997 charges, they relate to one incident in Qi:tober '96 where the appellant ws chared with drunkenness under section 3(j) of the Order in Public Places Act and \1th, agam, an offence under section 57 of the Criminal Offences Act. Again, language directed at a town officer (a different town officer as I understand it) but language to the same effect as in the previous charges.

. . The agistrate dealt with those charges together. They arose out of the same mc1dent but imposed, as I see it, the same penalty on each and, as I read the notes it would seem to be 8 months imprisonment concurrent on each charge.

First then to the drunkenness charge. That penalty cannot stand as a matter of law. It was a penalty unable to be imposed under section 3 of the Order in Public Places Act for all that can d ne under that Act, is impose a fine not exceeding $100 and in default of payment to 1mpnsonment for any term not exceeding 4 months.

So to send a man to jail for 8 months for drunkenness is something that is unable to be done. That sentence has to be quashed, and is.

The second charge under section 57 related to the use of language to the town officer An apolog had been given and had been accepted, the town officer I think being presen at the heanng nd expressing his acceptance of the apology to the learned Magistrate.

The Magistrate on sentencing there seemed concerned, as I understand he would be as to the failre of this Court to deal with the outstanding appeals from 1995. I am als cncerned w1t.h that, as to how such a delay occurred when, indeed, this Court sat in N1uatoputapu m early 1996 and could easily have dealt with the matter then ; let alone the fact that there have been several circuits to Vava'u between March '95 and the present time when the matters could have been dealt with.

Those matters ay well have affected the view of the Magistrate on this occasion. It sems to me that given the overall situation, the passage of time, the maturing, the aage, the expression of apology and the acceptance of apology, a sentence of 1mpnsonment was mappropriate on the second charges as well.

I intend to qua h that sentence of imprisonment of B months. On the charge of drunkenness, I subsntute a penalty rather more in keeping with the offence. He has been arrested, convicted and.dealt with on drunkenness before. I intend to impose a fine of $O on that charge nd m defau.lt 3 weeks imprisonment. On the other language charge, I impose a further fme of $50 m default 1 months imprisonment.

Mr Vaipulu, the Court on appeal has put a degree of reliance and trust on what it has en told about his aturing, his taking wife and family and the responsibilities which go with that. Some might see that he has been dealt with quite leniently by this Court and would hope tht you would convey to him that, living in a small community in an isolated island such as N1uatoputapu, it is difficult for those who exercise authority and *try* to keep orer t do that 1f tey have.people, such as your client, running around getting drunk, bemgd1sorderly, bemgabus1ve. If he keeps on doing it, it will keep getting worse for him.

. .In each of the case where I have ordered fines to be paid and, in lieu of payment, 1mpnsonment (and I thmk.on my calculations the fines total $230) J order that the appellant should have a penod of 8 weeks in which to make payment of all the fines. If

he makes default on all or any of the fines then those sentences of imprisonment which attach to those particular fines take force and effect.

Taumoepeau v Tonga Water Board

Supreme Court, Nuku'alofa
Lewis J
C.409196

23, 29 April & 9 May 1997

Administrative law - judicial review - affidavits - procedure
Practice and procedure - judicial review - affidavits - cross-examinations
Judicial review - procedure - cross-examination

The plaintiff applied for judicial review of a claimed denial to him of a water supply by the defendant. The case is reported on procedural aspects only.

Held:

1. Evidence was taken by affidavits from either side. Cross examination was not allowed as there was nothing exceptional in the circumstances of the case.
2. To fully explore facts is unusual since administrative law in common law countries does not provide an appeal on the merits but a review of the lawfulness of the procedures followed. Cross examination may unduly prolong the proceedings and deprive them of the expedition that was in most cases such a strength of prerogative order proceedings.
3. There was not here a denial of natural justice by the court precluding the right to cross examine.

Cases considered — Tonga Water Bd v Hamilton C 376/93 Dalgety J; Hamilton v Tonga Water Bd C226/94 Lewis J; Touliki Trading v Fakafanua [1996] Tonga L.R.

Statutes considered — The Water Board Act (& The Water Supply Regulations)

Counsel for applicant — Mr Fifita
Counsel for Defendant — Mrs Taumoepeau

Judgment

The plaintiff seeks judicial review of a decision of the defendant Board denying him a water supply and other consequential ancillary orders including damages. The plaintiff carries the burden of proof throughout these proceedings on the balance of probabilities.

The defendant Board is charged by the Water Board Act and Regulations (Cap 92) with the administration of The Water Board Act. The Board is a public utility under the Crown. The obligations of the Board are statutory. It exists for the production distribution control and management of water supply throughout the Kingdom.

As the law presently stands the Board its officers and employees may not require a new applicant consumer to pay the arrears of a prior consumer as a condition precedent of the Board connecting a supply. Provided that the new applicant presents an application in proper form and pays the requisite connection fee, then the Board must connect a supply. Tonga Board y_ Fale Hamilton and Vito Langifisi (1993) S.C. no. C376/9'3 Dalgety J and Fale Hamilton v The Water Board (1994) S.C. no. C226/94 Lewis J.

Regulation 17 (The Water Supply Regulations provides :-

> "The owner or the occupier of the premises, or both of them, is or are liable jointly and severally for the due payment of all charges for water or for other services provided to those premises by the Board under these regulations."

Evidence in this Review has been taken by affidavits from either side. Counsel for theDefendantBoard sought therighttocross examine some deponents. Crossexamination has been allowed in the past but only in the most exceptional circumstances. I saw nothing exceptional in the circumstances of this case and refused both Counsel the opportunity to cross examine on any issue.

In Touliki Trading Enterprises Limited and Squash faport Company Limited v Kinikinilau Tutoatasi Fakafanua and the Kingdom of Tonga [1996] Tonga LR [CA] Appeal No.3/1995, the Court made comment that to fully explore facts is unusual.since administrative law in common law countries does not provide an appealon the ments but a review of the lawfulness of the procedure followed, including the lawfulness of the taking into account of matters considered. Cross examination has, in the English Courts, been allowed in exceptional circumstances by virtue of the general power conferred on the courts by SCR Order 38, r.2(3).

It is suggested by some, including De Smith, fourth edition - "Judicial Review of Administrative Action" at page 579, that (cross examination) may "unduly prolong the proceedings and deprive them of the expedition that was in most case such a strength of prerogative order proceedings ".

The Defendant complains through counsel that there has been a demal of natural justice by the court precluding the right to cross examine. he.Plaintiff makes no sch complaint. In the exercise of a discretion I ruled cross examination not to be appropnate in this case. I decide the facts from the affidavits.

Those being the facts as I find them to be one must revert to the question posed by the Defence Counsel in her written submissions ..." (1) what it the decision of the defendant which is under review?"

(2) was the procedure followed in reaching that decision, according to law

On the facts as I have found them to be there was never a demand (i.e. never a "decision of thedefendant') made onthe plaintiff thatheshould pay thearrears of a former consumer, only that they must be paid by the registered consumer Tu'ihalamaka as re-connection fees, which were far less revenue producing than a first time fee which the plaintiff would have had to pay if his account of events is to be accepted by this court.

The Plaintiffs claim fails. I will hear counsel as to costs.

R v Fakalata

Supreme Court, Nuku'alofa
Hampton CJ
Cr 1078-1081196

12 & 13 May 1997

Criminal law - admissibility of confession statements
Evidence - criminal law - confession - admissibility

The accused was prosecuted for manslaughter as a result of alleged gross negligence. In the couse of the jury trial objection was taken to the admissibility of the inten•iews by the Police, of the accused, and the resulting statements. The police .officers who conducted the main interview were not available to give evidence.

Held (on the voir dire conducted without the jury present)

1. The interview was not admissible; the only officer called for the Crown was only in the interview from time to time, played no part in the interview and had no recollection of the questions and answers. He did not sign orcounter-sign the record. He could not say if the record was accurate.
2. Sothe pre-conditions rightly expected for an interv,iew to be admissible were not present; and in any event the court would have exercised it's discretion to eclude such evidence, under the proviso to s.22 Evidence Act, in all the circumstances.
3. Ruled out in the judge' s discretion also, was the statement taken 8 hours later by another officer not involved in the first interview and not tasked to speak to the accused at all, who took the accused from the cells charged him (without authority) and took a statement.
4. Some 4hours later the original interviewing officer returned, took the accused from the cells, charged him again and took a statement, which purported to be the accused's own narrative. But it had emerged that the officer asked the accused questionsyet only the replies were recorded and incorporated into th statement. The statement was misleading. The court was left with no idea how it was composed. Again it was excluded in the judge's discretion.
5. In the resene of the jury) The accused should be discharged as there was muffic1ent evidence to allow the case to go to thejury . There was simply no evidence.

Case considered Ibrahim v R [1914] AC 599 ·
Statute considered Evidenc Act ss 16, 20, 21, 22

Counsel for prosecution Mr Malolo
Counsel for defence Mr Paasi

Judgment

The accused is on trial on counts of manslaughter by negligence and drunken driving. After the greater part of the Crown case was heard, some twelve witnesses so far, the Crown got to the stage of calling evidence of police interviews and police statements taken from the accused.

The trial being ajury trial, thejury has been sent away and evidence has been heard by me, from some 3 police officers in the absence of the jury. Mr Paasi for the accu ed says that the record of interview, the answers given to charges and statements following the charging are not admissible.

I am aware and take account atall times of the matters oflaw particularly the Ibrahim Ibrahim v R (1914] AC 599 referred to me by Mr Maiolo, and to the provision s of the Evidence Act (Cap.15) and in particular section 16 whlch defines what an admission is, section 20 which defines what a confession is, section 21 which is fact is a statutory enactment setting out the effect of the Ibraham Case, and section 22which indicates when confessions can be admitted and that the Court has a discretion in cer tain circumstances as set out in the proviso to that section.

The events giving rise to these charges are said to have occurred in the early hours of the morning of the 1st of October 1994. A young man involved in a motor accident as alleged; is said to have died at 5:00 am on the 3rd of October 1994. The accused was arrested later that same date about 8:00 pm. It would seem from what I have heard, that he was in custody from then on for the rest of the time relevant to this ruli ng.

This part of the inqury proceeded in 3 marked stages:

First, a question and answer interview conducted by the Investigating Officer Vaihu, in the presence of two other officers, on the 3rd of October between 10:39pm and concluding in the early hours of the 4th October, at 28 past mid-night. This part was conducted by CIDOfficers. I note andcomment herethat forsome reason not explained tome in theevidence, at the end of that interview the accused was kept in custody and indeed he was put in the cells, but was not charged and not given the opportunity toanswer that charge. Either a man is going to be charged or he is not, and it seems to me to be quite inappropriate to interview, put him in the cells and leave him there for 12 hours. Not only inappropriate, wrong in my view and that casts a shadow over everything else that follows.

The second stage occurred about 8hours later, on the momi ng of 4th October, when some uniform traffic police officers entered into the act, charged him (the accused) with a negligent driving charge and then took a statement from him after that charge. That occurred between 8:I0 am and 9:25am.

The third phase involved the CID Officers again. The Investigati ng Officer Vaihu, but with a differentaccompanying officer this time, Detective Corporal Hausia.

This time 2 charges were laid, one of manslaughter and the other of negligent driving. But quite why he should have been charged twice in relation to the sameaccident with negligent driving under the same section of the Traffic Act is not explained to me. Again, it seems to me to be quite wrong. But he was charged with 2 charges and then a statement taken. That charging and statement occuning between 12:54 pm and 1:40 pm on 4th October.

Before I look in detail at those 3 phases. I make a general observation or two:

First, as tophases 1and3, Officer Vaihu did not give evidence, isnotavailable, is in the United States of America. That may be a reflection on the delay in bringing this matter to trial, which does not reflect well on the Magistrates Court, but does not reflect well either on the police and the prosecution which have a duty to keep an eye on these things.

The second general thing is this. That I have considerable uneaseabout the whole process here, from what I have heard in evidence, about the delays and about the way things have been done. Some of those causes of unease I have already commented on.

To tum then to the first phase, that is the CID interview (by question and answer) lasting ju st short of 2 1-> - 1rs on the late night of 3rd October 1994. The Investigating Officer, who was r.:.,.., ••1e Interviewing Officer, Mr Vaihu, as I have commenteci is not present i n Court and cannot give evidence. Nor can one of the other officers present, Mr Latu, who is alsoaway from the Kingdom, is no longer a police officer, and who was the appointed officer to listen to the interview and counter-sign it.

I was left with the evidence of a third stringer as it were, again an Officer Latu, and what I say is not a reflection on him, and should not be seen by him as being a reflection on him, because he was not there to play any part in this interview at all, and lte had no real interest in it. He had no part in the interview. He did not sign or counter-sign any documents. He made no notes and has in effect no recollection of events himself, apart from being present from time to time during the interview.

A nd I say from lime to time deliberately because, reflecting his lack of any real interest in the proceedings, he was in and out on a number of times, he cannot say how many, over that 2 hour or so period, just short of mid-night. He cannot say, and does not try to say, that he knows the questions that were asked and whether all the questions were recorded, and the answers that were given and whether all the answers were recorded. Nor can he say (and he was honest and truthful in his evidence in chief and his cross-examination), that what Mr Vaihu recorded was accurate, particularly insofar as whether he did accurately record what the accused said in his answers.

In my view tbe evidence is such that the pre-conditions that one, rightly, would expect before a question and an answer interview such as this would be admilled in evidence, are not present here, and cannot be present, because of the absence of the questioner himself or, at the very least, the other officer present who was taking a part. That latter officer at least, from what I heard in evidence, was present through the whole interview, and had a role in the interview.

So it seems to me that this record of interview, which I had marked as "E", is not admissible, as not meeting those pre-condition s of admissi bility. In an y event, given what I have already said, I would have declined to admit it in my discretion under the proviso to section 22 of the Evidence Act.

I will not repeat the reasons why I would exercise my discretion in that way. I have already incorporated them in what I have said thus far. But there are, in addition, questions in this interview which, as recorded, are leading questions in the nature of cross-

examination and, in addition, put matters to the accused from alleged eye witn.esses wo have not been called (again I suspected because of the effluxion of time) as witnesses m this trial. . · k d "E" T

J therefore refuse to admit into evidence the record of mterv1ew mar e as · o some extent that interview affects all that follows.

There then enters, some 8 hours later, the uniform police officers and I am n?w talking about phase 2. Here the man who did the chargi?g, and tc:>°k the cnfess1on statement so-called, did give evidence, that is ConstableToki. Mr Toki ha? been mvl_ved in some way in the inquiry on the night of the alleged accident, and of hts own volthon, off his own bat, on the morning of 4th October, he decided to get the accuse out from custody in the cells, and speak to him himself. He was not asked by any supenor, or any other officer to do so.

'U is apparent from his evidence that he knew the CID was involved and were conducting the investigation . yet he thought he would poke his or in a?d have goat this accused himself, it would seem. He had no knowledge of the mtervtew previously conducted or of its contents. He knew nothing of what had preced d and why the man was in custody. He could give no answer, in effect, as I understood m, as to why ?e hould have done this with out interview, without caution afterwards, JUSt charged htm m this way. Again I see that is totally inappropriate codu t by. a police ofice, taking somebody, when it is not his inquiry, and interviewing m this way. Agam I mtend to exercise my discretion and refuse to admit evidence of the charge an the answer to the charge that was given allegedly by the accused and the statement whi ch then ollowed. I had marked those two documents as "F" & "G". What posihle nght o authonty e had to walk into the cells, get a man out and charge him in the way that he did, and as hts first step is quite beyond me.

' We then come to the third phase of this interviewing process. The CID eenter the field. This, I remind myself, is Mr Vaihu coming back in soe 12hours after his mtemew had been finished, this time accompanied by a different officer (as I have noted Corporal Hausia). I have already commented on the unexplained delay of 2 ours between end of interview and charge. Here, in a document I have maked as .H , the.acused was charged with manslaughter by way of negligence and with negligent dnvmg (I have already commented on the second, that this is the second of such type of charge that was laid against him within a 4 hour period). . .

The evidence from Mr Hausia left me somewhat uneasyand uncertain, an certa1?ly not proved beyond reasonable doubt in my mind, as to whether the form of caution which · h wn at the start of the printed form of the charge was actually spoken to the accused ::oe the charge were read. There was a contradiction in his evi?e?ce betwee w?at he said to Mr Paasi in cross-examination as to that, and what he said m re-exammahon to Mr Maiolo. .

In any event the answer given to the charges, I find is somewhatequ1vocal and does not take the Crown very far. Of more significance is the statement subsequently made h. h h s been marked as "I". This is put forward as being a voluntary statement made W. if a by the accused himself as his own statement and it is recor d e d en ti re I Y ma narr alive form to give the i ndication that this is the man's own statement. . .

Now it has to be remembered (and I remind myself and the police should remind

themselves) that by this time the man has been in custody for something like 17 or 18 hours and has been charged by then with 3 charges, one of which is manslaughter. It emerged howeverthatduring the taking of this statement, questions were asked by the investigating officer, Mr Vaihu, of the accused. Mr Vaihu was conducting this part of proceedings, not Mr Hausia and again what I say is not a reflection on Mr Hausia. But he told me that he heard Mr Vaihu ask questions, as to how many he was not certain. The questions were not written down at all. Answers were written down and written into the statement. He, Mr Hausia, says the questions was asked to clarify matters as the statement went along.

Given the history of this matter, in the way I have had it placed before me and as I have detailed it above, I am entirely dissatisfied with such a method of'proceeding. If questions are going to be asked by investigating officers of persons in custody in a situation as this accused was, then the questions must be recorded, notjust the answers. A statement presented in the way this one was, as being his own free voluntary "confession" statement (and I vut confession in speech marks) is quite misleading. The Court here is left with no idea as to how this statement came about, how i t was composed.

Again I intend to exercise my discretion under section 22, the proviso, and refuse to admit the evidence, firstof the charges' form marked "H" and then the statement marked "I". That proviso is particularly appropriate to this stage because it says: "Provided always that where a confession is alleged to have been made to a police officer by the accused person while in custody, and in answer to questions put by such police officer, the Court may in its discretion .refuse to admit evidence of the confession".

I stress the phrase, in that proviso "questions put by such police officer". Here, there were questions. The Court is not able to be told what they were.

I add that, in addition to the reasons I have already given for excluding all of these documents "E, F, G, H & J", the contents in any event, seem to me to beat bestsomewhate equivocal and speculative. I would have been concerned as tothe weight which any Court could put on them in the circumstances of this case.

[The Crown then closed it's case and submissions were heard, as to whether there was a case to be let go to the jury. The Court then ruled further]:

Thank you for your patience, Mr Foreman, members of thejury, your patience in waiting. What I tell you is this, that I have heard the objection or objections to the evidence which is the rest of the Crown case, and I have decided and ruled that none of that evidence can be given in front of you. That evidence relates to the interviewing of and the taking of statements from the accused by various police officers. And after hearing the evidence I have just given a detailed ruling why the evidence should not be admitted.

And I add, while I think of it, that in the circumstance the case now is in, I lift the order which I previously made prohibiting any publication of what has taken place in the absence of the jury, that is now able to be published and so is my jud gment. The result of my ruling, the rest of the evidence being inadmissible means that the Crown case is now finished, there is nomore evidence from the Crown, which means that the only evidence that the Crown have in support of these two quite serious charges, is the evidence that you heard yesterday and again, for a brief while, this morning.

That evidence, in my view, is no where near sufficient to even reach a stage where it is appropriate to allow the case to go to the jury for decision. There is simply no evidence, in my view, on which a jury could convict on either of these serious charges.

It is not meant as any reflection on Mr Maiolo, who appears for the Crown, but, with the passing of time (remembering of these events took place in the end of September, start of October 1994, 2 1/2 years ago) a number of important witnesses, who would otherwise had given evldence for the Crown, are unavailable (and important witnesses such as, I undec:;tand it, possible eyewitnesses, people whowere involved in the events on thenight, as well as police officers who were involved in the actual interviewing of the accused). One is left, and I am sure others in this courtwill be left, with an uneasy feeling thatJustice ;not able to be done here because of the absence of witnesses. That in itself is something of a disgrace and a reflection on the way that some parts of the Justice system are administered in the Kingdom, and on the way that some parts of the police and prosecution's system are administered (e.g. the way in which police and prosecution do not keep a proper eye on cases which they have brought and make sure that cases are brought to trial atan early stage). There is an old saying, and there iswisdom inthesaying: "justice delayed isju stice denied" and I suspect that you and I, in the last 2 days, have seen an example of that.

Here on the evidence, there is no evidence or no satisfactory evidence as to for example, how the young man now deceased came to be injured. If it was in a motor accident, wherehe was on theroad; orwas heoff the road, whereabouts was he at the time? Was he walking, running, standing still. How was he clothed, what was the lighting. No satisfactory evidence connecting thevan thatisshown inthephotographs with involvement in the motor accident, that onethat occurred outsidethe shop. No evidence orsatisfactory evidence placing the accused as the driver of any such white van. No proper evidence which would indicate the method of driving of the van, whether in terms of speed orpath, off the road or on the road or otherwise. No evidence at all of any markings on the road which might indicate some point of impact or brake marks or swerve marks or anything of the like. No evidence orproper evidence which might indicate the state alleged against the accused (supposing the Crown could get over all those other hurdles), that he was drunk and incapable of having proper control of a motor vehicle.

Let alone any concerns that there might be as to causation of death, the linking of a traffic accident (if there was one with this boy) to his actual death, given the absence of any post-mortem investigation and report. Those are the sort of things, and they are not exhaustive, that make me say that there is noevidence on which ajury could convict. That this is not a case that can go to ajury . I am going to discharge you from giving a verdict and, in a moment, discharge the accused.

The accused will stand please.

Because of those difficulties with the evidence, or the lack of evidence rather, 1 formally discharge you on both counts. You areacquitted and discharged on both counts. I do not intend to say more but I have already underlined my concerns as tothedelaywhich has occurred here and the results that have flowed from that delay.

You are free to go!

Mr Foreman, membersof thejury, thank you for your service. It hasonly been the one case for you to hear 4his week. You have not completed that, in a sense, but that is what I am here for. I am here, as I said, to referee and if things are not within the rules, well then so be it. Thank you for the performance of your duty. It is an important civic duty that you do, and I am grateful, and the Kingdom is grateful, for your serving in the way you do.

You are now free to go your own way. I kept you back, to make sure we could complete it tonight. It seemed inevitable that we were going to finish tonight, so I kept you waiting on, rather than bringing you back tomorrow morning. Thank you.

Bank of Tonga v Kolo

Supreme Court, Nuku'alofa
Lewis J
C. 1256/%

23 & 29 May, 1997

Execution of judgment - delivery of goods
Practice and procedure - judgment - delivery of goods - res1ud1catu

This matter was reported, at an earlier stage, in 1995 Tonga L. when it ws held a writ of possession of chattels was not available, the judgment obtained only bemg for sum of money and not for delivery of goods. A second writ, seeking a judgment for delivery of chattels was taken.

Held:

1. The defendant raised a plea of estoppel by res judicata.
2. It is not enough that the matter alleged to have been estoped mgt have been put in issue or that the relief sought m ght have been claimed. It 1s necessary to show that it actually was so put in issue and claimed.
3. What had not been claimed here, previously, was the proper method of recovery. So the defence of res judicata was not available.

(This matter was affirmed on Appeal - judgment immediately follows)

Cases considered: re a Debtor [1958) 1 All ER 581

Counsel for plaintiff Mr Appleby
Counsel for defendant Mr Talanoa

Judgment

This action was commenced by Writ on 21 November 1996. Judgment on the same issues, (breach by the Defendant of the terms of a loan agreement made with the Plaintiff), and between the same parties was delivered by Ward CJ on 21 April 1995 and later on matters of enforcement by Hampton CJ on 17 November 1995 in Action No. 1019/92.

The prayer for relief in the matter before Ward CJ did not include a claim for the delivery up of Chattels, rem in personam - the delivery of goods. Hampton CJ held that-

• A judgment for the delivery of goods can only be obtained in this (Civil) Court, and may be enforced by either or both (under 0.26 r.2):-

(a) a Writ of delivery (0.26 r.8)
(b) if 0.16 r.3 applies, an order of committal (0.26 r. 12)

Again those means of enforcement correspond to, and reflect, the enforcement provisions available in England, this time under 0.45 r.4. That rule provides that a judgment for the delivery of goods may be enforced by either or both a Writ of delivery (or sometimes a writ of specific delivery) and an order of committal or sequestration.

As with a writ of possession in England, so with a writ of delivery - such a Writ of delivery may include provision within it for enforcing paym nl of money adjuged or ordered to be paid in the Judgment for the delivery of goods. It is a necessary incidental enforcement procedure; and that is available in Tonga and is set out in 0.26 r.8(2) and in the Writ of delivery itself (Form 7).

That provision does not allow a judgment for the payment of money only to be enforcement by the issue of the Writ of delivery. Such a Writ of delivery can be issued only lo enforce a judgment for the delivery of goods."

The Chief Justice made it clear in that judgment that he would not be prepared lo make the declaration sought by the plaintiff of a right to possession of the houses nor the sale of the houses in question. He added "In my view proper proceedings seeking judgments in those terms would need to be taken." The plaintiff here, (the Judgment Creditor there), says we have taken proper proceedings in the appropriate (Civil Court) - give me the enforcement we seek!

The Judgment Debtor (defendant) here says in the most minimali st submission that this matter has already been decided. The judgment debtor pleaded The Plaintiff cannot make a claim on issues already adjudged and appeal refused on no grounds (sic).'

The Judgment Creditor pleads in the statement of claim here that on 26 August 1993 the Judgment Debtor was found lo be indebted to the Judgment Creditor in the amount of $18,812 41 including costs in the amount of *$500.00* plus interest at 10% per annum until paid and seeks judgment for the delivery of the dwelling house al Hala'ovave, Kolomotu'a.

Presumably the pleadings and submission of the Judgment Debtor enter a plea of esloppel by res judicala .No expanded submission was made by counsel for the judgment debtor. He cited no authorities.

In order that a defence of res judicata succeed, it is necessary for a defendant to show that not only is the cause of action the same but also that the plaintiff has had an opportunity of recovering and might have recovered in the first action what he seeks to recover in the second action.

It is not enough that the matter alleged to be estopped might have been put in issue

or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue and claimed. Re a Debtor [1958] 1 All ER 581.

There is no doubt that the entire indebtedness was tried before Ward CJ and latterly Hampton CJ. A judgment was entered against the judgment debtor. The Plaintiff pleads the judgment and all it is comprised of. What was not claimed wa_s te 'proper ethod' of recovery. These present proceedings concern a proof by the plamtlff of the existence of a judgment and enforcement

Broadly speaking, res judicata is to do with avoiding the courts being troubled by re-litigation of identical matters when judgment has been entered in an eru:lier action. As between this action and 1019/92 this one requires proof of the Judgment m 1019/92 and little more. That is admitted and is proved. It is not that this action is identical with No. 1019/92. It is to do with what is prayed for in this action.

In my opinion, the defence of res judicata is not available here. The causes of action are different For reasons I have given there will be judgment for the Plaintiff in the terms claimed.

·IT IS ORDERED THAT,

1. Judgment be entered for the Plaintiff.
2. The defendant deliver up the dwelling house at Hala'ovave, Kolomotu'a to the Plaintiff within 14 days of the date of this judgment.
3. The Plaintiff have the costs of these proceedings to be taxed.
4. This Order be served on the Defendant within a period of seven days of the date of this Order.

Kolo v Bank of Tonga

Court of Appeal
Burchett, Tompkins, Beaumont JJ
App 20/97

4 & 7 August, 1998

Practice and procedure - res judicata
Land - houses are personalty - not fixtures

The facts are set out in the judgment above.

Held:

1. The causes of action were not the same and nor were the issues. The matter was not barred by a res judicata.
2. In Tonga buildings in general are to be regarded as iterns of personal property rather that accreting to the land and thus forming part of the realty.
3. A house was capable of being pledged as an item separate from the land on which it stands.

Counsel for appellant — Mr Tu'utafaiva
Counsel for respondent — Ms Tapueluelu

Judgment

On 12 May 1989 the appellant Mr Kolo entered into a loan agreement with the respondent Bank. The amount of the loan was T$17,793, which Mr Kolo required for the purpose of fencing. He agreed to repay it at the rate of T$250-00 per monih for the first 4 months and T$400-00 dollars per month thereafter, until repayment of the full amount and interest at 10% per annum "or such other rate as the Bank may from time to time charge to other customers on a like account" The agreement contained the following provisions:

"The Borrower pledges the following articles as security for the performance of this Agreement:

Mortgage over town-allotment at Hala'ovave,
Kolomotu'a plus Loan Agreement over house,
Car Reg T817 & T687 plus All trade stock.

and the Borrower agrees to preserve carefully the said articles hereby pledges as security. And the Borrower further agrees that he will not give away, sell or otherwise dispose of the said articles until he has received from the Bank a signed memorandum stating that the terms of this Agreement have been performed. In the

event of the failure by the Borrower to fulfil his obligations under this Agreement then the balance owing becomes payable on demand and the Bank is entitled to take possession of the said articles pledged as security without further process of Law and the borrower undertakes to give up control of the said articles on demand by the Bank.•

Mr Kolo having defaulted in respect of the repayments due under the agreement, theBank took out a writ forT$18,812-41 and interest on 7December 1992. This was not anactiontoenforcethesecurity,.butanactionindebt. Judgment was entered by consent on 26 August 1993. A small part of thejudgment appears to have been recovered by a writ of distress pursuant to which some goods were seized. The Bank then sought the issue of a further writ of distress in respect of Mr Kolo's house. In Bank of Tonga v. Kolo, an unreported judgment delivered 21April 1995, Ward CJ ruled that the house could not seized under a writ of distress. In the course of his judgment, he made it clear that this result did not flow, as it would in common law countries genrally, from the nature of a house as being, in law, part of the land, and not a chattel. It was not disputed, and Ward CJ clearly accepted, that, in Tonga "buildings generally are ligible_ for seizure u?der distress.• But just because buildings are here capable of being subjected to a wnt of distress, the exemption provision which, in most countries, extends to items such as apparel and tools of trade, in Tonga includes houses. This i done und_er secon 54_of the Magistrates' Courts Act which, by Order 26 Rule 7(2), apphes to a wnt of distress issued outof the SupremeCourt. Section54,asamended bytheMagistrates'Courts (Amendment) Act 1991, reads relevantly as follows:

> "Distress warrants shall be issued as follows - ... (d) houses, fixtures, growing crops, the clothing of a person and his family, and, to the value of $200, the tools and implements of his trade shall not be taken under a warrant of distress...".

Comparing the exemption in section 54(d) with similar provisions overseas, Ward CJ commented:

> "The provisions under our law are wider because of th nature of land ownership in Tonga. I accept the reasoning of Dalgety J in Bank of Tonga v. Vaka'uta 19/91[7 February, 1994) that properties such as houses and fixtures which cannot be subject todistress in England because they accrete to the land are considered severable from the land under our law and are properly described as goods and therefore subject to distress. Equally, although I question Dalgety J's use of Wolf v.Crutchley as authority for the proposition, I accept the word 'houses' means dwelling houses."

Ward CJ then rejected an argument that the protection of section 54(d) had been waived by Mr Kolo under the terms of the loan agreement. He said:

> "The agreement gives the Bank the right to possession but that is a long way from saying or allowing the implication that the Borrower realises and agrees that, if the Bank seeks distress, seizure of his house may take place under the writ in exclusion of the provisions of section 54(d).•

Accordingly, the Bank's attempt to recover under thejudgment for debt by seizing the house pursuant to a warrant of distress failed.

The Bank next attempted to enforce itsjudgment by way of an order for possession of the house. But in Bank of Tonga v Kolo (unreported 17 November 1995), Hampton

CJ held. that a judgment for debt in Tonga is not enforceable by an order or writ for possess10n, hether of land o buildings. In the result, the Bank failed again.

Following these successive failures, the Bank issued fresh proceedings in which it sought to enforce its security in respect of the house. In those proceedings Lewis J (as ?e thn wa) found in favour of the Bank, and ordered th:::t the house be deiivered up to 11. It1s against this order that Mr Kolo now appeals.

. . The first matter uged on Mr olo's behalf is that the Bank's claim is barred by a res jUd1cta. But the previous proceedings related to a claim in debt, not a claim upon the secnty. Te causes of action are simply not the same. Nor does any issue which was dec1dd against the Ba.nk before arise now. Finally, it cannot be said that there was anthmg unreasonabl in he course taken by the Bank of suing in the first instance, upon a smple catJse of action in debt, and only when it became necessary bringing later an action upon the security. This argument advanced for Mr Kolo cannot succeed.

Mr Kolo then relied on section 54(d) of the Magistrates' Courts Act as a defence to th bank's.claim..But section 54(d) does not relate toclaims to enforce securities, but to wnts of distress issued to enforce judgments. Accordingly, this argument also cannot succeed.

. • Of more significance was an argument that the house forms part of lhe land to which it is attached, and thus falls within the jurisdiction of the Land Court under section 149 of the Land Act, soas tobe excluded from thejuri sdiction of the Supreme Court by clause 90 of the Constitution.

lause 90of the Constitution reserves to the Land Court, and on appeal to the Privy Coun_c1l,. "cases cocerning titles to land". Thus the appellant's argument raises a constitutional question of great importance. The Constitution directs attention to "titles to la?d", rather than to the incidents of the possession of lanq. In commercial practice, tht is how.the c?nstitutional limitation has been understood. Buildings, as Ward CJ po1nted out in thejudgment towhich reference has already been made, have been regarded as 1tes f personal property rather than as forming part of the realty. Because of the Constituon of Tonga, and because of Tonga's traditions, the intricate law of fixtures and of accret10ns to land which applies elsewhere is not wholly appropriate to Tonga Although 1111 the implications have not yet been worked out, and their working outshould be left to the process of development of the law of Tonga case by case we think that th broad proposition sted by Ward CJ should be accepted. That means fuat iiwas open t Mr Kolo lopledge his house to the bank asan item separate from the land on which itstood.

. We shoul add that we do not think there is anything in the decision of Martin CJ in *aku, Receiver of :vioa11a Tadi11g Company v Fua* (unreported, 4 September 1989) wh1c)) 1s contrary to this conclus10n. That was a case where, in an action by the receiver of a company for posession of property he alleged tobelong to the company,certain land was ound by Martin CJ to be held in trust for the company. He then found that the buildings on the land had been paid for by the same company for which he had decided the l?nd was be!leficially held. In that situation, he found "as a fact that [the buildings] re fixture - they canno b moved and therefore form part of the land.• He then made a declaration that the buildings on the land comprised in lease [he specified the number] re the property of [th company]." This declaration was made in the Supreme Court, not m the Land Court. It_will be seen from this briefreference to the case, first. that no question of severance arose smce the beneficial title to the land and the buildings was in the same

entity, the company, and secondly, that there was no rejection of the Supreme Court's jurisdiction on any ground that the ownership of the buildings should be regarded as involved in a question of title to the land reserved exclusively to the Land Court. In fact, the right to the buildings was considered as a separate issue.

Finally, the appellant argued that the words in the Loan Agreement "plus Loan Agreement over house," typed into the loan agreement form after the printed words "Borrowerpledges thefollowing articlesassecurity fortheperformance of this Agreement", made the document, not the house, the security. This would be a fantastic reading of the language, and could not have been intended. When words, even if somewhat inept, convey a clear meaning, the Court should not stumble over pedantic difficulties. In our opinion, itisclearthat the intention of the parties was to includthehouseamongtheitems of property which would constitute security for the loan. An equitable mortgage thereby arose, capable of enforcement through court order. Indeed, as is pointed out in Butt on Land Law, Second Edition (1988) at 379, "an equitable mortgage will arise from an ineffective attempt to create a legal mortgage ...:provided the money has been advanced, the agreement is specifically enforceable and an equitable mortgage is created." In the same·text book at 381,authority is cited for the proposition that an equitable mortgagee should be accorded "theright which he would have had if the mortgage were legal, in order that the remedies of the mortgagee might correspond as nearly as possible with those of a legal mortgagee." See also Halsbury' s Laws of England, Fourth Edition Volume 32 paras 444 and 673, which indicate that the appropriate mode of procedure on the part of the equitable mortgagee who desires to enforce his security is to seek a court order. That is exactly what the respondent Bank has done here. In our view, the remedy granted at first instance was within the power of the Supreme Court, and was suitable to the circumstances.

Accordingly, the appeal should be dismissed with costs.

Faletau v 'Akau'ola

Supreme Court, Nuku'alofa
Lewis J
C. 1167/96

14 & 30 May 1997

Decea:e estate - donatio mortis causa - proof of promise Co11st1tut1011 - customary rights - survival of - legislatio11 Adopt1011 - customary - claim to deceased estate

ie = %r; : er: d a dhstomarily allotted by him, claimed part of ecease s mtestate estate.

Held:

1. There was no proof of a pro · d b . misema e y thedeceased directly to the plaintiffs m consequence of an imminent expectation of death on the part of the deeased, sothere was no basis for a claim of donatio mortis c Th claim was struck out. ausa. at

2. As t Ihe altematie claim, based on customary adoption the Probate and Admm1srahon Act is silentas tocustomary adoption, whereasthe Constitution (cl.11) is not. But it is clear that clause (111) works in a wa h" h establishes the blood line in title cases. y w ic re-

3. Unlike other commonwealth countries where native title was removed b reaso of a foreig1_1dominant country taking a subservient one by force and b quamg, the_notion of custom in Tonga has an uninterrupted existence and ts qumtessentlally Tongan.

4. ln_roads int_o c ston:i in Tonga has been through the passage of laws (in accord 1th the pnnc1ples m the Constitution) by legislation passed by Tongans The awbof onga has eolved by statutes made by Tongans in a Tongan Parlia.ment em rac1ng and d1scardmg custom as the Tongan Parliament deemed appropnate.

5. The pl.aintiffs i ere all legitimate and cannot be legally adopted.

6. T ere is no gap m the law of Tonga to be filled by resorting to the common law 1h nd, the ru.l s of equity or statutes of general application (such as the ce (Provision for Family and Dependants) Act 1975 UK) I$_1$ '.'"obate and Administration Act provides for the division of the roperr:/a mtestat deceased and the manner of the property's distribution

7. The _claims of he plaintiffs be struck out as customary adop;ion will t provide the basis of a claim in relation to intestacies. no

Cases considered: Fulivai v Kaiananu (1961) 2 Tongan LR 178
Tu'ipulotu v Niukapu [1995] Tonga LR
Te Weehi v Regional Fisheries [1986] 1NZLR 680

Statutes considered: Constitution cl 111
Probate and Administration Act
Civil Law Act
Maintenance of Illegitimate Children Act
The Inheriture (Provision for Family and Dependents) Act 1975/UK

Counsel for plaintiffs: Mr W Edwards
Counsel for defendant: Mr Niu

Judgment

This is an application by the defendant tostrike the claims of the plaintiffs in these proceedings on the basis that their claim, and its alternate, show no cause of action.

The plaintiffs claim an interest in the estate of the late Hon.'Akau'ola (the deceased) who died intestate on 30 December 1995. The defendant (formerly by name Jinoke Faletau but now having inherited the title of 'Akau'ola) is the brother of the deceased.

The deceased remained unmanied at the time of his passing with no children of his own. The defendant inherited the estate of the deceased having claimed an hereditary right..

It is not disputed that the second third and fourth plaintiffs were related to the deceased. They were adopted by what the plaintiffs say is, and was, customary adoption.

The plaintiffs claim some funds in Bank accounts of the deceased. They argue that were promised by the deceased that he would build a house for them and apply the funds in his bank accounts for the plaintiffs and himself. He died before the plan came to fruition. The defendant after some initial denials now admits the existence of the promise and the nature of the plaintiffs' claim.

The first claim of the plaintiffs must fail. The only basis under which the plaintiffs may establish any right to the intestacy of the deceased is by proof on their part of a donatio mortis causa, that is a promise made by the testator directly to the plaintiffs in consequence of an imminent expectation of death on the part of the donor. There is no such proof . There is no basis for a claim of donatio mortis causa either under the provisions of the Probate and Administration Act (Cap 16) or the Civil Law Act (Cap 25) sections 3and 4.

The Plaintiffs' first ground of claim in my opinion is unsupportable at law. I order that it be struck from the statement of claim.

THE ALTERNATIVE CLAIM

As to the second claim, it is said to arise from custom. The plaintiffs claim that they were adopted by the deceased by customary adoption, a common and recognised practice in Tonga without any formal documentation . As to the existence of the practice there is no evidence led at this point. The claim is before the court al the moment to determine whether a cause of action exists or whether the plaintiffs claim ought be struck by reason of the non existence of any cause of action.

I begin with an examination of the Probate and Administration Act (Cap.16)to see wh ther the Parliament at the time of the passage of the law contemplated customary ca1ms: .In large easure the Act makes provision for events related to l.istamentary d1spos11lon. The first clue as to the intention of the legislature is found in section 16and Schedule 1of the Act.

Section 16 provides:-

> 'The widow shall inherit the dwelling house on the town allotment (and if more than one the court shall decide which one shall go to the widow), the growing crops pigs and poultry and ngatu whether the deceased left a will or not but the rest of the property of an intestate shall be divisible according to schedule 1 hereto."

The schedule provides forthe division of property on intestacy. Where thedeceased dies leving a brother (or brothers as here) the division is prescribed as "amongst brotliers ..... m equal shares .....' In the Probate and Administration Act, Parliament is silent as to adoption and silent as to customary adoption.

In the Constitution (Cap. 2) clause 111it i s not. Parliament provides:

> '111. Whereas by Tongan custom provision has always been made that an adopted child may succeed to the estates and titles o01is adopted father now therefore it is decreed that upon the death of the holder of an estate or title who has inherited such estate or title by virtue of his blood descent from such adopted child the estate and title shall revert to the descendant by blood of the original holder of the est.ateand title in accordance with the provisions of this clause and should there be alive no such descendant by blood the provisions of the one hundred and twelfth clause shall apply."

The plaintiff's submit that the practice is a recognised one which is not repugnant to the 1aws of Tonga. They submit that the Constitution, clause 111, supports tile contention.

The defendant submits that the plaintiffs have misconstrued the intended meaning of the Cnstitution, clause 111. The defendant submits that clause 111 was specifically enacted m 1953 for the purpose of removing a title from a person who inherited the title from an ancestor who was adopted before the passage of the Constitution in 1875.

The defendant submits that clause 111 of the Constitution has been construed in a Privy Council decision as a clearstatement that customary adoptions no longer have force and effect in determining hereditary titles (whereas before the passage of the Constitution they did). Fulivai (Noble) v Kaiananu (1961) 2 Tongan LR 178followed in Tu'ipulotu v Niukapu [1995] Tonga LR 1994.

In my opinion, whatever the circumstances in which the enactment came about, the intention of Parliament is clearfrom Kaiananu, that the Constitution worlcs in away which would reestablish the bloodline in title cases. This is not such a case in any relevant sense. The only principle which may be usefully gleaned from clause 111for present purposes 1s that there has been at least a statutory recognition of the former existenceof customary adoptions.

It is submitted by the plaintiff that this court should follow the path of decisions in Canada, New Zealand and Australia in approaching the present claim. To follow the decisions of other Courts of the Commonwealth in the matters of interpretation is a

legitimate course to take. There is no doubt that this court is entitled to afford those decision persuasive status. Evidence Act, (Cap.15) section 166.

I am referred by counsel for the Plaintiffs to Te Weehi v Regional Fisheries Officer [1936] 1NZLR 680 at 691, where the Court said inter alia:-

> "The Canadian cases follow the general approach that rights of native or aboriginal people may not be extinguished except by way of specific legislation which clearly and plainly takes away that right."

It must be said, the removal of native title occurred in Canada (and New Zealand and Australia until the Australia Mabo decisions and their legislative sequel) by reason of a foreign and dominant country taking a subservient one by force and by squatting, whereas the notion of custom in Tonga has an uninterrupted exitence and is quintessentially Tongan.

The phenomenon which has brought about inroads into custom in Tonga has been the passage of laws in accord with the principles set out in the Constitution Act of 1875 and other legislation by the Tongans themselves. That is, the law in Tonga has evolved by .statutes made by the Tongans in a Tongan Parliament embracing and discarding custom as the Tongan Parliament representing all Tongans, deemed appropriate.

In the present context the effect here of foreign judgments and utterances must necessarily be weakened by that fact alone coupled with, for example, in Australia, the existence of the Colonial Laws Validity Act and like Statutes of the English Parliament.

I have kept steadfastly in mind that these arguments spring from a motion to strike the plaintiffs' claims. The admitted position is that there was, on any account of it, a customary adoption of the plaintiffs by the deceased. The plaintiffs are all of them the legitimate children of their natural parents and accordingly may not be made the subject of adoption (at law) as illegitimate children may be. (See Maintenance of Illegitimate Children Act (Cap.25) section 16).

The defendant makes the point that if customary adoption is given force of law in Tonga then any legitimate child customarily adopted would lose succession rights which he otherwise would have enjoyed as a legitimate child of natural parent. That may be a consequence and perhaps an unhappy one but it does not have relevance for the immediate purpose of this Application which is to determine if the Plaintiffs are possessed of a valid cause of action.

The plaintiffs argue that this court should exercise 'equitable discretion' in determining this matter and not strike the claim. The basis of the submission is that had the deceased been testate they would have taken under the will and its terms and although the Probate and Administration Act is silent the Court may resort to the Civil Law Act and thereby invoke the statutes of general application, the rules of equity and the common law of England.

The defendant responds that the Civl Law Act section 4 provides:-

> "4. The common law of England, the rules of equity and the statutes of general application referred to in section 3 shall be applied by the Court -
>
> (a) only so far as no other provision has been, or may hereafter be, made by or under any Act or Ordinance in force in the Kingdom".

and the Probate and Administration Act section 16 makes provision for the division of the property of an intestate deceased person and the manner or its distribution. There is no

gap in the law of Tonga to be filled by resorting to the common law of England the rules of equity and the statutes of general application.

The plaintiffs lastly submit that the Court may, using the Civil Law Act\ provisions resort to an Act or the UK Parliament - The Inheritance (Provision for Family and Dependants) Act 1975 - which should be considered when considering whether the plaintiffs are possessed of a cause of action.

Apart from suffering from the same infiimity as the argument of th pmeuce or absence of a law in Tonga which governs the issues and whether the plr.iutiffs may have resort to the Civil Law Act provisions, the UK Act specifically mnkes reference to claimants against the estate of persons who die intestate in England and Wales after the commencement of the Act. In my opinion the statute cannot have applicability as a statute of general application within the meaning of the Civil Law Act, s4.

I cannot leave this judgment without saying that I am not insensitive to the feelings the death of the adoptive father of the plaintiffs will have brought about but I am bound by my oath as a Judf! ;f this court to do that which the law requires of me.

This Court must ask whether there is any cause of action which is disclosed by the pleadings as they presently stand concerning a claim made by the plaintiffs that customary adoption will provide the basis of a claim in relation to intestacies. I have come to the conclusion that there is no such cause of action available to the Plainti ffs under the present law.

IT I S ORDERED THAT:-

1. The claim of the plaintiffs be struck out there being no cause of action.
2. The parties bear their own costs.

Sikuea & 'Akau'ola v Police

Supreme Court, Nuku'alofa
Lewis J
App 933/96

20 May & 13 June 1997

Constitution - trial - exclusion of defendants
Appeal - Magistrates Court - exclusion of defendants
Practice and procedure - summary trial - exclusion of defendants

The appellants were convicted after summary trial in the Magistrates' Court, of breaches of provisions of the Criminal Offences Act. The decision of the Magistrate recorded the exclusion of the defendants from court whilst their witnesses were giving evidence.

Held:

1. That was in breach of s.24(4) Magistrates Courts Act and in coutravention of cl.11 of the Constitution.
2. An accused person is entitled to be present at every stage of the trial against him, as of right
3. Convictions set aside.

Statutes considered : Constitution, cl 11
Magistrates Courts Act s.24(4)

Counsel for first appellant Mr Tu'utafaiva
Counsel for second appellant Mrs Taufaeteau
Counsel for respondent Mr Cauchi

Judgment

These Appeals are against the Judgment of a Magistrate at Halaano delivered on 15 April 1996, in respect of both judgment and sentence.

The Appellants on a large number of grounds would seek to have this Appeal allowed and the convictions, sentences and the Judgment of the Magistrate set aside.

The Appellants were charged (together with one Vaha'akolo Fonofehi whom the Magistrate found not guilty), with breaches of the Criminal Offences Act Cap.15 ('The Act'), section 57. The Defendant Sikuea was convicted of a breach of one count of s.57. The Appellant 'Akau'ola was convicted of a breach of s.57 and under the provisions of section 8 of the Act, was convicted of the offence of abetting a breach of s.57 by Sikuea.

The Magistrate further found 'Akau'ola not guilty of a second count of a breach of s.57 and not guilty of a second count of abetting.

In the result, Sikuea appeals a conviction and sentence for one count of a breach of s. 7 and a conviction for abetting the commission of an offence by encouraging (abetting) Sikuea in the commission of an offence.

At page 7 of the Judgment of 15 April the Magistrate says:-

> "The court told the Defendants to wait outside while their witnesses gave evidence. This is in accordance with s.24(4) of Cap 11 Magistrates Court Act."

The statement of the Magistrate is plainly quite incorrect The Magistrates' Courts Act s.24(4) provides:-

> "(4) If the Defendant says that he is not guilty the magistrate shall order the witnesses on both sides to remain out of the hearing of the Court until called upon to give their evidence." (emphasis added)

S.24(4) excludes witnesses not Defendants. Counsel tell me that in fact the Defendants were excluded. In my opinion their exclusion is a defect so fundamental that it amounts to a denial of natural justice and vitiates the proceedings. It is in contravention of clause 11 of the Constitution. The defendants at trial were denied the right of hearing just what was being put to their witnesses and consequently what was being said about them in their absence by counsel for the prosecution and indeed, by their co-accused.

It must be understood by all involved in the administration of criminal justice that a person accused of an offence or offences is entitled as of right to be present at every stage of the trial of charges brought against that person . The person charged may of course waive that right, but that is a choice which may be made only after the person is made aware of the existence of the choice and the consequences of it. That did not happen in the present case. The Judgment makes it clear in so many words.

There are a number of grounds of appeal. Some may have merit, some may not. I am not prepared to comment on rulings I may have made. Regrettably this is one of those cases where the breach at the hearing was so fundamental to the fair trial of the Appellants that I must allow the appeal without going further even though it was not a ground of appeal simply a matter observed by the court at the hearing of the Appeal.

In light of what Counsel have put to me about the matter I propose to allow the appeal, set aside the findings and orders of the Magistrate and discharge the Appellants. I so order. I would add that having regard to the age and nature of the proceedings and the comments of Counsel I do not propose to remit the matter to the Magistrates.

Mano & Kingdom of Tonga v Muller

Court of Appeal
Hampton CJ, Morling & Tompkins JJ
App 10/96

9 & 13 June, 1997

Damages - general - exemplary - pri11ciples - awards
Tort - assault - false imprisonment - damages

The respondent won a verdict against the appellants for damages as a result an assault on him and false imprisonment (by police). An appeal was taken against quantum of general ($10000) and of exemplary ($1500) damages.

Held (dismissing the appeal):

1. A court on appeal will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because the appeal judges think that if they had tried the case in the first instance they would have given a lesser sum. The trial judge must have acted upon a wrong principle of law or the amount awarded is such as to be an entirely erroneous estimate of the damage.
2. For false imprisonment damages are recoverable for the injury to liberty and the injury to dignity and reputation (humiliation and disgrace).
3. For assault damages are recoverable under such well known heads as pain and suffering, loss of amenities and enjoyment of life, and loss of future earning capacity (economic loss).
4. The trial judge did not act upon any wrong principle of law nor were the general damages so extremely high as to make them an entirely erroneous estimate of damage. It is important that a court, in assessing damages, taken into account levels of ordinary income in Tonga and the value of money and general conditions in the Kingdom.
5. The award of $10000 was not out of line with other awards. The amount of $1500 exemplary damages was a modest one. An higher award could have been justified but it could not be said that the award was so very small as to make it an entirely erroneous estimate even, although it related to an abuse of power and authority by police.

Cases considered

Kaufusi *v* Lasa [1990) Tonga LR 139
Flint v Lovell [1935) I KB 354
Lotu v Govt. of Tonga (l/85)

Counsel for appellants Mr Malolo
Counsel for respondent Mr Niu

Judgment

On 27 March 19% Lewis J. in the Supreme Court, following a trial which lasted some 9 days, made findings that the respondent (the plaintiff below) had been wrongly arrested, assaulted and falsely imprisoned by the first appellant (a police officer then acting in the execution of his duty) and that the second appellant was vicariously liable for those actions.

The events in question took place on 12 February 1993 and the trial judge's findings of fact are as follows: (the facts were then set out in detail).

The judge later said this as to general and exemplary damages (and it is the quantum of those two award only which is the subject of this appeal):

> "Being satisfied that the plaintiff suffered wrongful arrest and false imprisonment and being satisfied that as a consequence of the violence used against him in taking him into custody the plaintiff sustained shock and associated pain and suffering from the punches blows and kick delivered by the first defendant to his body, I am satisfied that the experience was an humiliating and distressing one.
>
> I find that he, as a consequence of the kick to his left knee delivered by the first defendant, has suffered a permanent residual disability in the nature of a 5% pem1anent loss of function. I am satisfied that the plaintifrs left knee is now more susceptible to early onset of aching. (Exh. Pl2 - 11.12.95). I find that the plaintiff will experience from time to time a sensation of locking of the knee and the feeling that something is catching behind the knee cap. I assess general damages as a global award of $10,000-00.
>
> It is appropriate to make an award to exemplary or punitive damages in this case. The first defendant was an officer entrusted with a duty of policing the area of Nuku'alofa under consideration. His duty included lool<ing to the safety of the citizens of the Kingdom not to cause injury and humiliation to them. He was to prevent breaches of the peace - not cause them. I award the plaintiff the sum of $1500-00 by way of exemplary damages."

The appellants say that both awards (of general and exemplary damages) were excessive and "not in line with recent case law." It is worth repeating what this Court approved and followed in Kaufusi v Lasa [1990] Tonga LR 139, at 140,:

> "A classic statement of the grounds upon which a Court of Appeal will interfere by reassessment of damages appears in the judgment of Greer *U* in Flint v. Lovell (1935) 1 KB 354 (C.A.) at 360 where he said:
>
> > "This Court will be disinclined to revi:rse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to ju;tify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely, bigh or so very small as to make it, in the judgment or this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

This statement hasbeen approved and adopted by both the Houseof Lords and the Privy Council and although not binding on this Court we would be foolish not to follow it."

We turn then to the award of $10,000-00 for general damages. This was, as the trial judge noted, a global award covering notonly the assault and the injuries suffered in tha but also the wrongful arrest and false imprisonment.

With regard to false imprisonment damages are recoverable, in a general sense, for the injury to liberty and the injury to dignity and reputation (humiliation and disgrace).

With regards to assault damages are recoverable under such well known heads as pain and suff ering; loss of amenities and enjoyment of life; and loss of future earning capacity (economic loss). The trial judge did not attempt to undertake any breakdown of the award of general damages.

However it is clear from the extracts from hisjudgment , which we have already set out, that all of the above-mentioned features or heads were in his mind when he made the award of general damages. He was recompensing the respondent for the separate (but related) wrongs inflicted upon him, resulting in public humiliation and violence on a person doing no wrong or harm, and for considerable injuries including a permanently disabling injury to the respondent's left knee.

The medical evidence as to that last - mentioned injury, was extensive. It showed, inter alia, that within 2 months of the kicking to his knee he had to uudergo surgery to that joint in New Zealand followed by prolonged and intensive physiotherapy but tha notwithstanding that treatment, he was left with a knee with a 5% loss of function (a lack of Oexion) with some continuing discomfort (likely to increase with age) and, as well, a lack of stability in the knee. That latter feature was said to make it unsuitable for the respondent (31 at the time of the assault) to continue in the occupation for which he had training, and in which he had experience, namely as a rigger. The lack of reliability in the knee was the important feature there.

The trial judge did not act upon any wrong principle of law here - and the appellants do not argue so. Nor are we convinced that the amount of general damages awarded were so extremely high as to make it an entirely erroneous estimate of damage.

It is important that the Supreme Court, in assessing damages, takes into account levels of ordinary income in Tonga and the value of money and general conditions in the Kingdom. We have reviewed the award in the light of those criteria. We have also considered the various cases put to us, by counsel on both sides, for comparative purposes, on matters of awards made in Tonga, in the past. We note that most of those cases put ot us date back to a period between 1987 and 1990 (with one in 1993). It is a difficult and invidious task to draw comparisons because physical injuries and the range of consequential sequelae do vary so much.

Nonetheless reviewing those judgm ents it does not seem to us that this award here is out ofline. One only has to look at the general damages awarded in 1987 in Lotu v Govl of Tonga & ors (No.1185) of $6000 for assault involving injuries that did not result in perma nent disability (an award described by Mr Justice Webster in 'Otuafi v Sipa & ors. (3.8..90 No.42/89) as being "the best yardstick") to see that is so.

Particularly it is so when it involves those additional heads (such as those that follow from the wrongful arrest and imprisonment; and from the permanent disability from the assault) as we have mentioned.

Indeed if the matter is looked at under the heads of damages we have the view that on the evidence as found by the trial judge , the following sums might well have bee appropriate:-

(a)	for pain and suffering	$4000 -
(b)	for loss of amenities and enjoyment of life	$4000 -
(c)	for loss of future earning capacity	$2000 -

That totals $10,000, without any account being taken of humiliation and loss of liberty.

As for the exemplary damages the cases reviewed by us show these features:

(a) first-an award of $1500as here, in thesecircumstances;isnot excessive, as claimed. However it is out ofline with out ofline with other awards in the sense that it is somewhat less than other awards which have bee made in circumstances where police officers have abused their authority and power.

(b) second- too many of the cases have involved police perpetrating wrongs on members of thepublic. Police are there toprotect persons from harm.

. The award of $1500 exemplary damages, in the circumstances foung by the trial JUd e•was a modest one indeed. An higheraward, in our view, would have beenjustified. But 11is not our role tosubstitute our view forthe trial jud ge who heard the evidence. And wecannot say that theaward was sovery small as tomakeit an entirely erroneous estimate of the damage. But the appellants may coWlt themselves fortunate.

Perhaps it is that the trial judge had in mind the overall effect of these two awards of damages (general and exemplary). He certainly dealt with them in the one short passage we have already quoted.

In that regard it is worth repeating what this Court said in Kaufusi v. Lasa & ors (supra, at p 142): "(fhe trial judge) concluded that although this \e for an award of exemplary damages , they should be assessed having regard for the sum he proposed to award for compensatory damages ... That is certainly a legitimate approach. While the assessment of compensation can never be affected by the amount awarded by way of exemplary damages, the converse is certainly not true and Rookes v Barnard is authority for that proposition and particularly the observations of Lord Devlin at p.1228" - ([1964] A.C. 1129).

The appeal is dismissed. The respondent is awarded costs and disbursements as agreed or as taxed.

Flemming v Manu

Court of Appeal
Morling, Burchett & Tompkins JJ
App 5/96

17 June 1997

Evidence - affect of criminal conviction - civil action

This was an appeal against adverse verdicts from a jury in the Supreme Court on claims for damages for alleged rapes and assault. The jury answered one issue of assault negatively even although the respondent had been convicted of that very assault in the Magistrates' Court, on a private prosecution brought by the appellant.

Held:

1. S.99 of the Evidence Act made that conviction conclusive proof of the assault.
2. The trial judge should have directed the jury to answer that particular issue, therefore, in the affirmative, that they must so find.
3. The jury's verdict on that issue, was obviously against the evidence and would be set aside.

Statutes considered — Evidence Act s.99

Counsel for appellant — Mr Appleby
Counsel for respondent — Mr L. Foliaki

Judgment

When this appeal was listed for hearing today, the Court was informed by counsel for the appellant that the appeal was not to seek a new trial at which damages would be sought by the appellant from the respondent. Rather its purpose was to have vacated an onerous order for costs which had been made in favour of the respondent at the trial, and to obtain a ruling as to the meaning and effect of s.99 of the Evidence Act.

Counsel for both parties have joined in asking us to express our view as to the meaning and affect of s.99 in its application to the facts of this case. We have been informed by counsel that upon expression of our view they will join in asking the Court to make consent orders which will dispose of the appeal.

The appellant sued in the Supreme Court for damages for assault and rape. She alleged 2 separate assaults, one of which was alleged to have occurred on the which was alleged to have occurred on the night of 8/9 April 1994. We need not refer to the other alleged assault or to the two alleged rapes and we shall refer hereafter to the 8/9 April

alleged assault as "the assault".

Before the trial, the appellant brought a private prosecution against the respondent in the Magistrates' Court in respect of the assault.

The respondent was convicted and fined by the Magistrate. The present action came before Mr Justice Lewis and a jury. Conflicting evidence was given as to whether the assault had in fact occurred. As part of her case, the appellant tendered evidence of the conviction of the respondent.

At the conclusion of the evidence, His Honour left four questions for the jury to decide. The fourth of those questions related to the assault and was in these terms: "Did the defendant on the night of 8th and 9th April 1994 enter the plaintiff's home and assault her?"

In his summing-up to the jury, His Honour referred to the evidence of the respondent's conviction. He told the jury it was "proper for you to take into account that (the respondent's) behaviour on the night of 8th and 9th April 1994, led to his being privately prosecuted by the appellant, and being brought before the Magistrate and convicted."

He further instructed the jury, that they could not conclude that just because the respondent had been convicted of the assault, he assaulted the appellant on other occasions. He also told the jury that the conviction may persuade them that the respondent unlawfully assaulted the appellant on the relevant occasion.

Later in his summing-up His Honour said, - "if you find that the respondent was properly convicted, and no attempt has been made by the defence to suggest that he was not found guilty according to law, than I would imagine, you will not have any difficulty in finding that he assaulted the plaintiff, in the manner complained of".

He also referred in the following terms to the evidence given by the respondent as to why he did not appeal against the Magistrate's decision. "He says, - "at this time I thought I have paid the fine and finished it, and continued on with my life, because it will affect my wife and children".

His Honour's charge to the jury continued: "Does that sound reasonable? Does his answer sound probable? It is for you to say, that his failure to appeal in time means, that while he is entitled to claim innocence, he may certainly not deny the fact that he was convicted of the offence and challenge the decision of Magistrate Palu before you, members of the jury".

Section 99 of the Evidence Act provides:

> "Every judgment is conclusive proof in all subsequent proceedings between the same parties and their privies of facts directly in issue in the case, actually decided by the Court, but not of facts which were only collaterally or incidentally in issue even though the decision of such facts was necessary in order to enable the Court to decide the case".

The jury answered question four in the negative, the other three questions (to which is unnecessary to refer) were also answered favourably to the defendant. His Honour accordingly gave judgment for the defendant with costs.

The appellant has appealed to this Court Two grounds of appeal are relied on:

1. It is claimed that the verdict of the jury was against the weight of the evidence; and
2. It is claimed that the conviction in the Magistrates' Court was conclusive

proof of the alleged assault on 8 19 April 1994.. . .

Itis not claimed inthe Notice of Appeal that His Honour's directions to theJury were erroneous. We do not think this is of much, if any, significance because if the conviction was conclusive proof of that part of the appellant's case that was raised *py* question four, the jury's verdict was obviously against lhe weight of the evidence. . .

In our opinion, s.99 clearly applied to the facts of this case. The prosecutio m the Magistrates' Court was brought by the plaintiff . The position would have been different if it had been brought by the Crown or a police officer.

We do not think that it is possible to read s.99 as conveying other than that the conviction was conclusive proof of the assault in the action between the prosecutrix, ie. the plaintiff , and the defendant

We refer again to the relevant words of section: .

> "Every judgment is conclusive proof in all subsequent proceedms between the same parties ...offacts directly in issue in the case actually decided by the Court.•

. The very fact which was directly in issue in the Magistrats' Court was whether the defendant assaulted the prosecutrix ie.the plaintiff on 8/9 Apnl 1994.

That being 80, we think with respect to the learned trial judge, that eshould have directed thejury that they must answer question 4 in the affirmative. Wh1ls His Honour did make statements to thejury from which they may well haveformed theview, that they should find for the plaintiff on that issue, he did not tell them that they must sofind. The consequence was that they answered question 4 erroneously.

The orders which by consent, we make are as follows: . .

1. Appeal allowed. Jury's answer to the question 4 set aside. Note tht 1t isagreed that thequestion should have been answered m the affirma1ve.
2. Order for costs below set aside. In lieu thereof, each party to pay his or her costs of the trial.
3. All further proceedings in the action permanently stayed.
4. Each party to pay his or her own costs of the appeal.
5. Appeal otherwise dismissed.

Liava'a v Bank of Tonga

Court of Appeal
Hampton CJ, Morling & Burchett JJ
App. 18196

13 & 20 June 1997

Ba11ki11g - guara11tee - explicit terms • reductions
Cb11tract • terms .constructio11

This was an appeal against ajudgment holding the father (now deceased) responsible in full for the full amount owed to the Bank by his son, on the basis of a loan agreement executed by both father and son (in November 1987).

Held, allowing the appeal in full.

1. The father and son were notjoint account holders.
2. The father never assumed any liability to guarantee the son's debit balance in the bank account, otherwise than in accordance with the agreement of 6 November 1987.
3. That agreement by its terms meant the father guaranteed the repayment of the son's overdraft up to $15,000 provided that limit was reached by 16 November 1987.
4. As at 16 November 1987 the debit was $9194.97, and that was the extent of the father's liability.
5. The fatherwas entitled tohave thebenefit of payments made into the overdraft account since 16 November 1987, the general rule applying, namely that payments made in reduction of a running account are deemed to have been made in reduction of the account as from its inception. The father's debt had been extinguished.

Counsel for appellant Mr Niu
Counsel for respondent Mr Appleby

Judgment

This appeal has been brought in the name of "Siosifa Tongotongo Liava'a (deceased) · The deceased died in early 1993. On 20 August 1993 an application was made under Order 9 Rule 6(3) of the Supreme Court rules 1991 for an order that Vaha'i Foliaki be appointed to represent the estate of the deceased. It is unclear from the Court records before this Court whether the appointment has been made. If 11has, the record should be amended accordingly. If not, the order should be made promptly and the Court record amended in appropriate terms.

The respondent bank brought proceedings against the deceased ("Tongoton0") to recover money's said to be owing by him to the bank under a document styled "Loan Agreement" executed by him and his son Siosiua Tu'iono Liava'a ("Tu'i no".>· The facts giving rise to Tongotongo's alleged indebtedness to the bank were not 111 dispute at the trial. The following account of them is taken from Lewis J's judgment.

Siosiua Tu'iono Liava'a (Tu'iono) is the son of Tongotongo. He operated a cheque account numbered 01 200 133 0201 with the bank.

·On 24 August 1987 Tu'iono requested from the bank a temporary overdraft facility. On 25 August 1987 a loan agreement and receipt were signed by Tu'iono and Tongotono for the amount of T$6,000.00 plus interest at 10% for the purpose of an overdraft facility - (the first overdraft).

On 16 September 1987 $7,000.00 was paid into the account and the first overdraft was cancelled.

On 30 October 1987 Tu'iono requested a temporary overdraft facility from the bank for the sum of $15,000.00 as bridging finance for the purpose of an hotel known as the Paradise International Hotel at Vava'u. On 6 November 1987 a loan agreement was signed by Tu'iono and Tongotongo for the amount of T$15,000.00 plus interest at 10% for the purpose of an overdraft facility which was to be cleared by 16 November 1987.

The account was operated by Tu'iono alone and between 30 October and 6 November 1987 cheques to the sum of T$1,721.40 were presented and honoured by the bank which brought the balance of the account from $20.48 credit on 30 October to $1,700.92 debit on 5 November 1987.

On 2 November 1987 an agreement for the sale of the hotel was signed between Carter E Johnson as seller as Siosiua T. Liava'a and nominees as buyers.

On 12 November 1987 Tu'iono paid Carter Johnson a deposit of US$10,000.00 pursuant to the agreement. On the same day Tu'iono requested the bank to increase the overdraft limit to $20,000.00. Tongotongo was neither present nor was he consulted about the increase.

On 15 November 1987 the account balance stood at $9,194.97 debit. On 16 November 1987 Tu'iono requested the bank by telephone to increase the overdraft limit to $25,000.00.

On 23 November 1987 the account had not been cleared and the balance stood at $9,746.07. On 30 November 1987 Tu'iono drew a cheque to purchase a US$ l0,000.00 bank draft and the balance thereafter stood at $27,069. 11.

On 9 December 1987 the bank cancelled the overdraft. Tu'iono then told the bank that the overdraft would be cleared by the end of 1987. The account balance at that time stood at $27,349.11.

The last activity on the account by Tu'iono was on 8 and 9 June 1988 when he

presented cheques for T$554.70 and T$200.00 which were subsequently reversed. The account balance at 10 June 1988 stood at $34,812.17.

The banlemade requests of Tu'iono that he clear his overdraft on several occasions between December 1987 and March 1990.

Lump sum payments were made to the account by Tu'iono and another family member, Sharon, in the amounts of $700.00, $4,900.00, $1,000.00, $200.00, $3,023.33, $5,000.00, $1,000.00 making a total of T$11,823.33.

On 26 July 1988 Tongotongo was advised by the bank that if Tu'iono did not clear the account in the following month his houses which were pledged under the loan agreement would be advertised and sold. On 10 August 1988 Tongotongo advised the bank tat he was epared to repay the debt from his pension since it had difficulty in collectm from Tu 10no. On 27 April 1989 he commenced payments at a rate of $50.00 per fort1gt. By 16 August 1989 together with other payments, a total of $14,373.33 had been. paid 111 reduction of the account, of which T$2,550.00 came from Tongotongo's pension. Tongotongo ceased payments altogether on 13 November 1991 because the bank had taken action against Tu'iono in New Zealand.

On 3 September 1991 Tu'iono was declared bankrupt in New Zealand. He had Jived m New Zealand since about July 1986.

On 12 September 1991 Peter Macdonald, Solicitor for the bank, sent a letter of dema?d n behalf of the plaintiff. Since 8 June 1988 the account has accrued interest and ex.ammatton fees and as at 30 June 1994 the balance stood at $39,312.59.

. The loan agreement ell:ecuted on 6 November 1987 provides that the liability of Tu'1onoand Tongotongo should be joint and several. The purpose of the loan is ex.pressed to be "Overdraft Limit".

The agreement further provides (in part):-

> 'The. Bank agrees to lend the Borrower the sum of $15,000.00 Pa'anga (hereinafter called the Agreed Sum') . . . . . The Borrower agrees 10 make repayments of . . . . " The space following these words is left blank. However, the words "To be cleared by 16/11/'87" are prominently typed in the blank space. The document continues: "The first repayment shall become due · · . · · . . . • These words are again followed by a space in which appear the words. "To be cleared by 16/11/'87".

he oan agre ment goes on to provide that "in the event of failure by the Borrower to fulfill hts obit gallons under this Agreement then the balance owing becomes payable on demand ...".

Lewis J. concluded on those facts that the bank was entitled to recover from Tonotongo the full amount owed to it by Tu'iono. His Honour appears to have arrived at this conclusion beca se he thought that Tu'iono and Tongotongo were joint account holders and that accord111gly Tongotongo was jointly and severally liable with his son to pay the bank the amount by which the account was in debit i.e. account no.01 200 133 0201.

. . However, His Honour was mistaken in his view that Tongotongoand Tu'iono were JOmt account holders of that account. It is clear from the evidence that account was operated by Tu'ionoalone. He was theonly person who drew cheques on the account and Ton gotongo never assumed any liability to guarantee payment of the debit halance in that account, otherwi se than in accordance wi th the agreement he signed on 6 November 1987.

All that Tongolongo agreed to do was to pay money to the bank in accordance with that agreement There is no warrant for holdin gTongotongo liable to indemnify thebank against unlimited losses incurred by it in i ts separate dealings with Tu'iono in respect of the latter's personal cheque account i.e.account no.01200 133 0201 which Tongotongo never guaranteed.

The question therefore arises as to theamountofTongotongo's indebtedness (if any) to the bank under the 6 November 1987 loan agreement. It is important to note that the purpose of the agreement is expressed to be "Overdraft Limit of $15,000 ... to be cleared
160 by 16/ 11/'87.• We take these words to mean that Tongotongo agreed to guarantee repayment of the overdraft up to a limit of $15,000 provided that limit was reached by 16 November 1987. He did not agree to pay the bank $15,000 if it chose to advance that sum to Tu'iono after that date.

. Itis common ground that as at 16November 1987the debit in Tu'iono's account was only $9, 194.97. Itwas submitted by Mr. Niu for the appellant that since Tu'iono owed the bank $1,700-92 before the loan agreement was executed on 6 November 1987, this amount should be decucted from the sum of $9, 194-97. Itwas said that the $1,700-92 was not covered by the loan agreement. We do not think this argument is valid. We think the better view of the evidence is thatTongotongo agreed to guarantee repayment of the debit
160 balance, whatever it was, provided it did not exceed $15,000 and further provided in effect, that the overdraft was crystallised as at 16 November 1987.

The remaining question is whether the appellant is entitled to have the benefit of payments made into the overdraft account since 16 November 1987. In our opinion he is. Itmay well have beenopen tothebank to allocate payments made thereafter toamounts advanced to Tu'iono after the same date. But there is no evidence that it did. In those circumstances we think the general rule applies, namely that payments made in reduction of a running account are deemed to have been made in reduction of the account as from its inception. Since the bank has received much more than the amount outstanding as at
170 16 November 1987, the appellant's debt has been extinguished.

The appeal is allowed and the decision of the trial judge set aside. In lieu thereof there should bejudgment forthe appellant. The respondent must pay the costs of the trial and of the appeal, to be agreed or taxed.

Cocker v Palavi & Minister of Lands

Court of Appeal
Morling, Burchett & Tompkins JJ
10 App. 2/97

16 & 20 June 1997

Land - naturaljustice - Minister - competing claims
La1,1d - reswnption - land courtjurisdi ction
Practice & procea'ure - appeal - poilll not taken below

Thejudgment below was reported in 1996Tonga LR. The first defendant belowappealed.
20

Held;

1. The Court below was right in referring the matter back to the Ministerof La d when he had not considered, as he should have, competing claims. n s
2. The Land C urt vas not prevented from havingjuri sdiction by s.149(1)Land Act, tht bemg irected to questions affecting the rights of persons claimin to have mte estsh resumed land at the time of resumption. Such claims woul no doubt give nse to claims for compensation wJiich are reserved fo th Supreme Court. r e
3. Althogh the.point (ofjuri sdiction) was not taken below this was oneof those excephonal circumstances where it was proper to allow the point to be rais d
4. Orders below, with some amendment, confirmed. e ·

Cases considered

Vailala v Futu (1958) 2 Tonga LR 165
Hakeai v Min. of Lands (1996) Tonga LR

Statutes considered

Land Act s.149(1)

0 Counsel for appellant — Ms Tonga
Counsel for first & second respondents — Mrs Vaihu
Counsel for third respondent — Ms Bloomfield

Judgment

This appeal arises out of the lease of a small area of land at the corner of W"lhngton Road and Fatafehi Road, Kolofo'ou. It is part of the government estate. Itseems to have been voluntarily surrendered tothe Crown in 1933 or thereabouts. Itwas acquired by the Crown for the purpose of building and maintaining a public water tank. This purpose was exhausted about 30 years ago when the tank was no longer required as a source of water supply and the tank thereafter fell into disrepair.

The predecessor of the first and second respondents ("the Palavis") was registered as the holder of all the land in the immediate vicinity of the subject land. Ithas always been regarded by the Palavis and their predecessors as belonging to their family. Indeed, after the tank fell into disrepair they took steps to make it secure and maintain the land upon which it stands.

The Palavis made enquiry of the Ministry of Lands as to what was to happen to the land after it was no longer required for public purposes. They claim that over a number of years they were encouraged to think it would be returned to them. A t one stage tey entered into negotiation s with the Ministry for a lease of a small part of the land which as overhung by a building erected on their adjoining land.

In January 1989 the second respondent (who is the father of the first respondent) applied for a lease of the land. His application set out in some detail the grounds upon which he relied. He stated the land was next to land leased by his son, that a commercial building was erected on that land, that it was hoped to extend the building on to the land applied for, that "we" (obviously referring to himself and his family) had looked after and maintained the subject land for many years and that the development of the land by the extension of the commercial building would be an improvement to the township of Nuku'alofa.

In May 1989 the appellant applied to lease the subject land. His application was approved on 24 July 1989, and a 50 years lease was graned to hi'.11. Apar ntly, n? notification was given to the second respondent of the making of this apphcahon.

Upon hearing of the grant of the lease to the appellant the Palavis approached the Minister seeking to have the position rectified. They were informed that the appellant would berequired tosign a releaseof his lease whereupon the landcould beleased tothen:i· But apparently nothing came of these discussions and in due course the Palav1s commented proceedings in the Land Court seeking orders that the lease to the appellant be declared null and void and that a lease be granted to them.

At the hearing in the Land Court it was submitted on behalf of the Palavis that e subject land having been voluntarily surrendered forthe specific purpose of a community water tank and that purpose being exhausted, the land should revert tothem because the land had been, in effect, given in trust to the government only for that particu lar purpose.

Hampton C.J. found it unnecessary to decide that point. He found that the decision to grant the lease to the appellant was made in ignorance of the application made almost contemporaneously by the second respondent. He concluded that th Minister had t considered thesecond respondent's application and had failed to giveitherof the Palav1s an opportunity to be heard in support of it. He accepted theevidence of Mr oala, Land Registry Clerk, that the Minister was unaware of the second respondents application when the appellant's application was submitted to Cabinet for approval. In these circumstances, Hampton C.J. set aside the Minister's decision and referred the appellant's application back to him to be dealt with according to law.

In doing so, he applied the following observation made by this Court in Siaosi Hakeai v Minister of Land s & others [1996) Tonga LR A ppeal 50/94- judgment 31May 1996 at page 3:

> "It is clear law that a person whose rights intorests or legitimate expectations areimperilled by anofficial'sconsideration of someother person'sapplications will generally by entitled to a fair opportunity to be heard before a decision adverse to him ismade. This iswhat is known asnatural ju stice. Herealthough the official of the Ministry of Lands knew the surrender had been arranged to enable him to apply for a grant of the allotments, he 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 sidesof a case to be considered that the principle of naturalju stice exists."

We think His Honour's decision was correct Indeed, on the hearing of the appeal the decision was supported by counsel for the Minister.

Ms Tonga submitted that since the subject land had been resumed by the Crown for the purposes of a public water tank the Land Court had no juri sdiction to deal with a dispute concerning it. Shecited sub-section 149 (1) of the Land Act Cap. 132 in supported of this submission.

The argument based on s. 149(1) was not raised in the Land Court or in the Notice of Appeal to this Court. Mrs Vaihu accordingly submitted that we should not allow the point to be raised. She relied on Vailala v Late Futu (1958) 2T.L.R 165, a decision of the Privy Council, where Hammett C.J. said:

> "We wish to emphasise that we will not allow any grounds of appeal to be raised at the hearing of an appeal lodged by or with the aid of a lawyer other than those set out clearly in the Notice of Appeal save in exceptional circumstances :•

However, as Ms Tonga's submission goes to the Land Court'sjuri sdiction we think this is one of those exceptional cases where it is proper to allow the point to be raised.

Sub-section 149(1) provides:-

> ."( ). The Court shall havejuri sdiction - (a) to define the area and boundaries of every parcel of land in the Kingdom; (b) to hear and determine all disputes, claims and questions of titl e affecting any tofi'a, tax or town allotment, or any interest therein; excepting any disputes.claims and questions affecting any land or interest in land resumed by the Crown under Part IX of this Act."

We do not think s.149(1) has any application to the facts of the present case. II is directed to questions affecting the ri ghts of persons claiming to have interests in resumed land at the time of resumption. Such claims would no doubt give rise to claims for compensation, which are reserved for decision by the Supreme Court. But s.149(1) has no application to a dispute concerning a lease by the Crown of land which has been resumed at some earlier point in time.

Ms Tongaalso raised the point that in making his formal orders Hampton CJ remited the matter tothe Ministerof Lands "for hearing and determination of both applicationsby first plaintiff and first defendant, according to law', whereas it was the second plaintiff, not the first plaintiff, who made the application in January 1989. This point is validly

made and calls foran amendment to the formal orders. However, we should make it plain that on the reconsideration of the matterit would be proper for the Ministertohave regard as afactor tothehistory of the Palavi family inconnection with theland.Alsothe Minister could consider any further application by either of the Palavis.

Hartlpton C.J.ordered the appellant to pay the costs of the application in the Land Court. We do not think this order was appropriate having regard to all the circumstances of the case. The appellant was entitled to apply for the lease. Itwas not his mistake that led to it being granted. Itwas the Minister's. Under all the circumstances we think that all parties should have borne their own costs of the hearing before Hampton C.J. The appellant should pay one half only of the Palavis' costs of the appeal since he has had partial success, if only on the question of costs. The Minister should bear his own costs.

The orders of this Court are therefore as follows:

1. Order 2 made by Hampton C.J.varied by substituting the words "second plaintiff' for the words "first plaitiff'.
2. Order for costs made by Hampton C.J.set asideand in lieu thereof order that all parties to pay their own costs of the proceedings in the Land Court.
3. Otherwise orders made by Hampton C.J. confirmed.
4. Appellant to pay one half of the first and second respondents'costs of the appeal. Third respondent to bear his own costs.

Lin v Liou

Court of Appeal
Hampton CJ, Morling & Tompkins JJ
App.6/97

16 & 20 June 1997

Debt - loan - proof
Practice & procedure - re-open case - discretion

The appellant appealed against the dismissal of his claim in the Supreme Court, claiming moneys he alleged were borrowed from him by the respondent.

Held:

1. This was one of those unusual cases where the Court of Appeal reached a cnclusion different from the trial judge on issues involving the credibility of witnesses.
2. If the respondent'sevidence was disbelieved by the trial judge, asit was, then there was no room fora finding that the money advanced by the appellant was not a loan. And the respondent admitted receiving US$22,218.
3. The trial judge did not reject as unreliable the evidence of 2 other witnesses which evidence tended to support the appellant's claim.
4. The judge below should have allowed the appellant to re-open his case and tender a letter, a relevant exhibit, that test being whether the grant of leave to re-open and call fresh evidencewould causeembarrassment orprejudi ce to the other side. No prejudice could have been caused here. The letter strongly supported the appellant's case.
5. Appeal allowed. Decision set aside and a verdict entered for the appellant in the sum of US$22,218.

Cases considered

Smith v NSW Bar Assn (No.2) (1992) 176 CLR 256
Londish v Gulf Pacific (1993) 45 FCR 128

Counsel for appellant — Mr Niu
Counsel for respondent — Mr Foliaki

Judgment

The appellant (the plaintiff at the trial) sued the respondent seeking to recover US$24,218which he claimed he had lent to the respondent (defendant). The defendant admitted that the appellant had paid US$22,218 to her, but alleged that the sum was a repayment of money the plaintiff had borrowed from her husband to meet his gambling debts.

The trial judge said he was unable to conclude from the evidence that either party was telling the truth. Since the plaintiff bore the onus of proof he found forthe defendant. The appellant brings this appeal from that decision.

It is an unusual case in which an appellate court will reach a conclusion different from that of the trial judge on issues involving the assessment of the credibility of witnesses. In the present case we recognize the advantage Lewis J had of seeing the w itnesses and of assessing their credibility. We have therefore carefully considered whether or not we should decide this appeal by forming our own view of the facts which are in dispute. We have come to the conclusion that we should decide the case ourselves rather than send the case back for re-trial.

There are several matters that lead us to this conclusion. The first, and most important, is the way in which the essential issue in the case, i.e. whether the amount admittedly received by the defendant was a loan or a repayment of the plaintiffs alleged debt to the defendant's husband, was presented to Lewis J for decision. If the defendant's evidence on that issue was disbelieved by Lewis J there was no room for a finding that the money advanced by the plaintiff was not a loan. There was, of course, room for a finding that the plaintiff had not proved that he had advanced the full amount he claimed to have lent the defendant. Indeed, that was a live issue before His Honour. But since the defendant admitted having received the bulk of the money alleged to have been paid to her, we do not think His Honour should have been left in any doubt that the plaintiff was entitled to a verdict for al least that amount, if he rejected the defendant's evidence that the money was not a loan.

His Honour stated in explicit terms that he rejected the defendant's evidence. He said: "I come directly to the point, I do not believe the Defendant or her husband.' This statement did not preclude His Honour from finding that the plaintiff had failed to discharge the onus of proving the amount he was owed by the defendant. But as he rejected the defendant's evidence that the amounts advanced to her were not loans, there was no room for a finding that the plaintiff had failed to discharge the onus of proving that they were indeed loans.

It was certainly open to His Honour to conclude that there were discrepancies and inaccuracies in the plaintiff s evidence. But these related to matters such as the precise dates when monies were sent to the defendant and the precise amounts.

Ifthere had been no admission by the defendant that she received US$22,218 from the plaintiff, the weaknesses in the plaintiffs evidence could have led His Honour to make a finding that the plaintiff had not discharged the onus of proving the amount of the defendant's indebtedness., But the admission made by the defendant overcame this problem to the extent of the amount admitted i.e. US$22,218.

Further, His Honour appears not to have rejected as unreliable the evidence of the witnesses Tsay and Yu. Their evidence tends to su pport the plaintiff's evidence that he did not borrow money from the defendant's husband to pay his gambling debts.

Yet another matter which tipped the scales in the plaintiffs favour at the trial was the defn?ant's failure to avail herself of the opportunity of rebutting evidence called by the plamtiff as to the probability that she was the author of a letter in which the alleged loan was .admitted: This evidence was called at a late stage of the trial, but an adequate opportunity was given lo the defendant to answer it. She declined to do so.

Tere is sme uncertainty in His Honour's reasons as to whether the English lranahon of this letter was tendered in evidence. It appears to have been marked as xh1b1t 6, but m His Honour's reasons he states that he rejected it as "inadmissible". It ts possible that Hts Honour meant to say that the original letter was inadmissible because of the later tene of it. However this again is uncertain, because the original ltter was maked as Exh1b1t 7. Whatever the position, His Honour appears to have not given any weight o the letter because it was tendered after the plaintiff closed his case.

Hts Honour wa of the view that the letter went to proof of a substantive, as distinct from a formal, matte (as it plaily did) and rejected it on that ground. With respect, we are unable to agree with that ruhng. We think the better test for deciding whether a party sh?uld be allowed to re-open his case is whether the grant to leave to re-open and call fresh evidence would cause embarrassment or prejudice to the other side: see Smith v New South Wales Bar Association (No.2) 1992 176 C.L.R. 256 at 266- 267 see also Londish v Gulf'Pacific Pty Ltd (1993) *45* F.C.R. 128 at 138-141.

opies of the letter were already in evidence, and both the plaintiff and the defendant had given evidence as to its authenticity. The defendent denied she had written it. Lewis J. made no finding on this issue, presumably because he found it unnecessary to do so because he regarded the letter as inadmissible.

The admission of the original lettercould not possibly have caused any prejudice the defendant. She had already been cross examined at length on it and it is difficult to understand what more she could have said about it. Moreover, she was afforded the opportunty of giving further evidence after the tender of the letter, but declined the opportunity.

. Staeens ae made in the letter stiongly supportive of the plaintifrs case. For mstance 1t ts said: . From the beginning when I got to know you, I know you have taken care of me all te time. So I asked you for the first time to lend me $20,000 to pay back my overdraw (sic) in Tongan. ..... I plan to pay you back US$I,OOO every month from the end of November, I hope you can give me your account number before I leave. I wi ll return all your money in time by living frugally.•

Obviously, if the letter had been treated as admissible evidence it would have made the plaintiffs case even stronger, especially as His Honour had already stated that the defendant's evidence was not to be believed.

. In the result, we think the plaintiff discharged the onus he bore to the extent that the evidence he called, and the admission made by defendant, proved that the defendant was indebted to him to the extent of US$22,218.

We therefore order that the appeal be allowed. The decision of Lewis J is set aside and a verdict entered for the appellant in the sum of US$22,2 18.

The respondent must pay the costs of the trial and of the appeal.

Minister of Police v Moala, 'Akau'ola & Pohiva

Court of Appeal
Morling, Burchett & Tompkins JJ
APP.19/96

11 & 20 June, 1997

Constitutio11 - power of Court - proceedings of Legislation Assembly
Habeas corpus - power of Court - privilege of parliament - contempt
Legislative Assembly - contempt - Constitution - Court

Thejudgment below, when the respondents were released on their application for writs of habeas corpus, is reported in [1996) Tonga LR, the respondent having been imprisoned for 30 days by the Legislative Assembly for contempt. The Minister appealed.

Held:

1. The position in Tonga as to parliamentary powers privileges and immunities is not the same in some other Commonwealth countries, because of the provisions of the Constitution; and it confers specific and limited powers in relation to contempt by cl.70.
2. So those powers and privileges in Tonga, depend on a true understanding of the Constitution.
3. Thejurisdiction to determine the meaning and application of the Constitution is conferred on the Supreme Court; and an exclusive power andjurisdiction to hear appeals from the Supreme Court is conferred on the Court of Appeal.
4. The Supreme Court has ajurisdiction to determine whether in a particular case the Legislative Assembly has exceeded the powers conferred on it by the Constitution. The Legislative Assembly may not enjoy, hold and exercise privileges, immunities and powers which are inconsistent with fundamental rights guaranteed by the Constitution.
5. A general warrant cannot preclude further enquiry by a Court if there is a challenge to an assertion of a parliamentary privilege defined by terms of a written constitution.
6. There is no constitutional right for the Legislative Assembly to deal with a person foran offencewhich did not exist at the timeof the alleged commission of it, still less to deal with a person for an offence which never existed.
7. The warrant here was not a warrant that stated a contempt in general terms; but was a warrant that stated no offence at all, instead relying on an asserted Order of the Legislative Assembly, by virtue of the power in cl.70 a direct appeal to the Constitution, which must entitle and require the Court, as the quardian and the interpreter of the Constitution, to investigate whether, in the particular circumstances, the "power" claimed was vested in the Assembly.
8. The summons to the respondents stated an offence which simply did not exist underth Cnstitution: Guilt was founded on that allegation. The Assembly erred m its nterpretat1on of the Constitution and acted beyond its powers under cl.70 m prefemng the charge and findi9g it established.
9. In addition the Constitution guarantees the procedural requirements of naral justice at such a trial before the Assembly. The respondents were entitled to natural justice.
10. The right to obtain a writ of habeas corpus is not lost by virtue of previous refusals.
11. The appeal was dismissed.

Cases considered: R v Richards exp. Fitzpatrick & Browne (1955) 92 CLR 157
(Victoria) v Glass [1871) LR 3 PC App 560
Kielly v Carson (1942) 4 Moore PC 63
Fotofili v Siale [1996) Tonga LR; [1987) SPLR 339
Bank of NSW v Commonwealth (1948) 76 CLR 1
Cmmsr Taxation v Lutovi (1978) 140CLR 434 Clayton v Heffron (1960) 105CLR 214
Armstrong v Budd (1969) 71 SR (NSW) 386 Smith v Mutasa [1990) LRC 87
Special Reference No.l. 1964 (1965) 1 SCR 413
Cormack v Cope (1974) 131 CLR 432 Robati v Cook Isl. (17-12-93) CA, Cook Is.
Sheriff of Middlesex case (1840) 11 ADa E 273
Cmmsr Police v Tanos (1958) 98 CLR 383
Toulilci Trading v Fakafanua [1996] Tonga LR
Doyle v Falconer (1866) LRl PC 328
Stockdale v Hansard (1839) 9 AD & El 14
Eleko v Nigeria '[1928] 1 AC 459

Statutes considered: Constitution

Counsel for appellants: Mr Waalkens
Counsel for respondents: Mr N. Tupou
Mr Tu'utafaiva & Mrs Taufaeteau

Judgment

This appeal raises important questions concerning the privileges of the Legislative Assembly of Tonga, and no less important questions concerning the liberties guaranteed to Tongan citizens by the Constitution.

Clause 70 of the Constitution finds its place within a group of clauses that relate to the Legislative Assembly. In that group of clauses, clause 69 makes it "lawful for the Legislative Assembly to pass judgment upon its members for their acts or conduct as members of the Legislative Assembly". Then clause 70 provides:

> "If anyone shall speak or act disrespectfully in the presence of the Legislative Assembly it shall be lawful to imprison him for thirty days and whoever shall publish any libel on the Legislative Assembly, or threaten any member or his property, orrescue any person whose arrest hasbeen ordered by the Legislative Assembly, may be imprisoned for not exceeding thirty days."

Although clause 70 does not specify by express words the tribunal which is to try an offender against that clause, the nature of the subject with which it deals and its setting in the .Constitution, suggest that the Legislative Assembly itself shall have the power to hold a trial. That is how the clause has hitherto been understood, and how the original 1875version of the Constitution read. (In that version, the provision now made by clause 70 was made in closely similar language by clause 73.)

As was pointed outin thejoint judgment of the High Court of Australia in The Queen v Richards; Ex parte Fitzpatrick and Browne (1955) 92 CLR 157 at 162, the powers privileges and immunities of the Parliament of the United Kingdom have ben define?, not by the Parliament, but by the courts. One of those privileges, Lord Cairns srud m Speaker of the Legislative Assembly of Victoria v Glass (1871) LR 3PC App. *560* at 572, "is the privilege of committing for contempt; and incidental to that privilege, it has ... been well established ... that the House of Commons havethe right to be thejudge sthemselves of what is contempt, and to commit for that contempt by a Warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is." Under the Australian Constitution, and until restrictions were accepted pursuant to the Parliamentary Privileges Act 1987, the Senate and the House of Representatives had, by s 49, the same "powers, privi leges and immunities" as "those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonweal th". Because the Australian Constitution did not define these powers privileges and immunities, but conferred them by reference to those obtaining in the United Kingdom, the High Court in Fitzpatrick and Browne held (at 162) that "it is for the House tojudge of the occasion and of the manner of [the privilege's) exercise".

But the position in Tonga is not at all the same. The Legislative Assembly is not the beneficiary of what Baron Parke, in Kielley v Carson (1842) 4 Moore PC 63 at 91 (13 ER 225 at 236), described as "the peculiar powers of Parliament", powers which are a result of an historical process in the distant past and, his Lordship thought, "ought not ... to be extended any further". (Fora more modem criticism in some detail of the utility of a broad privilege with respect to contempt, see D.C. Pearce: Contempt of Parliament - Instrument of Politics of Law? (1969) 3 Fed.L.Rev .241.) Rather than leave the powers of the Legislative Assembly to common law, or implication, or, as in the case of Australia por to the Parliamentary Privileges Act 1987, to a general grant of the powers of the Untied

Kingdom House of Commons, the Constitution of Tonga has chosen to confer specific and limited powers, which are contained in clause 70.

As was pointed out by Martin J and by the Privy Council jn Fotofili v Siale (1987) SPLR339, and (1996]Tonga LR the definition by the Tongan Constitution of the powers and privileges of the Legislative Assembly makes all the difference. Those powers and privileges are not at large, and whether the occasion for their exercise has arisen must depend on a true understanding of the Constitution. The Privy Council accepted (at 348) that "when a matter is a 'proceeding' of the House beginning and terminating within its own walls it is outside the jurisdiction of the courts". But it added (at 349 - 350) the significant statement:

> "In determining it 'sjurisdiction to inquire into internal proceedings of the Assembly [the Court) must apply the English common law regarding the privilege of Parliament lo determine the regularity of its own proceedings, *provided of course the Assembly hasnotacted contrary totheprovisions of the Constitution in the course of those proceedings* , for in such a case the Court is given jurisdiction by Article 90 of the Constitution ... .
>
> We conclude then that there isnojurisdiction in the Court to inquire into the validity of the Assembly's internal proceedings *where there has been 1110 breach of the Co11stitutio11.*
>
> . . . If, in the process of making its decision concerning allowances [ie., allowances payable to members, a peculiarly internal matter] the Assembly had breached a provision of the Constitution then we agree that the Court would havejurisdiction ...."(Emphases added.)

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

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

The words "in Law and Equity" do not limit the width of the conferral of power in all cases arising under the Constitution, for those words are words of extension, not of limitation: cfBank of New South Wales v The Commonwea lth (1948) 76 CLR I at 383; The Commissioner of Taxation of the Commonwealth of Australia v Lutovi Investments Proprietary Limited (1978) 140 CLR 434 at 443-444. In Clayton v Heffron (1960) 105 CLR 214 at 233 "law" and "equity" were treated, in the joint judgment of Dixon CJ, Mc Tieman, Taylor and Windeyer JJ, as comprehending the entire spectrum of legal juri sdiction. It is interesting tocompare the direct conferral ofjurisdiction on the Supreme Court by clause 90 of the Constituti on of Tonga with the indirect conferral of juri sdiction on the High Court of A ustralia unders76of the Australian Constitution, which relevantly provides:

> "The Parliament may make laws conferring original jurisdi ction
> on the High Court in any matter -
> (i) Arising under this Constitution, or involving its
> interpretation ... ."

The Tongan position, as distinct from that in England and that under s 49 of the

Constitution of the Commonwealth of Australia, which assismilates the Australian Parliament to the English House of Commons, is well illustrated by the New South Wales case Armstrong v Budd (1969) 71 SR (NSW) 386, where Herron CJ said (at 398):

> "This Court [the Supreme Court of New South Wales] has a jurisdiction to determine whether in a particular case the House [he was referring to the Legislative Council, one of the Houses of Parliament of New South Wales] has exceeded the powers conferred on it by the Constitution. In the exercise of that jurisdiction the Court will determine whether the limits upon the power of expulsion [this was the power there in question] enjoyed by the House have been exceeded or not ... . This Court has power in a proper case to declare a resolution for expulsion null and void."

The effect of a written constitution, in curtailing the very wide parliamentary powers and privileges that have been conceded to the House of Commons in the United Kingdom, has been repeatedly affirmed by the highest courts of countries that have written constitutions. In Smith v Mutasa [1990] LRC 87, a decision of a unanimous Supreme Court of Zimbabwe delivered by Dumbutshena C.J., the Court was concerned with a finding of contempt of Parliament made in general terms by the Zimbabwean House of Assembly against Mr Ian Smith M.P., the former Prime Minister of Rhodesia, by which his parliamentary salary was suspended for twelve months. Although, in terms, the Zimbabwean House had been accorded powers much wider than those in cl.70 of the Constitution of Tonga, Dumbutshena C.J. declared (at 92) that "all privileges and powers enjoyed by Parliament are subject to and must be consistent with the provisions of the Constitution". "Parliament", he continued (at 94), ". . .may not enjoy, hold and exercise privileges, immunities and powers which are inconsistent with fundamental rights guaranteed by the Constitution. If in Zimbabwe there is a conflict between fundamental rights and the privileges of Parliament *the conflict can only be resolved by the courts of justice"*. (Emphasis added). Therefore, the Court said (at 95), "If ... a dispute had arise11 between the appellant and the respondents on whether [what Mr Smith did] was a breach of parliamentary privilege or not, it would have been within the jurisdiction of the courts of this country to determine the dispute."

Pursuant to a power in the Zimbabwean Constitution, the Parliament had passed an Act to make a certificate of the Speaker conclusive that a matter concerned privilege. But Dumbutshena C.J. said (at 109) that "the court must examine the certificate in order to establish the legitimacy of the privilege claimed". For, "it is the duty of the courts to decide whehter the impugned statements or acts are properly a matter of privilege or not."

In reaching its conclusions, the Supreme Court of Zimbabwe placed some reliance on the decision of the Supreme Court of India in Special Reference No. I of 1964 (1965) 1 SCR 413. There, the opinion of the Court, delivered by Gajendragadkar C.J. asserted . (at 492) that to the constitutional right to seek redres from the Court "no exception is intended to be made by the Constitution by reference to any power or privilege vesting in the Legislatures of this country."

Both the Indian and the Zimbabwean Supreme Courts rejected the idea that a general warrant could preclude further inquiry where there was a challenge to an assertion of a parliamentary privilege defined by the terms of a written constitution. Dumbutshena C.J. referrred to the statements of Gajendragadka C.J. (at 445):

> "It is necessary to remember that though our Legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution."

And again (at 493):

> "If in a given case, the allegation made by the citizen is that he has been deprived of his liberty not in accordance with law, but for capricious or *mala fide* reasons, this Court will have to examine the validity of the said contention and it would be no answer in such a case to say that the warrant issued against he.c tizn is_ a general warrant and a general warrant must stop all further JUd1c1al rnqmry and scrutiny."

Dumbutshena C.J., for himself and his court, said (at 101):

> "It would be wrong ... in this country to follow all United Kingdom precedents on the law of parliamentary privilege without regard to the statute law and the Constitution of this country. Some of the precedents of the United Kingdom are part of our law of parliamentary privilege. Others have been overtaken by the provisions of our Constitution."

He added (at 103):

> "What is important for present purposes in that the Act imposes limitations on the power of Parliament to punish for a contempt."

This accords with the views of Barwick C.J. in the Australian High Court case cn:nack v Co (197 131 CLR 432. There, reliance was placed in argument upon the pnv1leges an 1mmumties of the House of Commons of the United Kingdom, attracted to the Australian Parliament by s.49 of the Australian Constitution. "But the submission" Baick C.J. said at 452, "was basically misconceived. We are not dealing here with Parliament w ose la\ s *and atívities* [emphasis added] have the paramountcy of the ouses of_Prhament 111 the Umted Kingdom. The law-malting process of the Parliament 111 Australia 1s controlled by a written Constitution."

. mith v Mutasa was followed by a unanimous Court of Appeal of the Cook Islands (Quilliam, Barker and Dillon JJ. A.) in Robati v The Privileges Standing Committee of the Parliament of the Cook Islands (unreported, 17 December 1993). There, the Plaintiff was summonsed by the Speaker of the Parliament (and the Court had regard to the terms of the sum{llons) for, as it was alleged, wilfully misleading Parliament; but the precise offence charged (on the facts accepted at the hearing) was not made an offence until th next dy. Although the Constitution of the Cook Islands provided for parliamentary pn:llege m very broad terms, and contained an express provision denying that "the vahd1_ty of any proceedings in Parliament" could be "questioned in any Court", it also o ta1_ne_d uarantees of liberty and the rule of law, and conferred on the High Court JUnsd1ction as may be necessary to administer the law". Quilliam J.A. described Smith v Mutasa a "of c pelling persuasion", and held that where Parliament, though claiming o pursu .its pn 1lege, acts unconstitutionally, "it must be proper for the Court to 111tervene . He cited also the remarks of Barwick C.J. in the High Court of Australia in Cormack v Cope (supra, at 453):

> "Whilst it may be true the Court will not interfere in what I would call the intra-mural deliberative activities of the Pa1liament it has oth a right and a duty to interfere if the constitutionall required process of law malting is not properly carried out."

And (at 454):

"There is no Parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law making are observed."

No sensible reason can be advanced why the Court should be more chary of interfering to prevent a gross excess of Parliament's right to deal with a breah of privilege (reaching beyond its constitutional limits) than of interfering to prevent an m gulanty m the procedure for the adoption of a Bill . Quilliam J.A ., and the other two JUdges who concurred with him, were right to treat the remarks of Barwick C.J., as in point, and to conclude that "there never was any constitutional right for Parliament to have dealt with the Plaintiff for an offence which did not exist at the time it was alleged to have been committed ."

And, if that is right, still less can Parliament deal with someone for an offece which never existed . Should it attempt to do so, as Barker J.A. said in his concurring ju ge?t, "the Constitution entitles the Court to consider whether Parliament is acting w1thm its rights."

. The proceeding from which this appeal comes was an apphcahon f r habeas corpus, brought by each of the respondents in respect of his imprisonment by virtue of an order or warrant under the hand of the Speaker of the Legislative Assembly. That warrant was addressed to the Minister of Police, and was to the following effect.

"The Legislative Assembly ordered to imprison [here each of the Respondents was named] for thirty days commencing 5 o'clock on the afternoon of 19 September 19% by v irtue of the power vested in the Legislative Assembly by clause 70 of the Constitution and the judgm ent of the House on this day regarding their imprisonment. They are not to be released until after the expiration of thirty days or otherwise ordered by Parliament for a shorter time.

I ask that immediate effect be given to this order."

This, it should be noted, is not a warrant that "states a contempt in general terms' (see Case of the Sheriff of Middlesex (1840) 11 AD. & E. 273 at 290; 113 ER 419 at 425), but is a warrant that states no offence at all, instead relying on an asserted rder of the Legislative Assembly "by virtue of the power vested in [it] by clause 70" - a d1Tec appeal to the Constitution which must entitle and require the Court'. as the guard1an and interpreter of the Constitution, to investigate whether, investlgat wether, m the particular circumstances, 'the power" claimed was vested m the Legislative Assembly.

The evidence indicated that, before the order to imprison the respondents was made, a summons was served upon them, or at least upon one of them, containing the following allegations:

"There is a complaint to the Legislative Assembly of Tonga regarmg the newspaper 'Taimi 'o Tonga' whereby [sic] you are the assistant editor and advertising manager, published in volume 8 number 36 on Wcdnesdy 4. of September 1996. It publishes [an] article on impeachment by the Leg slat ve Assembly which is not correct and it is disrespectful to the Legislative Assembly.

You are hereby summoned to attend the Legislative Assembly at Nuku'alofa Thursday 19th of September 1996 at 10 o'clock in the morning.

And take notice if you fail to comply with the summons and you do not attend you will be committed to prison.

Dated Wednesday 11th of September 1996.

Chairman of the Legislative Assembly."

It is unnecesary to recount the detail of the article which founded the issue of this summons. The appeal turns, not on what the article actually conveyed, though the appellants argued there was nothing in it offensive to the Constitution, but on the allegations drawn from it and set out in the summons as the charge against the respondents. However, an understanding of the circumstances may be assisted by a summary . The article began by informing its readers that an impeachment of the Minister of Justice had been submitted by the People's Representatives to the Parliament of Tonga. Its language was purportedly quoted, and signatories to it were named. (f here was no suggestion in evidence that the article misrepresented the document to which it referred, but rather that at the time of the publication of the article, i t had not yet reached the Legislative Assembly, for reaons that seem somewhat obscure.) Prominent among the complaints on which it was proposed to base the impeachment, as the article revealed, was a complaint Uiat the Minister had attended the Olympic Games in Georgia in the United States after the Chairman of the House, not the Legislative Assembly itself, had declined an application for leave. (The impeachment provision of the Constitution, cl.75, refers as a ground to "breach of the ... resolutions of the Legislative Assembly", not of the decisions of its Chairman.) Whi)e an article setting out the terms of a document proposing that he be impeached would naturally be offensive to the Minister, there is no comment in it about the Legislative Assembly itself.

Hampton CJ, who ordered the release of the respondents, held in subslance that the allegations contained in the form of summons fell outside the terms of clause 70 of the Constitution. He also held that the minimum requirements of a fair trial were not met by the proceedings which occurred in relation to the matter.

The form of summons calls for some immediate comment. It does not allege that any one of the respondents was personally responsible for any pa rticular statement in the article to which it refers. Nor does it allege that anyone of the respondent s spoke or acted "disrespectfu lly in the presence of the Legislative Assembl y", so as to fall within the first part of clause 70. Nor does it allege that by virtue of the article any one of the respondents did 'publish any libel on the Legislative Assembly", so as to fall withi n a further proscription in clause 70. To state something that "is not correct" is not at all the same thing as to publish a libel. And to be "disrespectful to the Legislative Assembly" by something written in an article is not at all the same thing as to "speak or act disrespectf ull y in the presence of the Legislative Assembly." Indeed, the allegation in the summons is an amalgam or conflation of two very inaccurate versions of two of the proscriptions contained in clause 70; and it thereby states an offence of writing something that is not correct and is disrespectful to the Legislative Assembly, an offence which simply does not exist under the Constituti on.

It was to answer a summons in these terms that each of the respondents was brought before the Legislative Assembly, and there is no suggestion of any other charge being preferred . The appellant, who contended that he held the respondents on a general warrant which should not be further examined, did not contest by evidence the natural inference that the determination of their guilt was made upon the allegation in the summons. In those circumstances. the inference was inevitable. For the Court could not accept

without evidence, as a reasonable possibility, that Parliament denied natural justice to the respondents by convicting them of offences to which they had no opportunity of advancing any defence. The appellant claimed that Parliament was not obliged to accord the respondents natural justice, but this is to miss the point; in the benc of ev1denc to the contrary, the Court will take it that Parliament, whatever the d1fficulties of enfor '.ng its duties against it, would act justly. The proper conclusion is that Parha nt nottf1d them of the case brought against them by the form of summons that was utilized; but .m doing so, Parliament erred in its interpretation of the Constitution, and it acted beyond its powers under cl.70 in preferring that case and in finding it established.

At the hearing of the appeal, the appellant sought to tender, as fresh evidence, !!-record of the relevant resolutions of the Legislative Assembly. But the terms of these resolutions threw no light on the present point, and it is unnecessary to rule on their admissibility at this late stage.

Although it is also strictly unnecessary to decide whether a person brogh before the Parliament under cl.70 has a legally enforceable entitlement to natural JUshce, the question should be answered. Counsel for the appellant contended tat no authority supported an affirmative answer, but he did not prouce any authonty to support a negative answer. The authorities he relied on were directed to one aspect only of the question _ whether Parliament could be called to accout if it faile o do whatever was its duty. The solution to the problem must be sought m the prov1S1on s of t Tongan Constitution understood as a consistent foundation of the State. The prov1S1on to be construed is 1.70 itself. As has been pointed out, it is necessary to make some implication with respect to the trial which the clause contemplates, for it says nothing about the trier. In general principle, the establishment of any tribunal to try offnces tha are not negligible involves an obligation to meet the demands of natural JUStice. As D1xn C.J. and Webb J. said in Commissioner of Police v Tanos (1958) 98 CLR 383 at 396, wit the ordinary courts, that "is a matter of course". Because it is a matter of course.' n failure to mention it in a constituting enactment will have any significance; to negative 11, there must be a clear contrary provision in express terms, or *necessarily* to be implied: ibid, also at 396.

While cl.70 makes no provision at all about the kind of trial it envisages., and cl .69 and 71 specify only the triers, other clause of the Constitut indotum to the dta 1ls of tnals. Clause 75, dealing with impeachment, makes express prov1s1on for natural Justice'. At tte beginning of the Constitution, in the group of clauses which this Court desc bed m Touliki Trading Enterprises v Fakafanua [1996] Tonga LR (Burchett, Tompkins and Neaves JJ, unreported, 31 May 1996) as giving "concrete application" to the fundamental affirmation of liberty with which the document opens, are to be found cls.11 and 13, both concerned with the right to natural justice. Clause 11, it was pointed out, refers to "any court", and it also uses the technical word "indictment", which is appropriate to a court. A clause so worded may not be referring to Parliament as a jud icial tribunal. But cl:13 uses the larger word "charge", and contains a general provision that "no one shall be tned on any charge but that which appears in the summons or warrant and fo w 1ch he was brought to trial•. This is a guarantee of the central requirement of natural JUStice, that the case to be met be known. And it refers, without limitation as to tnbunal, t? ay harge. Similarly, cls.14 and 16 contain, respectively, guarantees against forced self-mcnmmation and forcible searches without legal warrants, which are not limited to charges brought

in the ordinary courts. In the light of the whole of the Constitution, and having regard to cls. 13, 14 and 16 in partiular, cl.70 should be construed as authorizing a trial according o POC:edure that renects nghts fo natural ju stice and protection against comptdsory self-mcnm111ahon and arbitrary searches.

Accodi_ngly, this Court should hold that the Chief Justice was right in understanding l.70 as enhtlmg the respondents to natural ju stice. But the better view of the evidence •s not that hey were denied m1tural justice, but lhat they were convicted of an offence that did not exist.

Clause 70 does not altempt to pick up the wide ambit of the powers and privileges of the _Ho_use of Commons, as thos powers and privileges were picked up by s 49 of lhe Constituhon of the Commonweal th of Australia. Nor, in a written Constituti on such as hat of Tonga, would it be appropriate for it to do so. Each of the organs of Government m onga has the powers that are defined by the Constitution, which as the Chief Justice pomted out, and as was _poin_ted out by this court in Touliki *v* Fakafanua (supra), places at its vry f?refront the f' 1es of Tongan citizens. Clause 70 is intended to trench upon those_liberties only so far as 1s necessary to enable a Parliamentary Assembly to function effe tively. The clause is an exception to a principle of liberty, and should be understood, not m any loose or expansive sense, but in accordance with its terms.

Each of the offences creaed by clase 70 carries the same maximum penalty, and so must have been seen as of equivalent senousness. In fact, each is in the nature of a direct challege to the authori of the Legislative Assembly. In this context, the requirement that.disrespect, to conshtute an offence, must be displayed "in the presence of the Legisl_ativ Assembly" is plainly of the essence of the offence to which those words refer. Also,.1n this context, the words "publish any libel" should be given their ordinary legal manmg. The authority of the Legislative Assembly does not demand that no-one shall wnte any comments about it, for fear that those comments might be adjudged incorrect; nor would a mere incorrect comment rank with the other offences set out in clause 70. Thereor, although there was evidence in this case that the Tongan version of the Const1tu_t1on uses a word translatable as refening to lying or deception, in the context, subs tlal d1ffrence should be seen between the versions. In clause 70, as in other prov1s1ons ceatmg offnces, a loose meaning should not be given to a defining word so as to extend m an 1def1111te_way the ambit of liability. Here, the meaning of a libel is the apprpnte meamng. It 1s a word that was familiar in comparable 19th century consl tut1onal Jaws: see, for example, Doyle *v* Falconer (1866) LR 1 PC 320 at 338. Certaml y, the word, in thi s context, does not refer to something which is merely "not correct".

In the present appeal, the Court is concerned with a charge made 011 the basis that newspaper article was "an article on impeachment by the Legislative Assembly which is not o'.1':· hat doe t alleg a "libel n the Legislative Assembly", or even a lie about 1t, if libel means he . To discuss legislation or other resolution s proposed or to be proposed, to the Le islative _Assembly, or passed or to be passed by it, is of lh very esse e of a constitutional pohty - which Tonga is, as clause 31 of the Constitution exphc1ty states: _Indeed, clause 7 makes freedom of the press subject only to the law of slander (a add1t1onal reason to read clause 70 as referring to libel in the legal sense) and the protection of the Crown. What Milton wrote, translating Ewipides (Dore ed. of The Complete Poems of John Milton, vol 11, p.665), is embraced by our Constitution: —

> •This is true liberty, when freedom men
> Having to advise the public may speak free;
>
> What can be juster in a state than this?"

Because the Constitution did not authorise the charge that was brought, the appeal should be dismissed, subject toone further question. The appellant submitted tothe Chief Justice that he should not hear the respondents' applications for habeas corpus, because of the refusal of previous applications by Lewis J. However, there are several answers to this proposition.

In the first place, nothingin the nature of an issueestoppel or resjudi cata could have arisen in thecc:3e of the respondent 'Akilisi Pohiva. He had madeone previou sapplication to the Court, but not as a challenge to the warrant; his contention had been that, upon the prorogation of the Legislative Assembly, he had become entitled to be released in pursuance of hie principle which applies to a commitment for contempt of the English Houseof Commons. His argument then was that, as the Minister of Police wasjustifying his imprisonment upon the basis of a warrant claimed to be of the same kind asthat which could be issued by the authority of the House of Commons, the imprisonment should also terminate upon the same basis upon which a similar imprisonment would terminate in England - upon the prorogation of Parliament. (Cf. the order in question in Fitzpatrick and Browne (supra), which was expressed to endure only until the prorogation of Parliament, and see Stockdale v Han sard (1839) 9 AD & E 114). That was not an attack upon the constitutional validity of the resolution of the Legislative Assembly or uponthe warrant. Itfollows the appellant's point could not affect the order in favour of 'Akilisi Pohiva.

More fundamentally, cl.9 of the Constitution provides:

> "The law of the writ of Habeas Corpus shall apply to all people and it shall never be suspended excepting in the case of war or rebellion in the land when it shall be lawful for the King to suspend it."

This entrenchment of the law of habeas corpus as a constitutional right has applied continuously inTonga since theoriginal Constitution of 1875. There is no doubt that the right to obtain a writ of habeas corpus was then and for long afterwards held not to be lost by virtue of one or more refusals at first instance: R v Suddis (1801) 1East 306 at 314, per Lord Keyon C.J., ; Exparte Partington (1845) 13 M. & W. 679; Cox v Hakes (1890) 15A pp. Cas. 506at 514, per Lord Halsbury; Secretary of State for Home Affairs v O'Brien [1923] AC 603 at 609; Eshugbayi Eleko v Officer Administering the Government of Nigeria [1928] l A.C. 459. The right so entrenched constitutionally in Tonga did not disappear because, nearly a century later, an English Divisional Court in Hastings [1959] 1QB 358 considered the English law should follow a new path, and its view was accepted by the English legislature in The Administration of Justice Act 1960, without the matter ever being tested in the higher courts of appeal. That Act palliated the problem which the change in the law produced, that an unappealable decision at first instance might deny freedom to an unjustly imprisoned person, by requiring the question of refusal of a writ of habeas corpus to be referred to a Divisi0nal Court in the first instance. This solution is not suitable to conditions in Tonga, which has no Divisional Court, and where any appeal against a refusal of a writ of habeas corpus would be likely to be heard only after

the imprisonment hd ended, or been endured for a significant period.

. Itfollos that.m Ton?a the writ of habeas corpus remains available, as the English Privy Council hel 11to be m Eshugbayi Eleko (supra), despite an earlier application. In th present case: 1t should be added,the renewed application was suppor1ed by fresh evidence, and raised fresh grounds.

A final question of a technical nature was raised on behalf of the respondents. The referred to thereluctance of the law topermitCrown appeals in criminal cases that the appellant was not entitled to maintain the appeal. However, the re , fqn en d' y mg ti I a . . a issue 1s cons .tu Ilona one of great importance. Indeed , the appellant made it clear al the hearing hathis purpose wasnot topunish the respondents, but toclarify the law, and he undertook if s ccssul n the ppeal, not to re-arrest the respondents. The Court has decided Iha havmgju nsd1ction, 1t.sh uld resolve thequestions in dispute and, for the reasonsthat have been stated, should d1sm1ss the appeal with costs.

Hopoi & Fusimalohi v Police

Supreme Court, Nuku'alofa
Hampton CJ
Cr App 1372/96

11 & 18 July 1997

Dances Act - obstruction of police - rank
Appeal - obstruction - lawful execution of duty
Police - obstruction - lawful duty - Dances Act - rank
Criminal offence - proof - obstruction of police - rank

The appellants had been convicted of abusing and obstructing police officers in the execution of their duty when the police endeavoured to close a licensed dance being held in a private club, the dance having continued past the permitted hours.

Held, on appeal:

1. The private club, whilst holding such a dance, was a public place.
2. Only police officers of the rank of first class constable or above could take steps to stop a dance under the Dances Act.
3. The officers here were constables only and not of the necessary rank.
4. They were not therefore acting in execution of their lawful duty so the offences charged could not be committed.
5. The Minister of Police could not delegate power to such officers who were not of the necessary rank; the Minister could not order officers to do things beyond their own powers and in any event, the Minister was not a police officer.
6. (Obiter) S.57 Criminal Offences Act was being incorrectly used in the sort of circumstances involved here.

Cases considered — Tauvaka v Police [1997] Tonga L.R.164

Statutes considered — Dances Act
Criminal Offences Act s.57, s.113

Counsel for appellant — Mrs Taufaeteau
Mr 'Etika

Counsel for respondent — Ms Tapueluelu

Judgment

The appellants appeal against convictions and sentences imposed on 17 September 1996 by a Senior Magistrate:-

Hopoi against convictions for

(a) abusive language to a government servant namely a police officer (s.57 Criminal Offences Act) on which he was sentenced tQ 4 months imprisonment, suspende for 9 months;

(b) obstruction of police officers in the lawful execution of their duty (s.113 b Criminal Offences Act) on which he was fined $200 to be paid within 14 days and in default 4 months imprisonment;

Fusimalohi against conviction for

(c) obstruction of police officers in the lawful execution of their duty (s.113 b Criminal Offences Act) on which he was fined $200 to be paid within 14 days and in default 4 months imprisonment.

. The facts are simple. On Wednesday? August 1996 the Tonga Club, a private club, apphed pursuant to the Dances Act (cap 166) for a license to hold a public dance that evening, at the Club, between 8pm and midnight. (Both appellants were involved with the Committee which organised dances, which were held regularly).

The applied - for licence was granted on conditions inter alia; that the dance should cease at midnight, and that thereupon all persons not being bona fide residents upon the premises should leave and disperse.

At 12.30 on 8 August police officers (including officers Mahe and Sakopo the 2 officers named 111 the charges) went to the Tonga Club, the dance and the music still then continuing and a nearby resident, the Hon. Minister of Police, having been disturbed and having dispatched Police Officers. (I will come back to the Hon. Minister's role, and the police attitude to his instructions).

. There was a considerable measure of agreement between the accounts of the 3 police officers, who attended the Club, and the accounts of the appellants, both in their interviews with the police and in their evidence given before the Magistrate.

The police arrived. The volume of the music was asked lo be turned down. The police there then learnt from the appellant Hopoi that the dance was supposed to have stopped at midnight. Officer Mahe then directed the appellant Hopoi (a member of the organising dance committee) to stop the dance. The response from Hopoi, on all accounts (including his), was the use of the obscenely abusive language complained of.

These exchanges, it seems, took place at the door of, or just outside, the Club. The appellant Hopoi retreated in. Officers Mahe and Sakopo tried to enter as well to stop the dance (it being long after midnight by now) and Hopoi admits trying, physically and verbally, to stop and prevent them from entering. He claimed in relation to this conduct of hi (th swearig. te attempted stopping) that it was as a result to a misunderstanding by him viz. that his view was that this was a private club and the police could not enter and the police could not stop the dance.

. Hoi retreated; Officers Mahe and Sakopo followed. In the barroom the appellant Fus1maloh1 was seated. He, on his own account, knew the position. He knew the Police were _intent on arresting Hopoi and he tried to stop (and did interfere with) them by holding out his hands 111 front of them and telling them to wait and went on to claim that this was a private club and only members could enter.

On those facts the Magistrate found all 3 charges proved. He had been referred, in defence submissions, to sections 2(2) and3 of the Dances Act (cap 166) under which Act this licence had been issued and which sections provide, in their effect, that it is only a "police officer of or above the rank of first class constable" who can enter any place in respect of which a licence has been granted or any place where he has reason to believe dancing is going on contrary to the provision s of the Act to either enforce the conditions of the licence or to warn persons there to leave and disperse.

The Act is very specific. It is only a police officer of or over a specified rank who can enter. Here the 3 witnesses (Mahe, Sakopo, Tongia) who gave evidence for the prosecution about attending this dance described themselves as being police constables only. Nothing was said to indicate that any of them were of higher rank.

Questions of different ranks are provided for in the Police Act (cap35) eg. in s5 and some definitions in s 3 although there is no specific mention of, and definition of, a "first class constable".

. However, in further argument, all counsel agreed that a first class constable is an accepted and approved rank in the police and such a constable wears one stripe, is the equivalent of a lance-corporal and is often described as a lance-corporal. The Civil Service Lis to which counsel referred me, describes the following ranks : Police Commander, Deputy PoliceCommander, Chief Superintendent, Detective Superintenden Assistant Superintendent, Chief Inspector, Assistant Chief Inspector, Inspector, Cadet Officer, Sergeant, Corporal,Constable First Class, Police Constable, Special Constable, and Probation Constable. Thoseranks fitwithin the schemeforrankscontained in the Ac as can be seen, for example, from these definitions taken from s 3:

> Superintendent of Police" means the police officer appointed to that rank or any other police officer appointed or deputed to act in such office;
>
> "inspectorate officer• means and includes any police officer below the rank of Superintendent of Police and appointed to inspectorate rank;
>
> "senior police officer" means any police officer appointed to the rank of inspectorate or above;
>
> "subordinate police officer" means and includes any police officer below the rank of an inspectorate officer and appointed to rank above that of police constable;
>
> "police constable" means any police officer appointed to that rank and includes a recruit.

It is clear, therefore, that a first class constable (or lance-corporal as sometimes described, presumably from the one stripe) is a "subordinate police officer" as defined (and as set out above) and is a "rank ahove that of police constable".

Proof of the necessary rank was lacking in these prosecutions. Only officers of the ranks specified in the Dances Act could lawfully carry out the duties these office£$ (particularly Mahe and Sakopo) were attempting to perform namely to enforce the conditions of the licence, close down the dance and disperse those persons there.

If neither Mahe nor Sakopo were of the required rank (and/or that was not proved in evidence - and it was not) they were not acting in execution of their lawful duty first when they encountered Hopoi, directed him to shut down the dance, and provoked his

swearing at Mahe; and secondly when they tried to enter to shut down the dance. Those unlawfI actions by the 2 officers conditioned everything that then followed. Hopoi, though 11 may hav been stupid .and the height of folly, was entitled to resist the entry vrbally (and physically)_ as he did. Is he then guilty of a serious crime (and I emphasise cnme - not some petty m1sdemeanour or petty offence) under the Criminal Offences Act and•.as was alleged here, against s.57 of using abusive language towards an officer in the service of the Government?

As I expressed during the course of argument I am concerned about the use of s 57 in these sort of circumstnaces.

. First this is not the type of situation and behaviour that s.57 is directed towards particularly when one looks at it in the context of the surrounding sections e.g. ss.55, 56 and 58. All of those clearly deal with various interferences with the performance of xpectedadlawfol duties of various government (and police-see specifically mentioned m s.58) officers. I underline lawful. So also should - and does - s.57. To be an offence under s.57 against an officer that officer must be acting as an officer in the service of the Government at the time - and he/she must be performing lawful duties. Here Constable Mahe was not - and it was he who was abused, sworn at, by Hopoi.

Secondly, is a police officer a "Government servant" within the meaning of those words in s.57? Government servant does not seem to be defined anywhere (c.f. "civil servant" and "civil service" ins.2(1) Interpretation Act(cap.l)). The terms andconditions of ngagement of police officers are specifically spelt out in the Police Act (cap 35). Pohce ofce re engaged for specific periods of time (5 years) (s.12); the police force (s 4) isa d_isc1plmed body (see Part V) formed to fulfil specific functions (s.6) (generally of upoldmg the law - therefore in doing that they must themselves act lawfully, J add); all officers are sworn (s 13- theirattestation) inter alia, to perform those functions. Police officers are treated differently to, and are different to, other persons in the service of the government - they may be civil servants (and I stress "may• because I have not heard argument at alI on these aspects) but they are more akin to naval and military personnel who are specifically exempted from the definition of "civil servants". (Whereas a constable an officer of the Crown the English view, I note, is that a constable's relationship with the Crown is not that of masterand servant orprincial and agent). I have doubts therefore whether they are Government servants int he ordinary recognised sense o those words, and the Criminal Offences Act would indicate recognition of the differences between police officers on the one hand and other Government servants on the other. As examples of that differentiation in the Act, one looks at e.g. s.55 which creates offences of assaulting, obstructing and resisting Government servants in the la\ful execution of their duty and s 113(b) which creates the self same 3 offences for police officers acting in the execution of their duties; and s.58which createsoffences of refusing to assist "any public officer, police officer or other person" when lawfully requned so to do.

Thirdly, such behavioural - type offences surely are more appropriately dealt with under the Order in Pulic Places Act (cap 37) eg. ss.3 (h) or 3 (i) which not only carry a more approate maximum penalty but are still offences for which alleged offenders are arrstale without warrant (see s.5). There is a grossover-charging taking place from time to lime in the use of s 57, in my view and as I have commented on before (see Cr App 746i 95 and 218/97, Tauvaka v Police, Neia fu, Vava'u, 2 May 1997)- [1997] Tonga LR 164.

And it is no answer to say, as was put to and accepted by the Magistrate, that the problems for the prosecution here caused by s.2(2) Dances Act (first class constable or greater) were overcome by general provisions in the Police Act (cap35) suh ass.24(duty of every police officer to prevent offences) or s.20 (duty to obey lawful d1recnons). he claim was that the Minister of Police had given an order and the officers were executing that order.

That cannot be the position. The Minister cannot order and direct officers to do something which, as a matter of law, is beyond their power (or his, as I will come to) - as here. They were not Qf sufficient rank to do these duties, as specified in the Dances Act so that the Hon. Minister was no more than acomplainant tothe Police in theordinary way; and if steps were to be taken by the Police then they (the Police officers concerned) had the duty to ensure that those steps were taken properly and lawfully. Here, on the evidence, they did not so ensure.

In any event - and I stress this - the Hon. Minister of Police is not a police officer, is not a member of the police force and is certainly not a "police officer of or above the rank of first class constable" - so he could not, himself, take steps and e.g. enter under s 2(2) Dances Act. Hedid not have the power, sohe certainly could not delegate it to others, and order or direct others to enter and stop the dance on his say so. Those others could only enter and stop the dance if they wer proved to beof the necessary rank themselves i.e. a first class constable or above. That was not proved.

It mattered not that the Tonga Club was a public place as surely it was when conducting a dance of such a nature where members and non-members could att:n on payment of an entrance fee - look at the definitions of public place in bth the Cnm1al Offences Act - s 2 - and the Order in Public Places Act - s 2. The Magistrate was quite right to conclude it was a public place - it had lost it's status as a private club, so the appellants were wrong in holding and maintaining the view it was still a pri vte place at the relevant time, particularly Hopoi. However that mattered not, as I havesaid -only the requisite (proved) rank could enter such a place. . . .

Given the matters I have outlined both the charges agamst Hop01 had to fail. Charge 554 charged him with obstruction (under s 113 b Criminal Offences Act) by stopping Mahe and Sakopo from entering to stop the dance. They were not of a (proved) rank able to do that. They were not in execution of their lawful duty. Earlier Hopoi had sworn at Mahe as part of his resistance to the direction to stop thedance (the charge, no.555, under s 57 Criminal Offences Act). Mahe was not acting lawfully at the time and I have already set out my other reservations about s.57 and it's use.

As to Fusimalohi the obstruction charge (no 556) (s 113B) against him must fall as well. What the 2 officers (Make, Sakopo) were then attempting todowith Hopoi was not lawful - they were not executing their lawful duty.

Jn all these circumstances I allow both these appeals against conviction.

The convictions (and the sentences imposed thereon) are quashed, and set aside absolutely. In lieu thereof, on all 3 charges, verdicts of not guilty are entered and the Appellants are acquitted .on each charge that relates to him.

Bank of Tonga v Hana

Supreme Court, Vava'u
Hampton CJ
C772/96

1 May, 30 July 1997

Banking law - co11Solidation of accounts - consellt - transfer offunds
Contract - banking - implied terms - transfer offund
Limitation - transfer without consent - not extend p eriod

The bank sued for the balance outstanding on a loan account. The action was out of time (i.e. outside the 5year limitation period) unless the bank could rely on a transfer of funds it had made (within the 5 year period) from the defendant's current account to the loan account.

Held, dismissing the claim:

1. Factual ly the defendant had not consented to, nor discussed with the bank, the transfer.
2. Unless a bank makes it clear to its customer that it is retaining the right at any moment to apply the credit in a current account to reduce a debt in a loan account it will be an implied term that the bank will not consolidate the two accounts.
3. Given such an implied term sums paid into a current account are appropriated 1o that account and cannot be used by the bank in the discharge of the loan account without the consent of the customer.
4. The transfer made here was not a sum "paid" within s.16 Supreme Court Act and the claim, accordingly, was out of time.

Cases considered Bradford Old Bank v Sutcliffe [1918] 2 KB 833
Halesowen Presswork v Westminster Bank (1971) 1QB 1

Statutes considered Supreme Court Act s. 16

Counsel for plaintiff Mr Appleby
Counsel for defendant Mr Taufaeteau

Judgment

I apologise to counsel and the parties. This file, with the submissions on it, should have come to me, I having heard evidence on the matter in Vava'u and reserved my judgment awaiting legal submissions and having made findings of fact. Why the file has gone to Lewis J, with the submissions, I do not understand and I have just found thefile perchance.

The findings of fact which I made were against any consent by the defendant to the transfer of the small credit balance ($61.83) in his current accountwith the plaintiff, to the loan account with.the plaintiff which was then some $4500 odd in debit. That transfer was done by the plaintiff on 5 September 1991 and that transfer is relied upon by the plaintiff as keeping alive it's cause of action against the defendant, the 5 year limitation period (in s.16 Supreme Court Act) having expired otherwise, prior to the issue of this Writ on 1August 1996. (Withiout this disputed transfer the 5 year period, running from the last undisputed payment of part of the loan account on 14August 1989, would have expired in August 1994 i.e. some 2 years before the Writ was issued).

Not only did I find that there was no consent to the September 1991 transfer but I found that there was no discussion, as alleged by the plaintiff through it's employee and witness Mr Moala, as to the proposed transfer (i.e. no discussion of it on 22 July 1991 between Mr Moala and the defendant). Mr Moala'sdiary note on which he relied for his memory of the events, did not record such a discussion and he conceded that heknew, and had been instructed, that all facts should be recorded in the diary notes. He (Mr Moala) also agreed that he knew that, for a transfer, such as this under discussion here, a written consent was usually required and obtained by the plaintiff. That was not done here.

The authorities (principally Bradford Old Bank Ltd v Sutcliffe [1918] 2 KB 833 (at 847) and Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd [1971] 1 QB 1, & [1970] 3 All ER 477) are clear. Unless a bank makes it clear to the customer that it is retaining the right at any moment to apply the credit balance on the current account in reduction of the debt on the loan account, it will be an implied term of the arrangement that the bank will not, so long as it lasts, consolidate the two accounts. (As was said in the Bradford case by Scrutton L.J. and repeated in Halesowen), otherwise no customer could feel any security in drawing a cheque on his current accmmt if hehad a loan account greater than the credit balance on his current account. I add - quite sensbile. Little point in having a loan account otherwise).

In addition the authorities are clear that, given such an implied term, sumspaid into a current account are appropriate to that account and cannot be used by the bank in the discharge of the loan account without the consent of the customer.

Here there was no consent, whether to consolidation or to transfer to the loan account. That is the end of the matter, in my view. This transfer was not a sum "paid" in terms of s 16(1) Supreme Court Act. The claim wis and is out of time and cannot succeed. Itmust be dismissed (s 16: "it shall not be lawful to sue .....")

Mr Taufaeteau is correct when he submits that the bank was in "clear breach of an implied term of the agreeme!lt to maintain the two separate accounts".

There was no clear understanding setting aside that important and fundamental implied term. I sofind. Mr Appleby argues a lesser standard than either "consent" or the 'clear understanding made known to the customer by the bank" i.e. a mere "telling" to the customer, which he says, here, occurred at the meeting on 22July 1991. I find against him on e facts s I have stated ; and, as well, I doubt a mere "telling• is sufficient _ the requirement ts for the bank to make it clear to the customer.

I would have soe concerns as well as to timing _ but in view of the above I donot hae to reolve ordecide the. The meeting of 22July 1991was over 5 years before the Wnt was issued. No xplanation as to the delay in transfer of funds from current account to loan accunt was given to me in evidence i.e. delay from 22 July 1991 to 5 September 1991 mean mg that the latter date wasjust within the 5 year period. I note that m tt a er, no more.

The orders of the Court are:

(i) claim is dismissed with judgment for defendant

(ii) costs to defendant as agreed or as taxed.

R v Fungavaka & Tapu

Supreme Court, Nuku'alofa
Hampton CJ
Cr 227 & 229/97

28 July & 1 August 1997

Criminal law - disclosure - prosecution - pre trial
Practice and procedure - prosecution - disclosure pre trial
Evidence - prosecution - pre trial disclosure

Prior to a murder trial the defence sought disclosure of statements made to the police by both persons not lo be called as witnesses and persons lo be called for the prosecution. During argument orders were sought only as to the latter category of persons.

Held:

1. "Prosecution" included the police, crown solicitors and crown counsel, and forensic experts engaged by police and crown.
2. s.143 Evidence Act does not enable a court lo make the orders sought, that section relating to contr<?l of cross-examination on a prior inconsistent statement.
3. The common law used to be that if the prosecution did not intend to call as a witness a person whom they had interviewed and who could give evidence upon a material subject then, whether the prosecution considered him credit worthy or not, his name and address should be made available lo the defence; but only in exceptional uses would the persons statement have to be produced to the defence.
4. And in the case of the police statements of persons to be called as witnesses for the prosecution the duty of the prosecution was to produce such statements to the defence if there was a material inconsistency between the statement and the oral testimony of the witness .
5. But the more recent approach in England was less rigid and had been extended. An inflexible approach could lead to an injustice and the interest sofjustice are paramount. An inflexible or restrictive approach could render nugatory the defence rights to cross-examine under s.143 Evidence Act.
6. The court has an over-riding and supervisory role in such matters; and a court has a discretion lo order disclosure by the prosecution .
7. A failure to disclose may result in a material irregularity in trial, justifying a conviction being set aside on appeal.
8. Open justice requires maximum disclosure and whenever possible the

pportuity for the defence lo make representations on the basis of fullest mfoatin. That.is an a ctof the defendants elementary common law right to a air t_nal; and m lhat_it 1s f help to an accuse_d to have the opportunity of cons1dnng all the mateal evidence which the prosecution have gathered and from w1ch the prosecution have made their own selection of evidence to be led.

9. Here the_ accued were charged with a capital offence. Full statements by proection _w1tnsses had no(been made available to the defence at the prehmmary mqu1ry. There was a material discrepancy between witnesses statements and their oral evidence.
10. I fairness the statements to the police by prosecution witnesses should be disclosed to th defence. The potential to work an injustice must be avoided.
11. An order for disclosure was made in these particular circumstances.

Cases considered

R v Ward (1993) 96 Cr App Rl
R v Bryart & Dickson (1946) 31 Cr App Rl46
Dallison v Caffery [1965] lQB 348
R v Howes (CCA - unreported: 27/3/50)
R v Hall (1958) 43 Cr App R 28
R v Xinaris (1955) 43 Cr App R 30 (note)
Muhadeo v R [1936] 2 All ER 813
Baksh v R [1958] AC 167
R v Clarke (1930) 22 Cr App R 58
R v Charlton [1972] VR 758
R v Mason [1975] 2 NZLR 289
R v Lawson (1989) 90 Cr App R 107
R v Mason [1976] 2 NZLR 122 & (1975] 2NZLR 209
re Van Beelen (1974) 9 SASR 163
R v Turnbull (1976]3 All ER 549
R v Church (1974] 2 NZLR 117
Practice Note [1982] 1 All ER 734
R.v Maguire (1992) 94 Cr A pp R 133
R v Davis (1993] l WLR 613
R v Livingstone (1993] Crim LR 597
R v Keane (1994] 2 All ER 478
Leyland Justices exp. Hawthorn (1979] QB 283
R v Hennessey (1979) 68 Cr App R 419

Statutes considered

Evidence Act ss 143, 134, 132
Magistrates Court Act ss.34, 42
Criminal Procedure & Investigations Act 1996 (UK)

Counsel for Crown — Mr Cauchi, Ms Tapueluelu
Counsel for Fungavaka — Mr L Foliaki
Counsel for Tapu — Mr Appleby

Judgment

This is a ruling pre-trial on a defence application for the court to order pre-trial disclosure (or discovery) by the prosecution, of dou'.11ets viz.statements of all persons interviewed by the police duringthe course of a hom1c1de invetiati nand whether those persons are to be called as prosecution witnesses or not (f heJoint tnal of the accused on murder and grievous bodily harm counts is set tocommence on 18Augst l . As the application was argued however it became centred around matters relating to d1slosure of police statements made by persons to be called as witnesses for the prosecution. A general order was sought from the Court in relation to the statemnts of all (some 26r so) prosecution witnesses; and in the alteative an rde for the d1sclosur of the pohe statement(s) of one prosecution witness, viz. Lesteh.Tai._ (I sh uld make 1clear that in this judgment, when I refer to "prosecution" I mean 1t as includmg, inter aha, allof such bodies as the police, Crown Solicitors and counsel,and forensic exprts (say scientists, psychiatrists, doctors as examples) who are engaged to advise the police, prepare reports and give evidence - see R v Ward (1993) 96 Cr App R at 23).

· First the defence refer me to and rely on s. 143 Evidence Act (cap 15) as showing that "the court has an absolute discretion to require production of previous state"?ents". Whatevers.143does say (and mean) it is entirely clear that it does not, rn cnnot, directly relatetothis typeof situation before me(but Iwill return, later, tocertainincidental effects s.143 does have).

S.143:

(a) given its placement in Pt VIII of the Evidence Act "Of Judicial Procedure"; and

(b) given its position in the Evidence Act and the suound'.ng sections (particularly ss I38to 142 inclusive and 144 lo 149 inclusive); and

(c) given its own wording; . . . .

clearly relates to matters arising in cross-exammatton of a witness at trial.

The proviso, on which the defence places reliancl'., is abundantly 1e"… ·he cou may at any time during the trial require e w.riting to b_e ?roducd for its inspection ….. . The underlinings are mine. The section 1s a prov1s1on which regulates the cross-examination on a prior inconsistent statement and it permits the court to have contiol of and prevent abuse of the procedure by allowing the court to call forand see the claimed inconsistent statement.

sos.143does not directly help the accused. Itdoes not relate to pre-trial disclosure. The defence then tum tothe common law of England forassistance (in the absence of any other statutory provision - ss.3 and 4 Civil Law Act (Cap 25)).

I am referred to cases such as R v Bryant & Dickson (1946) 31 Cr. App. R 146 at 151 (and I note also such other older cases as Dallison v Caffery [1965] 1 QB 348); R v Howes (27 March 1950- unreported, CCA); R v Hall (1958) 43 Cr. App. R 29; and R v Xinaris (1955) 43 Cr App R 30 (note). (Again I add to those last 2 cases, cases such as Mahadeo v R [1936] 2 All ER fil1; Baksh v R [1958] AC 167; R v Clarke (1930) 22 Cr App R 58; R v Charlton [1972] VR 758).

Theeffect of the Bryant and Dallison cases is well summansed,in my view, in a New Zealand case of R y_Mason (1975] 2 NZLR 289 which concerned. the duty of the prosecution to disclose information which it did not intend to produce in evidence. The production of statements of persons interviewed by the police, but not to the called as witnesses, was sought by the defence. In thejudgment it was said that "if the police have interviewed a person who can give evidence upon a material subject and the prosecution does not intend calling him, then, whether the prosecutor considers him creditworthy or not, it must make his name and address available tothedefence". Itwas forthe prosecutor to decide whether the evidence was "material" but that decision must be reached with "complete fairness" to the defence (the passages cited are from p.292). (This matter and all the other duties and responsibilities of a prosecutor, which I will go on to refer to, are a part of the prosecutor's duty of fairness as an "objective minister of justice").

Thejudge in Mason went on tosay (p294) "that there is no general dutyplaced upon the prosecution tomakeavailable to thedefencethe written statementsthat the police have obtained from the persons who, in this case, will come within the ambit of my order "(i.e. those persons about whom the prosecution have to supply their names. addresses and phone numbers).

Thejudge (at pp 295-6) went on to suggest that production of such statements may be required in exceptional cases, saying "At the same time I am inclined to the view, allhough I make nodecision upon the matter, that in truly exceptional cases, a refusal by the prosecution to comply, at least tosome carefully considered extent, with a request for the production of statements of this kind might result in unfairness to the defence and even, perhaps, a miscarriage ofjustice". Tothat should be added this observation of Lord Denning in Dallison v Caffery [1965) 1QB348 at369:"The duty ofa prosecuti ng counsel ... is this : if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent. he must either call the witness himself or make his statement available to the defence". My underliningand I emphasise the word •credible• . A "credible" witness to material matters not called by a prosecution would surely fall within the "exceptional"category-especially when the evidencetends toward innocence. In addition Lord Denning.went on thus "If the prosecuting counsel ... knows of a witness whom he does not accept as credible he should tell the defence about him sothat they can call him if they wish" (p.369). Lord Diplock in that same case (a civil case) affirmed and applied the Bryant case; as did the Court of Appeal in England in R v Lawson (1989) 90 Cr App R ,107.

In the Mason case the New Zealand Court of Appeal (R v Mason (1976] 2 NZLR 122) affirmed lhP.judgment below, agreeing that there must be some circumstances which would justify more than the disclosure of the names of such persons, but declining to set limits on ajud ge's discretion to make an order in favour of the defence (lemphasise the judges discretion-and the Court of Appeal described that discretion asonewhich "always resides in the trial judge to order production if the interests ofjustice demand it" - p.123). The New Zealand Court of Appeal had expressed some reservations about Lord Denning's observations in the Dallison case, observing that thoseobservations went well beyond those of Lord Diplock; and went on to refer, with approval, to remarks made by the Full Court of South Australia in Re Van Deelen(1974) 9 SASR 163at 249 as follows: •... the principle enuciated by Lord Denning postulates three attributes of the evidence which it is within the power of the witness to give. It must be credible, in the sense ... of having a show of truth, reasonableness and worth; of being capable of belief . It must be material in the sense of being admissible andrelevant to ttie issues, or the vital facts in issue. And it must tend to establish the innocence of the prisoner." Which reinforces the

view I have already expressed. Ifthe statement inissuefits thsethree criteria,then surely the matter must be within the "exceptional" category. And, given what I have said'.thee is not, in my view, any clash or conflict between the Bryant case and Lord Denning m Dallison (as has been suggested by some commen tors an by some JUdes).

Iflhadcometoit,inthiscaseinlooking atthe1ssueofd1sclosere1aungto eons interviewed but not to be called as witnesses, I would have been guided by the pnnc1ples set out , above; being I believe the relevant common law princiles although om what extended and more flexibly applied now in England than previously as I will discuss below _ and I would adopt a similar flexible stance. But in the end both defence counsel have not pursued anyorder under this line of the common law cses.

I should also note a very clear, and necessary, categoncal exception to any remaining principle that there is no general duty to disclose statemens of persons interviewed but not to be called. That exception, a common law exception, onces identification evidence _ R v Turnbu ll [1976) 3 All ER 549 (and muc earlier eg m identifi cation by description in the 1930Clarke case mentione above. articul rsof such identification evidence should be supplied on request; and thisexceptin aphes as well tostatements of persons interviewed who are to be called as prosecution witnesses.

The second line of common law cases (eg. Howes. Hall.Xinaris) relied on by the defence relates to disclosure of statements made to the police by witnesses to be called by the prosecution to give evidence (and it is under this second general head that the defence have sought the alternative orders mentioned by me a e).

Fonnerly there was no general rule in the common law reqwnng the prosecution to supply the defence with copies of all statements made by persons who were to be clled to giveevidence-seeegR v Charlton [1972) V R758at761. There were someexceptions (over and above the identification exception above).

The first related toprevious inconsistent statements. Where the.witness s statement was seriously at variance with his actual or intended testimony at tnal, defence counsel was entitled to see the statement - Mahadeo v R [1936) 2 All ER 813 at 816-7 (P.C.) Although productionhad been ordered in a number of cases (refereg to Howes.Clarke, Hall and Xinaris above) it was said that the duty to disclose did not exted to statements which exhibited only minor discrepancies with oral testimony. What tnggered the duty to disclose was a material inconsistency.

The second exception applied to witness statements shown to an accused whilst he was being interviewed by the police (see as an example: R v Church [1974) 2 NZLR 117 at 118).

What I have set out would seem to have been the position throug t e . s an l980s and, in considering the request for disclosure of previu statements of witnesses to be called by the prosecution, I would be guided by th pnnc1pe set out , above, but subject to more recent extensions to 1hem and a far less ng1d approach to those principles as I will discuss below .

I should add this to what 1have said I am guided by I do not apply, I ca not as a matter of Tonga law apply, the (U.K.) A ttorney General' "Guidelines for the disclosure of 'unused materials' to the tried on indictment" : Practice Nole (1982] 1 A ll R 734 (although I will return tothose Guidelines later in thisjudgm ent and he eff ct h1ch they have had in the ever-developingcommon law). (I alsoadd that there 1snothmg m th cae law which would support a general proposition that material held by a prosecuhon is

privileged because it was supplied in confidence, nor does either s 134 or s 132 of the Evidence Act support such a proposition).

But I am also guided by 3 general rules or principles which must be allowed sway and influence in this area of the criminal law:-

(a) for a prosecutor (or a court) to adopt an inflexible approach to, and within, the guidelines I have mentioned can work an injustice (and see e.g. what was said in R v Lawson (1989) 90 Cr App R 107 at 115- "an inflexible application of Bryant can lead to an injustice").

(b) particularly that will be so given that it is for a prosecutor to decide whether eg. (i) a case is exceptional and does require the handing over of statements made by persons not tobe called as witnesses; or (ii) the discrepancy between a prior statement and testimony is not minor but falls within the category of a material inconsistency;

(c) the interests of ju stice are paramount

In exercising the functions and duties, and particularly those set out in para 18b(ii) above, the prosecutor must have in mind s 143Evidence Actand the right which isthereby given tocross-exameas to previous inconsistent statements. Such a right could be (and must not be) rendered entirely nugatory by a prosecutor adopting an inflexibleor unduly restrictive approach. Justice - the interests of ju stice - would not'be served.

Given the interests ofjustice, although the duties set out in above are properly those of a prosecutor, the court must have an over-ridingand supervisory role, if necesary (see eg. R v Ward (1993) 96 Cr App R 1at26- where the English Court of Appeal said "that the ultimate decision as to evidence which was otherwise disclosable should be withheld from disclosure on the grounds of public interests immunity was one to be made by the Court").

Subject then to what I have said above, where the defence seeks disclosure, and whether prior to or at trial, and order may be made for production of the information. It is a matter within a trial judge's discretion.

It became settled law in England (and certainly became cemented in, in the law , at the timeof the infamousIRA bombingcases such as R v Maguire &ors (1992)94Cr App r 133 at 146and R v Ward (1993) 96 Cr App R 1at 22 and [1993) l WLR 619) that the failure of the prosecution to disclose to the defence evidence which ought to have been disclosed was an "irregularity in the course of the trial" (s.2(l)(c) Criminal Appeal Act 1968- UK), that why there was no disclosure was irrelevant, that the duty of disclosure was a continuing one.and that if that which was not disclosed ought to have been disclosed the irregularity (in trial) would be a "material " one resulting in conviction being set aside on appeal. The above summarises the effect of Maguire (at 146);and Ward (at 22) said this: "The obligation to disclose only arises in relation to evidence which is or may be materia l in relation to the issues which areJtpected to arise, orwhich unexpectedly do arise, in the course of the trial. Ifthe evidence is or may be material in this sense, then its non-disclosure is likely to constitute a material irregularity". (My under-lining).

But having referred to the above 2 cases (Maguire and Ward) that leads me to what is, apparently, a less ri gid approach, a more fle,;:ible (and just) approach by the courts in England in the last few years, no doubt as a response lo the injustices now known to have been prerpetrated in such cases as the IRA bombingones. (see R v Davis [1993] l WLR 613as well, applying Ward (and saying, al 617, 'we recognise that open justice requires

maximum disclosure and whenever possible the opportunity for the defence to make representations on thebasis of fullest information" -Taylor L.C.J; R v Livingstone [1993] Crim LR 597 - the prosecution has a duty to present to the accused all material "of relevance to the defence" and I add who is to be the arbiter of that - how can it be the prosecution?; and R v Keane [1994] 2 All ER 478). I quote from Ward at p 25as follows (my emphasis added):-

> "To return, however, to the position in 1974, Mr Mansfield submits, rightly, that paragraphs 443 and 443a of Archbold (38th ed.) were by no means exhaustive" (i.e.Archbold summarising such cases as Bryant Howes. Clarke, Baksh, Hall, Xinaris. and Dallison, I comment) "They were merely aspects of the defendant's elementary common law right to a fair trial which depends upon the observance by the prosecution, no less than the court, of the rules of natural justice . No authority is needed for this proposition but it is illustrated by the decision of the Divisional Court in Leyland Justices exp. Hawthorn [1979] Q.B. 283. On the broad basis of this right, the defendant is plainly entitled (subject to statutory limi tations on disclosure, and the possibility of public interest immunity, which we discuss below) to be supplied with police evidence of all relevant interviews with him. We would adopt the words of Lawton L.J.in Hennessey (1979) 68 Cr. App. R. 419, 426, where he said that the courts must,
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> > "... keep in mind that those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution."
>
> That statement reflects the position in 1974 no less than today. We would emphasise that "all relevant evidence of help to the accused" is not limited to evidence which will obviously advance the accused's case. It isof help to the accused tohave the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecutio n have made their own selection of evidence to be led. We believe that in practice the importance of disclosing unused material has been much more clearly recognised by prosecutors since the publication of the *Attomey-Ge11era/'s Guidelines.* The current Code of Conduct for the Bar, reflecting the words of
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> Lawton L.J. which we have quoted, provides that::
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> > "Prosecuting counsel should bear in mind at all timesthatheis responsible for the presentation and general conduct of the case and that it is his duty to ensure that all relevant evidence is either presented by the prosecution or made available to the defence."
>
> So far as the law is concerned, however, the only practical difference between 1974 and 1992 in the present case is that in 1974 the police and the Director of Public Prosecutions were entitled as a general rule to adopt the Bryant and Dickson (1946) 31Cr. App. R. 146rather than the Dallison *v* Caffery [1965] 1Q.B. 348, approach to the statements of persons who could give material evidence but were not to be called, that is to say, they were not generally obliged to disclose more than the name and addressof the person concerned and the fact that he had made a statement.•

(This passage is also to be found in R v Ward [1993] 1WLR 619 at 645-6).

Here the accused arecharged with murder, a capital offence. Insofar asone accused (Fungavaka) isconcerned the preliminary inquiry before the Magistrates Court was done prsuant tos.42agistrat s'Courts Act (cap 11)i.e. acommittal without calling evidence with the prosecution lodgmg(as they were only obliged tosodo) "a fair summary of the statements of the.posecution witnesses" together with a list of exhibits and a copy of documentary exhibits. The other accused (Tapu) chose the different route and evidence was called at the preliminary inquiry (per s 34 Magistrates' Courts Act). Jn that evidence it became apparent that there was, at least arguably, some difference between what was said by the witness Lesieli Tai in her evidence in chief and what was set out in the Fungava_"fair summary" of her (Tai's) statement - and in an area which I accept may well be cntical to the accused Tapu at trial i.e. whether after a punch allegedly inflicted by him on the deceased, the deceased fell to the ground and whether his head hit the ground. I accept that, under cross-examination in the court below, the witness seems to have said that she did not see the deceased fall and hit his head on the ground but I comment first, beca use questions and answers are not recorded the matter isnot entirely tear; nd secondly, why .should not - fairness - the accused have the (apparently mcons1stent) statement available tothem foruse at trial, if needs be, unders 143 Evidence Act? Indeed as presently advised, if it came to it, I would see the alleged difference, between.the deposition's.evidence and the police statement, as a "material" discrepancy -not a minor one. Itcertainly touchesonmatters which are, or may be, material i n relation to the issues expected to arise at trial - it is a "material" discrepancy whether viewed in terms of Mahadeo, or Bryant, or Dallison or Ward, and is of relevance to the defence in terms of Livingstone.

Accordingly I would have ordered, in any event, the specific disclosure, to both defence counsel, of any (and all) statements to the police by Lesieli Tai, (although, r add, as I am now told today, Lesieli Tai's statement has been handed to the accused's counsel by the prosecution).

I say "in any event". But given:

(i) what I have set out above as to the more flexible - and just (in my view) - approach to disclosure as evidenced e.g. in Hennessey, Lawson, Maguire, Ward, Davis, Livingstone and Keane;

(ii) the fact that this trial is on a capital count, for each accused;

(iii) the fact that one accused (Fungavaka) has not had lhe benefit of a preliminary inquiry where wi tnesses were examined (bul only has a "fair summary"); and

(iv) the one presently known discrepancy already mentioned (lhe witness Tai);

I order in this particular.case, in these circumstances, (and I emphasise those words) that the prosecuhon should disclose to both defence counsel, pre-trial, all the stalements of all witnesses for the prosecu tion (and make available copies of all those statements to defence counsel).

To make it clear - if there has been more than one statement taken from a witness

all the statements of that witness should be disclosed.

The potential to work an injustice must be avoided.

In my view, in this particular case and in these particular circumstances, such an order is in keeping with the prosecution obligation (of fairness) to ensure that all relevant evidence of help to these accused is made available to the defence noting, as was sajd in Ward, that it is of help to an accused to have the opportunity to consider fill the material evidence which the prosecution gathers and from which the prosecution makes it s own selection of evidence to be led. The accused must be given every opportunity to make representations on the basis of fullest information (Davis).

I order disclosure accordingly and as set out in detail above.

As, in effect, a postcript to this judgment I add that in the course of considering this matter I have given thought, as well, to the relevant provisions of the (UK) Criminal Procedure and Investigations Act 1996. As at the time of this judgm ent it has not been able lo be ascertained whether this Act has come into force and effect yet. But whether it is in force or not I do not believe that it is a statute which should be applied in Tonga (P.ursuant to the Civil Law Act). First the English statute covers many areas (in one comprehensive code), a number of which are already the subject of extensive legislative enactments in Tonga (look in the English statute at some of the sections in Part V Committal, Transfer, Etc; Part VI Magistrates' Courts' Part VII Miscellaneous and General, as some examples only). The English statute is one code containing many interlocking, mutually dependent, sections - provisions in one Part are dependent on what has been done (to the law) in other Parts. Secondly many of the provisions (whether as individual measures and/or because of their interlocking with other provisions) are not suitable and appropriate to Tongan conditions and circumstances.

However (and this is important), the English statute underlines the necessity for prosecution disclosure (and I note that many other common law jurisdictions have now legislated for this) and recognises (eg. in s 21) the existence of rules of common law relating to disclosure (and it is those rules and their development that I have set out - or attempted to - above). Some thought should be given, in the Kingdom, to providing some suitable statutory regime of disclosure coupled with / revision of the relevant provisions of the Magistrates' Courts Act relating to preliminary inquiries and perhaps, introducing concepts of "hand-up" proofs of evidence and the statements on which such proofs are based.

Police v Moala

Supreme Court, Nuku'alofa

Hampton CJ
Cr A pp59/97

11 July 1997

Passports - false statement - forms
Immigration Act - arrival - declaration - forms
Appeal - criminal proof

The police ppealed against the dismissal of 3 charges brought in the Magistrates' Court; one of ma kin a false s tement when applying for a passport; the other 2 of making a false statement to 1mm1gration when entering Tonga.

Held, dismissing the appeals

1. The form signed by the respondent when applying for his passport was not the form prescribed in the Passport Act.
2. As t the other 2 charges the Magistrate had founq a lack of the nesary intent required to be proved and the court, on appeal, was not brought to disagree with that.
3. (Obier) gain the forms used did not comply with the requirements of the Immigration Act, and in any event the forms were not declarations as required by the Act.

Statutes considered

Passports Act
Immigration Act
Criminal Offences Act

Counsel for appellant Ms Tapueluelu
Counsel for respondent Mrs Taufaeteau

Judgment

Thepolice have appealed against thedismissal of 3charges brought by them against the respondent, 'Eakalafi Moala, in the Magistrates' Court; those charges having been heard by a senior and experienced Magistrate on 14th November 1996, and he having delivered a reserved judgment on the 19th November 1996.

I have reached the view that the appeal cannot succeed. The 1stcharge I would deal with in this appeal is the appeal against the dismissal of the charge that had been brought under sections 19and 21of the Passports Act (Cap. 61). The charge was to the effect that the defendant, the respondent here, made a false statement in an application fora Tongan passport, and in particular in a statement, in section 78of the form that he completed on 17th August 1994, which reads "that I have not lost the status of Tongan subject".

The Magistrate in dismissing that charge gave various reasonsincluding one which I consider to be fundamental and which meant that this prosecution could never have succeeded. Section 19 of the Passports Act, under which the respondent was charged, provides that should any person applying for a passport or renewal of passport make a false statement in any declaration required to be made by persons soapplying then hewill be guilty of an offence; and section 21goes on to provide a penalty.

The wording in section 19, and in particular the words "declaration required to be made by persons so applying' relate back to section 12 of the Act where it says the applicant for a passport 'shall sign a declaration in Form IIof Schedule 1hereto.• Form II sets out a detailed 'Declaration to be Made by Applicant for a Passport or Certificate of Identity.' That form as contained in Schedule 1 of the Act bears no relationship whatsoever to the actual form filled out by the respondent in August 1994, Exhibit A, which is headed up as being •Application for Tongan Passport".

In fact not only does it bears no resemblence to the form signed by the respondent, but the form in the Schedule has a very solemn declaration and attestation to it, and'the declaration should be made before the Minister of Police in Tongatapu or before the Senior Police Official of the District in which the applicant resides if other than Tongatapu.'

The Magistrate in considering this charge said that Exhibit A did not relate to the form which the Passports Act allows for when applying for a Tongan passport. And therefore, the Court had not seen any evidence that the form signed by the respondent, that is Exhibit A, was legal.

With that comment, this Court can only but agree. The effect of sections 12and 19 are conclusive, coupled with the form set out in Form IIof Schedule 1. If the authorities do not choose to abide by the prescribed forms in their own Acts of the Legislative Assembly, which control the particular activity in question, then they cannot be heard to complain if prosecutions taken, on forms which do not comply with the Act, are thrown out.

The charge was rightfully dismissed.

The other 2 charges were brought under section 64 sub-section 1 para (a) of the Criminal Offences Act (Cap. 18). They are related to what are called "Immigration Arrival Cards•completed by the defendant below (the respondent here) when he came by aeroplane to Tonga on 2 ocassions on 4 September 1995 (that Card is Exhibit C) and on 13 March 1996 (that Card is Exhibit D).

Itis said in the 2charges, Nos. 404 an *405*, in the court below, that Mr Moala when making a statement in the Immigration Arrival Card, made a statement that he knew to be false by filling in that he was a Tongan subject when he had already been naturalised as an American citizen. And the answers in the twoforms, Cand D, which are challenged as being false, are the answers to entry 3 which question is headed "Country of Citizenship" and in each case Mr Moala in answer had entered "Tonga'.

Before lookingat some of the technical aspects relating to theforms themselves that docarry some concerns in my mind, I look at the basis on which the Magistrate dealt with the 2 charges in dismissing them. The charges were brought under section 64(1) of the Criminal Offences Act which says "Any person who knowingly and wilfully makes otherwise than on oath a statement false in a material particularand the statement is made "(and it sets outwhere thestatement should bemadeand I will come to that shortly,)" shall be guilty of an offence ..."

I stress the words 'knowingly and wilfully makes" a statement false in a material particular. And it seems to me reading the reserved decision of the learned Magistrate, that he rightly focused on that state of mind "knowingly and wilfully" which is one of the fundamental ingredients of this criminal charge and which must be proved beyond reasonable doubt by the prosecution, if the prosecution is to succeed on a charge of this nature.

The learned Magistrate (as I say, a senior and experienced Magistra te) heard the evidence, then reserved his decision. In giving his decision he focused on that proof of state of mind "knowingly and wilfully" and made it the subject to of virtually all the remarks he made in the course of his decision. He found on all the evidencethat that proof of knowingly and wilfully making a statement false in a material particular was not made out by the prosecution.

The prosecution relied, to a considerable extent, on the statements made by the respondent himself in the course of interview (question and answer interview, Exhibit E of 6th October 1996); and on the answers given as well on that same dale when the respondent was charged with these 2 offences alleged of making false statements on the Arrival Cards. Consistently throughout that interview and the charging process the respondent said, repeatedly, that he believed that he was a Tongan subject, that his status had not been affected even although some years before he had taken out a US passport.

That was what he said throughout. That was picked up by the Magistrate and the Magistrate in weighing all the evidence concluded that element of knowingly and wilfully making a statement false in a material particular had not been proved beyond reasonable doubt. The Magistrate had considerable advantage over this Court. This Court is not in a position, as it has considered the notes of evidence, the argument and the Exhibits, to disagree with the conclusions of the learned Magistrate. And for that reason if no other, the appeals against the dismissals of those 2 charges should be rejected.

Igo on toadd some further concerns that have come to my mind, as J have listened to the argument and looked at the Exhibits in this case. It seems to me that there may be difficulties with forms involved here as well. The respondent was specifically charged under section 64(l)(a) of knowingly and wilfu lly making a statement false in a material articular, "and the statement is made (a) in an accont, certificate, declaration, entry, mventory, nonce or other document which he is authorised or required to make attest or verify by any written law."

What written law. I ask, authorises orrequires a person in the position of Mr Moala

to make these Immigration Arrival Cards? I look at the Immigration Act (Cap. 62). Section 5 sub-section (le) says this: "For the purpose of exercising his powers and functions and carrying out his duties under this Act, any Immigration Officer may ... (c) require any person who desires to enter ... the Kingdom to make and sign any prescribed form of declaration." There is no prescribed form of declaration set out in the Act, otin any Schedule to the Act (in fact there is no Schedule to the Act).

There are Regulations, Jmmigration Regulations, made pursuantto section37of the Immigration Act. Interestingly enough, and I look at the Act for a start, section 37 sub-section l(b) says: - at the Prime Minister may with the consent of Cabinet make Regulations not inconsistent with the provisions of this Act forall orany of the following purposes ... (b) prescribing the forms to be used for the purposes of this Act ..."

The Immigration Regulations, made under section 37, donot prescribe "forms to be used for the purposes of this Act" and certainly do not prescribe forms such as the Immigration Arrival Cards which were Exhibits C and D and which were the essence of these prosecutions.

Regulation 10 does say that "The Principal Immigration Officer may cause to be useo forthe purposesof the Act and of these regulations such forms andstamps as he may deem necessary and convenient forcarrying out or giving effect to the provisions of the Act and of these regulations."

I have real reservations about the validity of Regulation 10and of any forms said to be made and used under Regulation 10. If one looks back at the Act, for example section S(l)(c): there should be a "prescribed form of declaration." Section 37(l)(b) then allows Regulations to be made (by the Prime Minister with the consent of Cabinet, I remind myself) "prescribing the forms to be used". The Regulations do not do that and to have a Regulation as Regulation 10is, it seems to me, is to have a regulation which is ultra vires, outside the powers given in, the enactment. However I say this as obiter. Itis not the basis of my decision. I gave the basis earlier on, upholding what the learned Magistrate had said, but the Regulations, the forms, the enactment, as I have said, Ihave real concerns about and it seems to me that they are matters that should be considered by theappropriate authorities.

In any event, and as well this is obiter, it is not the basis of my judgment, but how can a form (such as Exhibit C and Exhibit D) be said to be a declaration? There was no declaration on the forms, yet the requirement under section 5(l)(c) is for a declaration.

Again, anarea of concern which I draw to the attention of the appropriate authorities in relation to the Immigration Act, the Regulations and the forms.

As with the 1st charge which I considered, in relation to these 2 other charges brought under the Criminal Offences Act, I find that this appeal broought by the prosecution should be dismissed, and it is accordiiigly.

Fotu v Minister of Police & Minister of Lands

Land Court, Vava'u
Hampton CJ
L 950/96

6 May, 1998

Land - earlier judgment - lack of survey - Crown use

The Minister of Police, believing land in Leimatu'a to be vacant, built a Police Stattion on it. The plaintiff claimed that she had a widow's interest in the land and.that another adjoining piece, which had been leased to her daughter, was part of the original block which contained both pieces (i.e. the piece the Station was now built on and the leased position). She claimed possession of it.

Held:

1. The lack of survey and of issue of Deeds of Grants aided confusion.
2. The solution lay in a decision of the Land Court made in 1948 which, when properly read, made it clear that two pieces had been subdivided off the original block; the first granted to the plaintiffs husband (thenow leased land), the second granted to another (Fine) and on which the Station was now; the balance to revert to the Estate of Fotu (to be at the disposal of the present or any further holder of the title).
3. The plaintiff must fail in her claim for possession. The land had not been -granted to her husband.

Cases considered — Hafo'ou v Fotu (1948) 2 Tongan LR 60

Counsel for plaintiff — Mr Paasi
Counsel for defendants — Mr Cauchi

Judgment

The plaintiff claims that the Police Station at Leimatu'a, built in 1995, has been built on her land. She asserts that is so. Itis for her to prove on the balance of probabilities. And I indicate that on the evidence I have heard, she has not so shown that this Police Station has been built on her land, the land to which she says she was a widow's interest. I have carefully reviewed the evidence over the last 12days or so, since the case was heard in Vava'u and I have looked with some care at the exhibits produced and at the judgment of Hafo'ou v Fotu (1948) 2 Tongan L.R. 60 (Richardson J. in this Court).

The plaintifrs claim for an Order for possession and for a Declaration as per the statement of claim (that is a Declaration that the resumption by the defendants of the allotment was illegal) must fail, and it will be dismissed.

I should say that I have a very unfavourable view of the credibility of the plaintiff and of her daughter (Lataisia) because the Court was mislead by them in their concealing quite relevant factual matters from the Court. I am not here to decide if the plaintiff and her daughter were wrongly chased off a block of land (which I will describe as the lease land shown on the Plan Exh.3 with the name Lataisia Fotu on it) or whether they were chased off there in early 1985 by Fotu Tangaloa or Fotu Samiu or both. I am not here to decide if the Police Station has been built wrongly on someone else's land, (for example, Fine who was variously known as, and is the same person as, Fine Kuma, Siaosi Fine Kuma, Siaosi Fine Hafo'ou).

The claim here that is to be decided, and is decided in favour of the defendants, so far as the plaintiff is concerned, is whether the Police Station has been built on her land and contrary to provisions of Part IX of the Land Act, particularly section 142.

The plaintiff claims a widow's interest extending over the land in question and that, after the death of her husband in March 1980 (that is 'Aisea Fotu, he being then the title holder Fotu), she registered her interest in December 1980 as per Affidavit Exhibit 1 and as shown in the Register Book Exh.2 and the predecessors of that Register Book.

Certainly she did register a widow's interest but the question is, a widow's interest in what block of land? What land does it relate to? The lack of Deedsof Grant, for none seems tohavebeen issued for Leimatu'a, does not help; hasadded tothe confusion, as has the lack of any areas shown in the Register Book whether Exh.2 or the predecessor Registers, Exhibits 9 & 8.

IfI look at the Plan, Exhibit 3, extending northwards from the six way intersection and encompassed within a large triangle are 3 blocks of land and, working northwards they are markedas Lataisia Fotu, 1rood exactly; the second marked Fine, lr 10.6p(where the Police Station, on everyone's evidence, and on the Court's view of the area, is now built); and the 3rd furthest north marked Fotu, 2r 28.8p (and it ison that area, on the view, and on the evidence, that the monument to the first Fotu has been erected and still stands. Mr Paasi for the Plaintiff claims that the widow's registration relates to the land lr 10.6p shown as Fine on the Plan Exh.3.

MrCauchi for the defendantssaysno, that the widows registration relates tothearea marked Lataisia Fotu lr exactly i.e. the southern most area.

The solution in my view is to be found quite clearly in the judgment of Richardson J inthecase I have mentioned which was brought between Fine Ha'afo'ou and 'Aisea Fotu.

In conjunction with the reasons which I give there should be read the full text of RichardsonJ'sjudgment, which is relevant tothis matter, and particularly where hedeals with the area in the Township of Leimatu'a known as Funga Saione.

I just highlight 4 passages now and comment on them in this way.

First on page 60 the reference 2/3rd of the way down that page to the late Fotu who "promised that he would divide the area of Funga Saione into 2 portions, retaining the Southern portion for himself" (and I stress the word Southern Portion for himself) "and giving the northern portion which he named Ma'u-he-'Ofa to Plaintiff" . The plaintiff being Fine Hafo'ou.

The second portion I highlight is oh page 61 second paragraph on that page where theJudge makes reference to finding that the grantto thedefendant (that was 'Aisea Fotu, the now deceased husband of the present plaintiff) "was legal and binding to the extend of a statutory town allotment The grant however cannot purport to convey to defendant more than the statutory area and rest must remain for the time being in the estate." That is the Estate of the title holder Fotu.

The statutory town allotment (the Statutory area referred to) was in the terms of measurement in those days, no greater than lr 24p and no less than 30 p.

The third extract is from the next paragraph where at the bottom of that paragraph the Judge went on "that therefore plaintiff has a right to a portion of the area known as Funga Saione, such portion being that which was referred to as Ma'u-he-'Ofa".

I pause there. That relates to the first extract 1read out, where Ma'u-he-'Ofa was described as being the northern portion.

Then in the last paragraph on page 61the Judge directs that the whole of the area of Fugna Saione be surveyed," and that there be first demarcated therein the town allotment of defendant " (that is 'Aisea Fotu)" which shall be of the normal statutory area and that defendant shall register this allotment so surveyed as his town allotment, that the registered name thereof shall be Funga Saione. When this has been done I do direct that the survey shall continue over the balance of the old area Funga Saione and that the balance thereof up to a maximum of the statutory area "(again I stress those words)" of a town allotment shall be demarcated and shall be known as Ma'u-he-'Ofa and that the plaintiff shall be entitled to register this area as his town allotment in that name". I pause there, that means the first area to 'Aisea Fotu to be known as Funga Saione, second area, Ma'u-he-'Ofa to Fine.

The Judge went on "Should there be any further portion of the former area of Funga Saione remaining over after the demarcation on these two statutory town allotments it shall revert to the Estate of Fotu and shall be at the disposal of the present or any future holder of the title". I stress the reversion to the tale of Fotu.

Following that Judgment, and as shown as the register book Exh.8 (then followed by Exh.9 and that followed by Exh.2) 'Aisea Fotu was registered in October 1948 as the holder of Funga Saione and Siaosi Fine Hafo'ou was registered on the same date, 26 October 1948, as holder of Ma'u-he-'Ofa.

On the evidenceI have heard, I conclude that what is in fact shown on the Plan Exh. 3would indicate that the southern most area of Funga Saione was surveyed off into 1rood exactly and went to 'Aisea Fotu, that is the area now marked with the name Lataisia Fotu.

That is consistent with the Judgment of Richardson J and consistent with the law as to the size of town allotments. That was what was then surveyed off.

The next allotment, which is that shown of the Plan Exh.3 with the name Fine on it, of Ir 10.6p, is again consistent with the Judgment of Richardson J and with the law as to

the size of town allotment

The remainder of the land, the 2 r 28.8p which was then left, reverted to the Eslate of Fotu and is the area marked with the name Fotu on the Plan Exh.3.

That area of 2r 28.8p is too large to support Mr Paasi's claim in submissions made today that area marked Fotu on the Plan Exh. 3 , 2r 28.8p , was in fact Fine's town allotment That would be not only outside the law as to the size of town allotment, but also would be outside, and in direct contravention of, the quite explicit orders and direction of Richardson J of March 1948.

Those are the conclusions as to the division of land, and where land was and is to be held, that all the evidence, including the exhibits, lead me to.

Occupation ofland, and land holding , may well be two different things. Itmay well be, and it is a very long time ago now, that after the 1948 Judgment the then Fotu, the second Fotu, Fotu Nehumi (the father of 'Aisea Fotu) continued to reside and did reside in a variety of houses on the land, the middle allotment, the allotment marked Fine, and that he in fact continued to stay there until his death in 1978.

Itmay well be that Fine allowed Fotu Nehumi to continue to reside there. Fine it would seem (and there may well have been some family arrangement) continued to occupy a house or houses that had been build on the Fotu land, the land that remained in the estate of Fotu near where the monument is that is on the 2r 28.8p area.

Eventually, and a shorttime before Fotu Nehumi's death (and theseevents may well be related), in 1976 or thereabout, 'Aisea Fotu built substantial 2 storey house on the lr area Southern-most area (the area shown a Plan 3 with the name Lataisia Fotu on it.)

That I suggest is important. Nearing the death of his father he chose to build on this other area a house for himself his wife and his daughter. He shifted from the Fine land. It(the Fine land) was fenced off from the Lataisia Fotu marked land. The house on the Fine land, after the death of his father (Nehumi), was allowed to fall into disrepair and ruin and was eventually dismantled. Somewhere between that time and 'Aisea Fotu's death in 1980, a start was inade to build a community hall on the Fine marked land. It got no furtherthan a foundation and possibly a stage. Itstopped there. Nothing else was done on that land.

On the evidence it seems to me that the interests of 'Aisea Fotu (when he was still alive) and then those of his widow and of his daughterwere focussed on the Lataisia Fotu marked land and to secure the daughter an interest in the land, as their only child, 'Aisea Fotu arranged, quite lawfully as I am told, a lease of the land to her.

Itseems to mequite clear from the evidence that ineffect the widow and the daughter and the family paid no real attention to the Fine land from then on and that is in keeping with the conclusion which I have reach that the town 'api referred to by Richardson J in the Judgment in 1948 which was to go to 'Aisea Fotu is the area Southern most, the area with the name Lataisia Fotu on it, of 1rood exactly.

It is for those reasons expressed shortly that I find that the plaintiff must fail in the claim that has been made by her.

Pohiva v Lasike

Supreme Court, Nuku'alofa

Hampton CJ
Cr App 95/96

1August 1997

Criminal law - autrefois convict - conditions

Constitu_tion - crimial charge - internal proceeding of Legislative Assembly
Se11te11c111g - probation - when appropriate

The appellant, a people's representative in the Legislative Assembly wasconvicted f assault and placed on probatio for 3 years as a result of throwing a book at the actig Speaker of the Assembly, whilst the Assembly was in session. The appellant was suspended from the Assembly for 14days and lost pay and allowances.

Held:

1. A defendant cannot consent to give a court jurisdiction if it does not have such.
2. The.defndant had never.been jeopardy on an assault charge before the Legislative A.ssembly..wh1ch matter was a disciplinary, and very different . mattr, so that the special plea of autrefois convict was rightly rejected by the Magistrate.
3. A court, on such a scial plea, must consider whether the offence charged in he later proceedings 1s the same or in effect the same, as the ofTence charged in the former proceedings. The defendant , to succeed on such a special plea must hav.e been in peril for the same offence, both in fact and in Jaw.
4. The heanng of an assault charge in these circumstances was not a:n inquiry in o t .e internal proceedings of the Assembly but was a hearing of an allegation that there had been criminal behaviour in the Assembl
5. The sentence imsed was inappropriate, however, probation neriher bein necessary nor es1rable. Probation is a means to try to control and modify aberrant behaviour. Probation tenn quashed and appellant convicted and ordered to pay costs only.

Cases considered

Connelly v D.P.P. (1964] AC 1254
Fotofili v Siale (1987] SPLR 339 [1996] Tonga LR

Appellant in person
Counsel for respondent Mr Kaufusi

Judgment

This is an appeal by the appellant against a decision of a magistrate on a chge of common assault. The appellant was convicted on that charge an placed on probaofor a period of 3 years, the maximum term permissible under section 198 of the Cnmmal Offences Act.

The matter arises out of events that took place in the Legislative Assembly of the Kingdom on 2nd August 1995, during a sitting of the Assembly. The incid nt n qestion occurred when the appellant, a member of the Legislative Assemly, havmg m his hand a Volume of the Lawsof Tonga and being in the course of a speech m debate m the House, and being interrupted orcut off by the Acting Speaker, the H?nourable Lasike, inan upset reaction threw the Volume at, and hit, the Honourable Las1ke.

A literal version of throwing the book at somebody. The first result of that incident was that the appellant, under Rule 69 of the Rules for Proceedings and Standing Orders of the Legislative Assembly of Tonga (which Rules are made under Clause 62 of the Constitution) was brought before the Legislative Assembly and was suspe ded from the Assembly for a period of 14 days (the maximum allowed under Rule 69) with a resultant loss of his pay and allowances of some $1,200.

Rules 69 allows for up to 14 days suspension from the House 1f the members so resolve and such suspension, as I am told here was the case, was for an offence (and tat is the word used in the Rule) ofdisregarding the authorityof the Speaker and/orof abusmg the Rules of the House.

The appellant says, both in his written submissionsand in his oral argumen bef?re me (and he has argued the matter in person today), that what was done y th Legislative Assembly was in accordance with its Rules and procedures, as prescnbed m Rule 69.

That was the first result of the incident.

Thesecondresultis that the Honourable Lasike, the Acting Speaker (as wash1 nght under section 197, sub-section 2, of the Criminal Offences Act), as the peson aggnevd, brought a private prosecution against the appellant forassault, a harge laid.under section l 12of the Criminal Offences Act. That prosecution was brought m the Mag1strates Court. The appellant appeared in person. Initially he seems tohave pleaded guilty, but was then allowed to argue the special plea of autrefois convict, saying that he could not e dalt with by the Court (i.e. the Court did not havejuri sdiction and power to deal w1h h1) because he had already been dealt with, in relation to the same matter, by the Leg1sla1Jve Assembly.

In the Magistrates Court, as here, he referred to Clause 12 of the Consttution,.a doublejeopardy provision, which says in itsrelevant part that "noone shall be tnd agam for any offence, for which he has already been tried, whether he was acquitted or convicted".

I pause and deal with an issue which has been raised by Mr Kaufusi for the respondent here before me. Mr Kaufusi in writing. and orally, says that cause of the appellant's plea of guilty in the Magistrates' Court, he had surredered h1msel to the jurisdiction of that Court. and therefore could not argue the autrefo1s convict special plea as he was allowed to do and as he had done before me.

That argument of Mr Kaufusi's cannot be correct. Either a Court hasJnsd1c11on or td t If it does not if it does not have the jurisdiction or power to deal with the matter, 1 oes no . b · t t h n then it matters not whether the accused person consents to it, or su m1ts o 1 av1 g

juri sdiction or not.

A Court cannot be givenjuri sdiction it does not have. And so here, if the appellant is correct in hisarguments, the mere fact that he pleaded guilty does not mean that he had given, or could give, to the Court jurisdiction that it did not have.

The Magistrate dealt with that special plea of autrefois convict with a great deal of care. She heard submissions on it over a number of days. She had the opportunity to consider it, and obviously had because in herdecision given on the last dayof the hearing. she referred to a number of authorities.both in England and in other Commonwealth jurisdictions which had not been referred-to her in the course of argument She rejected the plea of autrefois convict and rightly, in my view, rejected that submission.

The appellant was not in jeopardy, never was in jeopardy, on a criminal assault charge before theLegislative Assembly. The matter before the LegislativeAssembly was a very different matter. Itwas, as I have said, todo with disregarding the authority of the Speaker, a disciplinary ma!!er, and a very different matter, a substantially different matter, to the specific criminal offence charged in the Magistrates' Court under section 112of the Criminal Offences Act, a charge of a common assault.

The authorities on the special pleas of autrefois acquit and autrefois convjct make it clear that on such a special plea, a Court must consider whether the offence charged in the later proceeding is the same, or in effect the same, as the offence charged in the former proceedings. It is immaterial that the facts under examination, orthe witnesses called in the later proceedings, are the same as those in the earlier proceedings.

For lhe doctrine of autrefois convict to apply the accused in effect must have been in peril for the same offence, both in fact and in law, with which he has been previously charged and convicted. The offences must be exactly the same in law, because legal characteristics are precise and either they are the same or they are not.

Those propositions are take from the House of Lords case of Connelly v OPP [1964) A.C. 1254. If those criteria are put alongside what happened here, it can be seen immediately that the Magistrate was right that these were very different matters, substantially different matters, i.e. the Legislative Assembly matter was very, and substantially, different to that before the Magistrate in her criminal juri sdiction.

Rule 69 appears in Part XVI of the Legislative Assembly Rules under the heading of "Rules of Debate". It is one of a number of Rules which are designed, quite properly, toregulate and control mailers *of* debates in the House. Itwas a contravention of that Rule, as lo debates in the House, that led to the suspension of the appellant for 14 days.

There is someforce in what was said, in thecourse of submissions in the Magistrates' Court, on behalf of the respondent. If say this attack on the Acting Speaker had been a grievous one, is it possible that because the Legislative Assembly took immediate steps to suspend the member who was the attacker, that that member could not becharged with some offence of grievous bodily harm or indeed, if death subsequently resulted, with murder. That is not the case. It would be an absurd result and it is not what the law provides.

As argued before me, and indeed before the Magistrate, the appellanl says that the Court is interfering with internal matters of the Legislative Assembly. And that in conducting, or allowing the conducting of a prosecution for assault in the Magistrates' Court, lhe Magistrate was inquiring into the regularity of the Legislative Assembly's own proceedings.

That misunderstands the law i relation .t this aect and in particulai:.i misunderstands what was said by the Privy Council m the case referred to me of Fotof1h & Others v Siale (1996) Tonga LR but which, for convenience sake I refer to in the report in [1987] S.P.L.R. 339and in particular eittracts at348and 349. Two eittracts are referred to. The first page 348: "there is ample authority for the proposition that when a matter is a "proceeding" of the House beginning and terminating within its own Rules, it is outside the jurisdiction of the Courts."

The Magistrates' Court here, and this Court, is not asked to enquire into the "proceeding" before the House, which was the motion to suspend under Rule 69. The Magistrates' Court was not being asked to enquire into that at all. If it had been asked to do so in some way, to review that (and it could not, because the jurisdiction under the Constitution would be that of the Supreme Court in any event), but if it had been asked to cl so then a Court would be faced with this injunction which comes from page 349 of the Siale case that the Court if it were to inquire into internal proceedings of the Assembly, can' only do so if "the Assembly has ... acted contrary to the provisions of the Constitution in the course of those proceedings."

But here in the Magistrates' Court, and in this Court, there was not an enquiry into what the Legislative Assembly did in relation to the Rule 69proceedings. Ithad nothing to do with the matter and indeed, as the appellant himself conceded and as I referred to earlier, what was done by the Assembly was in accordance with its Rules and Procedures. Sowhat was done by the Assembly was not under scrutiny atall. What was underscrutiny was the allegation that there had been criminal behaviour in the House and in that regard the Courts do have jurisdiction.

Insofar as the Magistrates' Court is concerned the line is this way. Clause 84of the Constitution says, in its relevant part, that the judicial power of the Kingdom shall be vested in, inter alia, the Magistrates' Court. Then, in the Magistrates Court Act, section 11, sub-section 1, makes it quite clear that "Every Magistrate shall have jurisdiction to hear and determine all criminal cases in which the punishment provided by law does not eitceed $1,000 or 3 years imprisonment."

The offence charged in front of the Magistrate here, under section 112 of the Criminal Offences Act, was within thejurisdiction of the Magistrate. Itis speltout in this way in s.112 "Is liable on summary conviction to a fine not eitceeding $500 or to imprisonment for any period not eitceeding 1year or to both."

Therefore on both limbs that were argued in front of the Magistrate, and as are in front of me, I find that the Magistrate was correct. She was correct to reject that special plea that she had allowed, quite properly, to be argued. I do not intend to go in to further detail. The appellant was not being tried for the same offence twice, and that plea was properly rejected.

On that occurring, he indicated then his plea of guilty. He was convicted by the Magistrate, again quite properly in my view, and was then placed on probation, as I have said for 3 years, and ordered to pay costs of the prosecution in the sum of $350.

I have reached the view that latter portion ofthe Magistrate's decision, that is the sentence, is one that should . reviewed by me. Mr Kaufusi says that the sentence as peel was not directly raised (as I understand him) in the notice of appeal filed by the appellant. The notice of appeal is a notice of general appeal. It is an appeal against the decision of the Magistate and it refers in the notice to it being an appeal against the

conviction and the discharge on probation for 3 years, that being the decision of the Magistrate.

I take.the view tat the notice of appeal doe raise the question of sent'!nce. In any event, looking at section 80 of the Magistrates Court Act, in my view the sentence was open to be cnsidered by this Court. Itseems tome that a sentence of probation, particular for the mait1mum term of 3 years, was an in appropriate sentence. Not only was the term o probation eitcessive, but indeed probation itself was inappropriate in all the circumstances that were involved in this prosecution.

I cannot see anything from any of the materials before the learned Magistrate that would indicate that probation was necessary or desirable or, as I have said, appropriate. There was no need for it. I have some degree of sympathy for the appellant when heputs forward the position, as he does, that given what had happened in the House in terms of his suspension and his loss of wages and allowancesof some $1,200, in reality he had been punished, and punished sufficiently, already.

. G.iven those circumstances, I am of the view that the appropriate way to have dealt with 1s matter was.to have marked out the seriousness of what was done by entering a conviction, so that 1t goes on his record as a conviction for assault; was to order the pyment of the costs that were awarded(that is the $350 costs of prosecution together with the $8Court costs), but to impose no further or other penalty.

Probation is a sentence that is supposed to be used to try and control and modify aberran behaviour, particularly aberrant criminal behaviour. It is not, in my view, an appropnate penalty for something that has occurred in the circumstances and in the way that this event occurred.

The.result is that the appeal against conviction is dismised. The appeal against sentence 1s allowed. The term of probation is quashed and, in lieu, the position will be that he appellant will becnvicted, ordered topay costs of prosecution (asordered below) that 1s $350and Court costs of $8, as in the Court below, but without any further penalty.

Insofar as costs in this Court in concerned I donot intend to award costs either way in all these circumstances.

Monfort Bros v Jaimi

Supreme Court, Nuku'alofa
C 134195
Hampton CJ

February & August 1997

Architect - negligence - standards applicable
Tort - negligence - architect - standard

Plaintiff sued for damages against architect for alleged negligence in design and supervision of building of a technical institute.

Held (dismissing all claims and allowing counter claim for outstandig fees):

1. An architect's liability is not, in theordinary case, absolute m the sense thathe is liable whenever loss result from his acts.
2. An error of judgment may or may not amount to negligence.
3. If the majority of architects would, under the circumstances, have done the same thing this would normally provide a good defence for a defendant charged with negligence, to clear himself if he shows that he acted in accord with general and approved practice.
4. In most cases expert evidence from a suitably qualified architect would be necessary to prove negligence.

(A subsequent appeal was not argued, and was dismissed by consent).

Case considered — Eckersly v Binney [1988) 18 Com LRl

Counsel for plaintiff — Mr Edward
Counsel for defendant — Mr Appleby

Judgment

The plaintiff, a religious order, sues the defendant, an Architect , for damages following it is said from alleged negligence with regards the construction of a Technical Institute in Popua on Tongatapu in 1994/1995.

There seems to be no dispute between counsel as to the legal principles in relation to the claim of negligence against an Architect. And I adopt what has been put in front of me from Keating on Building Contracts, the 6th edition 1995, where amongst other things the following principles are set out, and these are the ones that I see as being the main ones applicable to the case before me.

First, an Architect's liability is not, in the ordinary case, absolute in the sense that he is liable whenever loss results from his acts. Secondly, an error of judgment may or may not amount to negligence. I add to that this, it comes from the case of Eckersly v Binney [1988] 18, Com LR 1p 80 by the now Chief Justice of England: "The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet". That may be pertinent given some comment which I will come lo in due course made by Mr Julian, called as an expert on behalf of the plaintiff, in the course of this action.

Third, that if the majority of Architects would under the circumstances have done the same thing, this normally provides a good defence for a defendant charged with negligence toclear himself if he shows that heacted in accord with general and approved practice. Then in most cases expert evidence from a suitably qualified architect is necessary to prove negligence.

Here as I see the matter and as I have reviewed it over the last week; these matters have become really entirely factual issues. I have had the opportunity in the first week of this trial, back in February this year, of observing over a considerable period the plaintiff s principal witness, Brother Joseph Kottoor. The case was set down initially for 5 days, that was to encompass the plaintiff and defence case both on claim and counter-claim. At the end of 5 days Brother Joseph was still in the witness box and he continued on to the 6th day when the trial resumed in August.

Since then, really in the space of 3 days, I have heard 8other witnesses to complete the case of plaintiff and defendant. I say this, that seldom have I had such a strong view about a witness as I have about Brother Joseph Kottoor. And I go on to express theview, that really encapsulates thisjudgment, that he was the author of the misfortunes that may be said to have befallen Montfort Brothers. If there are misfortunes, he has been the cause of the difficulties.

I have had to through the course of this trial and through the period from February to now, keep on reminding myself to keep this matter in proper context. There are some matters that I think do put it in proper context and should be stated at the start.

1. It seems extraordinary to me that the claim, as it has come down during the course of this trial, in fiscal tenns, monetary terms (as it has on the plaintiff s own evidence or Brother Joseph's own evidence) to a comparatively small sum, should occupy such a length of time in Court. And one cannot help but reflect on that when it is put besidewhat obviously will have been considerably amounts of costs spenton litigating such a matter. Itsays something I believe as to the intransigence of this man, Brother Joseph, which I will come to shortly.

2. This matter is in relation to a building contract where the buildings are valued at somethingover$1. million.Over buildings completed within time forless than thecontract price despite all theextras and changes, almost entirely atthe instance of Brother Joseph. Buildings completed as I say, within price,within time, and to what I am told (and I was given a view as well by the request of both parties) was an appropriate and suitable standard.

Those matters commented on in detail, work commented in detail, by a very experienced Architect called on behalf of the defend!(and I apolgis if I get the pronunciation wrong, hereafter I'll call him Mr Star) Michael Staruszkiew1cs.

In his report, adopted as part of his evidence, he commente on the fact that e project came in finally with a saving of some $3,000, refemng o that as bemg outstanding. and referring to the fact that the completion and the way 1t was completed was a credit to those concerned and to the construction administration abilities of the defendant.

Itwent on toobserve that so far as he was concerned "the final archilect\Jral product is a project that all the participants can be proud of and will servetheTechnical Institute well fo the future". One of the witnesses for the defendant who impressed me was the local Architect employed by the defendant. The defendant is based in Fiji. He has a Tongan Office and the local Architect here, Mr Solmone Tuita as.in effect the persn for the defendant administering this particular project. Mr Tu1ta m the course of his evidence said that in his experience, in most jobs, the contractor often fell behind the schedule; there would be problems with poor workmanship; there would be techmc problems but inhis view none of those occurred here. That the contracorwas ahead. Ts wasthefirsttime In hisexperiencethatsuchhadoccurredandthequalityofworkmanship conformed with expectation ahd contract documents. . .

As I said in opening, my view is that the difficulties said tobe faced by the plaintiff are in effect as a result of or in effect may have been made by , the actions of Brother Joseph Kottoor on behalf of the plaintiff. I make it clear now and I will come.to this specifically later that I donot findnegligence proved against the defendant measnng that against the authorities or principles I have already referred to, and measung thse principles against the evidence that has been put before me. Very strongly one 1s leftwith the view that in Brother Joseph's world, at least in so far as this particular matter was concerned, every one else was out of step but him. Anything and everything. it would seem, became in his eyes, a matter of contention and dispute. And Mr Star in he course of cross-examination, made these observations which I have seen to be pertinent, that never in his career had he seen a client dispute amounts certified in payment certificates as happened here and as I will come to. . .

Astothat (and I add this now while I think of it) I add tothataspect aboutcernf1cates that Mr Star went on to express the opinion that from all he observed, the Architect had tried to be impartial, and the correspondence both ways, that is, to the contractor and to the plaintiff showedthat. Tjle Architect frequently went back to thecontractor. Amounts were reduced. The Architect was not rubber stamping what the contractor produced to him to be certified as the next progress claim but the Architect acted in accordance with the duties imposed on an Architect in that situation.

I do conclude that Brother Joseph was, and is, an intransigent man in all respects as he was, in all respects, and in relation to this building project whether in relation to

contractors or sub-contractors or materials or Architects, or when I come to it in terms of attitudes, to such asthe Arbitrator. And those mattersare clearly revealed in the evidence that he gave before me and under cross-examination. It can be seen, the attitude, in looking at the statement of claim of December 1995 and the further particulars of April 1996 that are in the file. An attitude that can be seen in relation to what occurred over payment of Architects fees, on the counter claim, and that was settled in relation to that aspect only on the 9thday of this trial. Fees that were outstandingsince 1995.The attitude can be shown as well, orcan be seen as well , in relation to the last of the progress claims. (it was not a final claim as submitted, it was the last of the progress claims, certificate 7) and the refusal by Brother Joseph to accept even on the amended certificate 7, despite Arbitration, any aspect of that certificate in effect. And it was that attitude, and that conduct in relation lo that certificate, that brought the detennination of the building contract by the contractor, and the subsequent difficulties.

Mr Star made the points, and it was made by others in evidence, (and this was important) that the plaintiff, had to pay thecontractor under that amended certificate 7. It is the plaintiff who, as the client has the contract with the builder or contractor. The contract is clear, that payment should be madeon the certificate. This was not even in its amended form, a final certificate. Itwas still a progress certificate, until the final wash up and the final certificate whichwould haveonly comeat the end of the 6months defects period.

The contract, if payment had been made, would have covered defects and I include in that term "defects• not only work done allegedly improperly but work not done at all. During that period those defects would have been remedied, all necessary adjustments and re-calculations would have been carried out. And much if not all, (and I tum to the list of the matters that are now complained of, as founding negligence against the Architect) would have been resolved.

The onus was on the client, as Mr Star said, to fulfil and pay on the certificate. He did not do so, chose not to do so. The result was a termination, the loss of that defects period where the matters now complained of could have been resolved. And as Mr Star says within the approved tender contract sum.

The defendant and others of his employees as I have indicated say similar things. Indeed they, thedefendant and the employees, tried to dissuade Brother Joseph on behalf of theplaintiff from thecoursethat led to termination.They had told me so,and I accepted as so, in their oral evidence. Itis.clear from thedocumentary evidence before me as well.

Thedefendant himself said that itwasimportant totry and prevent this confrontation and avoid the contractor walkingoff thejobwhich would and could only result in costing the plaintiff more. The defendant, in accordance with his duty as an Architect, tried to prevent the plaintiff giving a ground to the contractor to allow him to terminate, to walk off thejob.

In the end of the defendant trying to prevent this occurrence, caught really between a rock and a hard place, had no say in what occurred because Brother Joseph would not pay and thecontractor simply detennined thecontract in accordance with notice that had been previously given, and had been given in relation todifficulties with payment, orover payment, of the earlier certificates.

At the time of that detem1ination, practical completion had been reached in relation to the project. The buildings were in effect finished. There were only minor things left

and Istress minor things and that is the conclusion Ihave reached. All of which should have been picked up and could have been picked up , in the defects period.

The defendant, Iconclude, did his best to prevent the termination. This was after the Arbitration and will refer tothe Arbitration indetail later.The defendant concluded, andIconcur with him and this was expressed in the course of cross-examination, that the problem so faras he could see, lay with the personally of Brother Joseph who wanted, he said, it seemed to him vengeance from the contractor, the consultant, everyone. A one track mind; would not even listen to the Arbitrator and the result of the Arbitration.

190 Brother Joseph, Iam sure was demanding, difficult and dogmatic. Inote that one of the plaintiffs own experts, described him as a difficult client and surely he was, and that it seems to me is the root and cause of the difficulties here.

Thepositionastothataspectisinmyviewwellsummarisedandsetoutinthereport of Mr Star which he gave in his evidence in chief at pages 5 and 6,"paragraph 4.6, and I do not intend to read that total aspect now but it should be read into thisjudgment in its entirety, all of paragraph 4.6 of that report.

As indeed, and Itum to a further extract from his evidence in chief, the report at paragraph 7, summary on pages 24and 25, and that whole paragraph should be read into
200 thisjudgment as well.

Iaccept from Mr Star's evidence that there is no basis for the allegation of negligence but Ido not just accept what he says. Ihave formed that view and had formed that view quite independently long before he gave evidence, and in particular as Ilistened to the evidence of Brother Joseph. As Mr Appleby submits, in effect Mr Star gives me a yardstick, an objective standard, against which I could measure such things, and a standard that is established by his experience in Australia and in the Pacific and indeed in a number of other places through out the World. (The Judge then traversed numerous factual issues and claims).

It has been considerably reduced by now. It leads me then to the alternative or
210 further or alternative cause of action which claims a fiduciary relationship between defendants and plaintiff, a reliance, said to be heavy, by the plaintiff on the defendants' skill and professional expertise, an allegation of gross negligence and a failure to carry outthe obligations implict in the fiduciary relationship bydoingorfailingtodothe matters already considered in paragraphs 8,9 and 16of the Statement of Claim. And as a result of tha seeking general and/or punitive damages in the sum of $17,000.

The claim must fail in any event because of the findings Ihave already made in relation to the claimed negligence that it hangs on, and that Ihave already dealt with in relation to, the alleged failure of the defendant There is no need for me to comment
220 further except to say that in rejecting this claim, Ido so on the basis as I have already outlined, but also that itseems to me there is force in what was Mr Appleby has said in his submission , as to whether such a fiduciary relationship as alleged, existed here in any event, and quite what basis therecan be for a claim of punitive damages in these sort of circumstances, Icannot follow. It seems to me, there can be no legal basis to claim punitive damages when th allegations were of negligence in a professional relationship; either damages flow from the alleged negligence or not.

I noted that Mr Edwards in making his final submissions did not refer in any way to this further or alternative claim. In the circumstances, Idismiss that aspect of the claim
230 as well.

There.will, on th claim, bejudgment forthe defendant against the plaintiff . On the counter-claim, there will be an Order made as I indicated earlier and as recorded in my Note Book by consent, to the effect that the plaintiff on the counter-claim is to pay to the defendant, to settle the professional fee aspects, the sum of $36,000 plus $1,000 costs.

. . Such payment to be made on this basis: ONE $20,000 forthwith, TWO balance WJthm2months from 14thAugust 1997with interest payable on such outstanding balance at the current Bank of Tonga Overdraft rate.

I goback then to the claim and thejudgmentin favour of the defendant en the claim Insofar, a that is concerned costs will follow the event. There will be costs as agreed 0 as taxed, m favour of the defendant against the plaintiff on the claim.

Tu'ipulotu v Kingdom of Tonga

Supreme Court, Nuku'alofa
Hampton CJ
C 237/%

9 April, 22, 28 May, 11 July, 29 August 1997

Hereditary estates and titles - jurisdiction of Land or Surpeme Court"
Royal prerogatives - not subject to judicial review
Constitution - position of Monarch - royal prerogatives

The plaintiff sought an order directing the defendant to publish in the Gzette, in the name of the King, that the plaintiff was the lawful successor to the noble title and estates of Niukapu. The defendant applied to strike out the action.

Held, striking out the action.

1. The matters were not within the jurisdiction of the Supreme Court but m that of the Land Court, being matters which related to questions of title affecting land and related to the determination of hereditary estates and titles.
2. The named defendant had no power to make the publication sought. Such publication was within the sole prerogative of the King; and had nothing to do with the exercise by the King of his role as a member of the executive branch of the Government of the Kingdom.
3. Leave to apply for judicial reveiw and leave to amend (to name the King as a defendant) should be refused as well for the reasons above and for the reasons that the King cannot be sued (the Courts are his Courts and can have no jurisdiction over him) and that the King cannot be subject to judicial review (the exercise of jurisdiction and power by the Courts under the prerogative writs is the exercise of a part of the Royal prerogatives assigned to the judiciary by the King).

Statues considered — Constitution clauses 36 to 49, 51, 54, 56, 61, 50, 90, 91, 92, 112
Land Act, ss 11, 22, 38, 39, 40, 57, 141, 143, 149, 162
Court of Appeal Act, s11
Crown Proceedings Act, s5

Counsel for plaintiff — Mr Niu
Counsel for defendant — Mr Taumoepeau

Judgment

This is an application to strike out these proceedings on the basis, as set out in the motion:

(1) that the statement of claim does not disclose any reasonable cause of action against the defendant;
(2) the claim has no basis in law as against the defendant;
(3) the defendant has no power, in law, to carry out the orders prayed for in the statement of claim, because the law does not vest in the Government of Tonga the power to cause the gazetting of the appointment of any noble.

I have reached the view that these proceedings must fail and will be struck out; and I have reached that view on a number of bases.

First. Central to, and essential to, the claim as set out in the statement of claim, (whether in its original, or it's now proposed amended fonn) is the assertion that the Kingdom of Tonga (in the statement of claim) or the Kingdom of Tonga and His Majesty the King (in the proposed amended statement of claim) has or have failed to publish the plaintifrs name in the Gazette, pursuant to s.38(1) Land Act. In referring to the statement of claim I refer in particular to paras. 14 & 15 and prayer (c); and in tenns of the proposed amended statement of claim to paras 14 & 15 and prayer (c). I will read the following paras. from the statement of claim (they are, in fact, the same in the proposed amended statement of claim):

"3. Section 38 of the Land Act (Chapter 132) provides (where relevant) as follows:
38.(i) Upon the death of a holderof an hereditary estate ..., His Majesty shall cause the name of the lawful successor to the title of such holder to the published in the Gazette together with the date of his succession thereto which shall be the day following that on which the death of the holder took place ...•

4. Section 39 of the Land Act also provides as ollows:
"39.The successor to the title if he has attaine the ageof 21 years shall as from the date of succession published in the Gazette possess and enjoy the hereditary estate appurtenant to the title to which he has succeeded together with the rents and profits thereof and all other rights and privileges attached to the title.•

5. His Majesty did not cause the name of the Plaintiff to be Gazetted. He instead caused the name of one Kanitesi Mahe to be gazetted and he, the said Kanitesi Mahe, possessed and enjoyed the hereditary estate of the title and of the rents, profits rights and privileges thereof.

6. The appointment of Kanitesi Mahe took place on 4/9/89.The Plaintiff brought an action in the Land Court on 16/9/92 claiming the title and estate from him. On 28th April 1994the Land Court gavejudgment in favour of Kanitesi Mahe and dismissed the Plaintifrs claim. The Plaintiff appealed to His Majesty in Privy Council and on 28th April 1995, His Majesty and Privy Council upheld the appeal of the Plaintiff and ordered as follows:
"l. The appeal be allowed, and the orders made by the Land Court on 28th April 1994 be set aside;
2. It be declared that the appellant was entitled to succeed, upon the death of his father, to the title and estate of Niukapu;

3. Each party bears his own costs of the action and of the appeal."

14. The failure of the Defendant to make the publication of the Plaintifrs name in the Gazette in accordance with s.38(1) of the Land Act has resulted in the deprivation of the right of the Plaintiff to the emoluments to which he would otherwise have been entitled. He is properly entitled to those emoluments together with interests at 10% per annum thereon from the date upon which they were payable until payment of the same.

15. The said failure has further resulted in deprivation of the right of the Plaintiff to hold and enjoy the lands of the estate appurtenant to the title. To date he has not been consulted with regard to grants of tax or town allotments or of leases out of those lands, and he has not been allowed to draw or receive the rents and profits of those lands. He is entitled to those rents and profits as from the day when they were received by the Defendant and the Plaintiff is properly entitled to interests at 10% per annum from the date of receipt of the same by the Defendant until payment of the same.•

Prayer (c) seeksan order directing that the defendant (ie the Kingdom of Tonga) do publlsh forthwith in the Gazette, in the name of the King, that the plaintiff is the lawful successor to the title and estates of Niukapu with effect from 1 September 1984.

The corresponding provisions, in the proposed amended statement of claim under the same numbers and/or letters, are for all present purposes identical. Prayer (c) seeks an identical order but directing the defendants (ie the Kingdom of Tonga and His Majesty, the King) "topublish forthwith in the Gazette, in the name of" the King, that the plaintiff is the lawful successor to Niukapu.

I have the clear view that such matters are not within thejurisdiction of the Supreme Court but, if they are within anyjurisdicti on, they are within the jurisdiction of the Land Court (because those are clearly matters which relate to questions of title affecting land, this is a case concerning titles to land, and is a matter relating to the determination of hereditary estates and titles).

Significantly the first round of this litigation (which is referred to in para 6 of the statement of claim) took place in the Land Court and the successful appeal from that Land Court judgment went to the Privy Council. That was, and is, because the matter, in the first instance, came within s.149(l)(b) Land Act which provides that the Land Court shall havejurisdiction to hear anddetermine all disputes, claims andquestions of title affecting any _land or any interest in land in the Kingdom and because of clause 90 of the Constitution which provides that the Supreme Court shall havejurisdiction in all cases in law and equity arising under the Constitution and laws of the Kingdom except cases concerning titles to land which shall be determined by a Land Court, subject to an appeal to the Privy Council in matters relating to hereditary estates and titles or to the Court of Appeal in other Land matters. Those provisions still apply to this round of the litigation, before me here.

On appeal, the matter is controlled by section 162(l)(a) of the Land Act, as amended in 1990, which provides foran appeal to the Privy Council if the order orjudgment relates to the determination of hereditary estates or titles; and most importantly by clauses 50, 90 (which I have just read) 91 and 92 of the Constitution. Those Constitutional provisions (along with eg. s.11Court of Appeal Act) make it clear that appeals in matters relating to the determination of hereditary estates or titles must go to the Privy Council. And I stress

the words in those clauses of the Constitution ("matters relating to the determination of hereditary estates or titles".)

Furthermore, secondly, and in any event, the original statement of claim and pleadings must be struck out on the following basis.

The claim is as set out in paragraphs 14 and 15 of the Statement of Claim.

The failure of the Kingdom of Tonga is the alleged cause of action. But there is no power in the Kingdom of Tonga to make the publication under section 38of the Land Act.

That is a matter entirely for the King. It is entirely his prerogative - a part of, an essential part of, the prerogative to appoint nobles.

I note that section 38 does not use words such as "His Majesty in Council" or "His Majesty - or the King - with the consent of the Privy Council." That is to be contrasted with other provisions where such phrases are used, for example in the Land Act (and this is not exhaustive) sections 11, 22, 57, 141, 143 On the other hand in sections 38 (and 40) the words "His Majesty" are used, and deliberately used.

The Constitution also malces such a distinction. Again not exhaustively, clauses 37, 54and 56 use words such as "the King with the consent of the Privy Council" or "the King with the consent of Cabinet", or "the King and the Legislative Assembly" whereas other clauses (and again not exhaustively) for example 38, 40 to46 and 48 to 51 inclusive, 61 and 112 simply use the expresssion "the King".

Clauses 36 and 39 are quite instructive, each clause holding examples of both formulations. In clause 36 the King, for example, shall appoint all military officers and make military regulations but the King cannot make war, lawfully, without the consent of the Legislative Assemlby. So also with clause 39: the King, lawfully, may make treaties with foreign states, but itshall not be lawful for the Kingtoalter the customs duties without the consent of the Legislative Assembly. Itisclearly envisaged that the King does retain the sole prerogative to do certain things.

Clause 112is significant dealing, as it does, with the situation where, in an estate, there are no heirs. The estate reverts to the King and it is for the King to confer the title and estate upon any other person. Clause 44 is also especially significant: "44. It is the King's prerogative to give titles of honour and confer honourable distinctions ...•

The Kingdom of Tonga, therefore, has no power to confer nobili ty on the plaintiff or rather to appoint the plaintiff as a noble. Itis only His Majesty, the King, who can do that It is entirely his, that is His Majesty's, prerogative and that is in keeping with the Constitution.

I 1 ook at Clause 41. Itprovides that "The King is the Sovereign of all the Chiefs and all the people. The person of the King is sacred. He governs the country but his ministersare responsible. All Acts that have passed the Legislative Assembly must bear the King's signature before they become law.• I also look at Clause 31 which says that "The form of Government ... is a Constitutional Government under (and I stress the word "under") His Majesty .... his heirs and successors."

My view as to those matters is reinforced by section 2(1) of the Interpretation Act where it is said that "His Majesty", "The King" means "His Majesty the King of Tonga or the Sovereign reigning for the time being over (and I stress the word "over") the Kingdom of Tonga."

The King or His Majesty is not, therefore, the Kingdom of Tonga as envisaged in the Crown Proceedings Act (Cap. 13) section 5, and as sued as the defendant in the original

proceedings.

I conclude that, in keeping with the clear provisions and intent of the Constitution, it is only when fonnulations such as "His Majesty in Council" or "the King with the consent of the Privy Council" or "the King with the consent of Cabinet", are used that the King has a role, a part, in the executive branch of the Government of the Kingdom - see clause 30: "... 1st The King Privy Council and Cabinet (Ministry) ...". When such a fonnulation is not used, but as e.g. in section 38 Land Act the words used are "His Majesty• then that does not relate to any role or part of the King in the executive but solely to matters within his exclusive preserve or prerogative.

I look again at prayer (c). How can a Court direct that, i.e. direct the Kingdom of Tonga to do something which only the King has the sole right entitlement and prerogative to do.

So I conclude:

(i) the wrong defendant is named and complained of, and the claim against the defendant has no basis in law because the defendant, that is the Government, has no power to appoint the plaintiff a noble and/or to publish the name of a successor to a noble title - only His Majesty can lawfully do those things.

(ii) It follows that there can be no cause of action, as there is no duty owed by the named defendant to the plaintiff (and the affidavits of 3 nobles, namely those of Lasike (paras 3 - 5), Luani (para 6), Tu'ivakano (para 3) confinned that their respective appointments as Nobles came from the King personally).

(iii) It also follows, as I have said, that the defendant named in the Statement of Claim has no power to carry out the Order as sought (prayer(c)).

(iv) And with regard to the monies prayed for, no amount of money is payable to the plaintiff because he has not been appointed a noble - that is the combined effect of sections 38(1) 38(2) 38(3), 39 and 117 of the Land Act.

The third basis for dismissing these proceedings is this. In effect the plaintiff is seeking Orders for judicial review. Order 27 of the Supreme Court Rules refers, and in particular Rule 1. That rule reads as follows.

> "This Order applies to any action against an inferior court, tribunal or public body (including an individual charged with public duties) in which the relief claim includes an order of mandamus, prohibition or certiorari or declaration or injunction."..."

The plaintiff has now applied for leave to apply for judici al review. That was done subsequent to the first argument which I heard on 9th April 1997. The application is supported by an affidavit and a proposed amended statement of claim (as per Order 27 Rule 2(3)(b).).

Effectively the only difference between the two statements of claim is the joinder of a further defendant, that is His Majesty as a second defendant.

I refuse leave to apply-for judicial review on the following bases:

1. The matter is not within the jurisdiction of this Court, i.e. the Supreme Court, as I have set out above.
2. The Kingdom of Tonga cannot be made the subject of these proceedings and of the Order sought, as I have set out above.
3. The King cannot be sued.

The only exception to the statement about the King not being able to be sued is to be found contained in Clause 49 of the Constitution, which states as follows:

> "It shall not be lawful to sue the King in any court for a debt without the consent of the Cabinet".

!"either the Constitution nor any other statute make provision for the ability to sue the King m any other matters. And, accordingly, it is said by the Solicitor General that, through the Civil Law Act, the common law of England relating to such matters is made applicable, in Tonga. Accept that submission.

At common law the Sovereign's person is inviolable and he is immune from all suits adations at law, whether civil or criminal. No proceedings are maintainable against the King 1 person. The courts are the King's court and the courts can have no jurisdiction over him. (Those rules apply to the Sovereign in his private capacity as well). In addition the maxim "The King can do no wrong" is applicable. (Refer to Halsbury's Laws of England, 4th Ed., "Constitutional Law", paras 894, 895, 896, 943 and 946 and the authorities and writings cited therein).

Those matters are reinforced by what is said in Clause 41 of the Constitution that the ng is the Sovereign of all the chiefs and all the people and that the person of the King 1s sacred.

. I dditin, I etout a furth?r, fourth, reason why leave should not be given to apply for JUd1cial review 1.e. thp.t the King cannot be subject to judicial review. That is evident fro_Ord_e 27 _RuJ 10f the Supreme Court Rules which I have already read and, in addition, 1t 1s, h1stoncally, the case and still the case that the prerogative writs (that is the writs referred to in Order 27) cannot be issued against the King. That is because the courts, in exercising jurisdiction and powers under the prerogative writs, are actually exercising a prt of the Royal prerogatives (i.e. the King's prerogatives), and a part assigned to His MaJesty'sJu ges by the King himself. The King assigns to His judges certain prerogative powers relating to the administration of ju stice, such as the power to control inferior courts and public authorities by the prerogati ve writs and orders (see Halsbury, as above, para 891(note 3)).

Therefore I make orders (i) striking out the original statement of claim and the pros amened state ent of claim; and (ii) refusing the application for leave to apply for JUd1c1al review (and ll)Cidentally to file an amended statement of claim).

In any event I note that application for judicial review is considerably outside the 3 month time limit referred to in (Order 27 Rule 2(2)).

Boiani v Kingdom of Tonga

Supreme Court, Nuku'alofa
Lewis CJ
C. 1252/96

10 & 16 September, 1997

Administrative law - judicial review - leave to seek - delay
Judicial review - leave to seek - delay
Limitation - judicial review - 3 months

The applicant ex parte sought leave to bring proceedings for judicial review of a decision to discipline and demote him in his employment. Although Judicial review was and is the appropriate course and on the face of his affidavit the applicant had an arguable case, nearly 16 months went by before he indicated any intention to seek review, and then a further 2 years elapsed.

Held refusing the application:

1. The applicant must show good reason for extending the 3 month limitation period.
2. a good reason to say that the lawyer of his choice was unavailable. It was not.
3. The delay here was fatal.
4. The length of delay will be a factor affecting the determination of what amounts to good reason in each case on its merits.

Rules of Court considered — S.C.R. 0.27 (rr 1 & 2)

Counsel for applicant — Mr Kaufusi

Judgment

The Applicant seeks leave for Judicial Review (rsc 027 rr 1 and 2). Judicial Review is unquestionably the appropriate course for the Applicant to take in this matter and on the face of the Plaintiff's Application, if leave is granted for the Review sought, then he most certainly has an arguable case. All those things must be said.

Having said them, it is clear that one hurdle stands in his way. The hurdle is that he has not acted promptly as the Rules of this court require him to do. He identifies, and it is clear from any reading of his affidavit, that the date when the grounds for the application first arose is 18 March 1994 when he was informed by the Office of the Prime Minister by letter than an Appeal, which he had lodged against an administrative decision that among other things disciplined and demoted him, had been unsuccessful.

The next formal step in the Plaintifrs process of prosecuting the Application was the sending of a letter by his then Counsel W.C. Edwards, to the Prime Miniter's Office seeking to "address the decision to demote him and to suspend him with out pay" and that consequently he would not be receiving any further wage increment. That letter was sent to the Respondent on 14 July 1995, nearly 16 months after the grounds arose and even then not seeking Judicial Review but Cabinet's Review. In spite of correspondence exchanges, no decision from Cabinet has been forthcoming. Now he seeks leave to have Judicial Review.

To have leave at this point t11e Applicant must demonstrate that there is good reason for extending the limitation period of three months imposed by 027 R 2(2). In my opinion the delay of nearly 16 months is fatal to his Application. While it is a reason, it can never be good reason in the context of the 027 to say that a lawyer of the Applicant's choice was unavailable. He had, in Tonga, a list of competent lawyers from whom to choose. He was quite entitl6d to have sought leave under the Rules in person. It is not open to him now to advance his Counsel's unavailability as good reason for his failure to do that which the Rules require of him. The Rules are designed to ensure Application within a specified time so that the class against whom Review may be sought will not be disadvantaged or prejudiced.

All Applications for leave must be brought promptly and in any event within three montl1s. Here the delay has been at least 16 months and more if a stricter view in taken. The length of delay will be a factor affecting the the determination of what amounts to 'good reason' in each case on its merits.

R v Naupoto

Supreme Court, Neiafu

Lewis CJ
Cr 465/97

12 & 3 December 1997

Criminal law - manslaughter by negligence - eleme11ts
Manslaughter by negligence - eleme11t

The accused was charges with manslaughter arising out of a fatal motor accident. The case is reported only as to the element of the offence and the standard of negligence to be proved if a prosecution is to succeed.

Held:

1. Intention to kill or cause harm or injury is not relevant.
2. Negligence means negligence arising by a failure of a driver to exercise the duty of car owed by him/her to other people using the road.
3. In order to secure a conviction the Crown must prove a very high degree of negligence.

Cases considered R *v* Bateman [1925) All ER 43
Andrews v D.P.P. [17] AC 576

Statutes considered : Criminal Offences Act ss 86, 92

Counsel for prosecution Mr Cauchi
Counsel for accused Mr Vaipulu

Judgment

The elements of theoffence of manslaughter by negligent driving are, therefore, that the Prosecution must prove beyond any reaonable doubt that:-

the accused
on or about the 29 March 1997 on the road at H11'alaufuli
was the driver of a motor vehicle and driving it negligently
and by reason of his negligent driving, that is by breaching the duty of care owed by him to other persons using the road
directly caused.the death of another person using the road.

Intention to kill i.snot a requisite element of the offence. Intention to cause harm or injury or death is not relevant to the proof of a charge under s86(l)(b).

The negligent driving means negligence arising by a failure of the driver toexercise the duty of care owed by him toward other people using the road. In order to secure a conviction the Crown must prove a very high degree of negligence.

In R v Bateman [1925] All ER 45, it was said, •... in order to establish criminal liability the facts must be such that, in the opinion of the Jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.•

The degree of negligence is not necessarily the same as that which is required for proof of the offence of dangerous driving. On the one hand there are acts which are unlawful irrespective of the manner in which they have been performed , on the other hand there are acts such as driving a motor car which are only un)awful when they are performed in a particular manner, when they are performed negligently.

Andrews v Director of Public Prosecutions [1937] AC 576 HL establishes the proposition that where the act is of a class unlawful only when performed negligently then if a person dies as the result of the performance of such an act the question whether the accused has committed the criJlle of manslaughter shall be considered exclusively on the basis of the negligent manslaughter doctrine.

As Lord Atkin said in Andrews, "simple lack of care such as will constitute civil liability is not enough; forthe purposes of the criminal law there aredegrees ofnegligence: and a very high degree of negligence is required to be proved before the felony is established.•