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IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 10 of 2023
[CR 21 of 2023]

BETWEEN:

'ETUATE LAVULAVU Appellant

AND

REX Respondent

JUDGMENT OF THE COURT

Court: Randerson J
Harrison J
Dalton J

Appearances: Appellant in person
Mr S. Sisifa SG & Mr T. Maka for the Respondent

Hearing: 27 September 2023
Judgment: 5 October 2023

[1] This is an appeal against a decision of Tupou J holding that the appellant was in contempt of the Supreme Court in making a statement to a journalist which was published by VPON Media & Broadcasting on youtube and facebook. The context for the broadcast was that on 4 June 2021, the Hon Justice Cooper of the Supreme Court found that the appellant and his wife were guilty of 3 counts of the criminal offence of obtaining money by false pretences.[1] That decision was overturned by the Court of Appeal on 10 October 2022.[2] There were several reasons to overturn the decision. One of them was that the Judge, Justice Cooper, showed apparent bias.

[2] At the contempt trial below, the journalist (Mr Tonga) who made the offending broadcast gave evidence. The Judge below summarized that journalist's evidence as follows:

[1] Rex v Lavulavu CR173 of 2018.
[2] [2022] TOCA 22.

"33. Mr. Tonga explained that after the Court of Appeal decision that released the Respondent and his wife from prison, the public were very interested in hearing from the Respondent in person. Coupled with what he saw as his obligation to update the public on current events, Mr. Tonga requested an interview with the [Mr Lavulavu].

34. He said there was a total of about 10 programs with the [Mr Lavulavu]. They were all conducted in the tongan language. The material interview was titled "Polokalama Mavahe #2 mo "Etuate Laulavu" o VPON Media and Broadcasting Facebook (https://www.facebook.com/vponmedia.co.nz) & Youtube (http://www.youtube.com/@VPONMEDIA).

35. He explained that during such interviews, the questions are spontaneous and often include questions from the public. He would pick the questions most relevant to the topic and put that to the interviewee. Naturally they are impromptu questions and are answered in the same manner.

36. Based on a question from the public, he at around 1:41 mins of the program asked the Respondent if he believed there were persons who misled the Judge causing his decision to be biased and unfair as decided by the Court of Appeal. Translated, it reads:

"My question to you is that yesterday you raised that there are some people from the outside who have been visiting the office of the court. I want to know whether according to what you know, if there were any others who were affected by the Judge's decision that was full of bias and unfair and those other grounds that were accepted in the Court of Appeal." *(our underlining)*

[3] There was evidence before the Judge below that the appellant's answer to that question was as follows:

"Yes I believe that is what happened and it was not just me who saw them I was very surprised but I don't want to talk about who it was but they are political figures, two of them and others who are in a higher level than the Judge. I think its best if I just leave it at that, but to my knowledge there are people, from what I know, who have been misleading the Court and I feel sorry for the Court. I stayed back when the Court of Appeal trial finished and the appeal judges came and delivered their judgment and I felt sorry for the Judge and I had a lot of love for the Judge. I really felt that he believed these people who were trying to mislead him from the side and that's where the truth was lost and for other reasons that I will discuss tomorrow" (our underlining)

[4] The Attorney-General made an application for contempt based on this question and answer. The application was on the basis that:

> "8. The gist of the Respondent's rémarks and comments can be perceived as alluding to the following allegations and therefore, amounts to contempt of court:
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> (6) **That Justice Cooper's decision was influenced by political figures and persons of high rank."**[3]

[5] In determining the case, the Judge below correctly directed herself as to the applicable law. She said:

> **"The Law**
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> 49. The Crown cited ***Attorney General v Vatikani*** [2005] TOSC 23 where Paulsen LCJ said:
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> "[15] The relevant law on contempt of court has been set out by the Court of Appeal in *Namoa v Attorney General* and in *Attorney General v Tapueluelu.*
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> [16] Any act done or writing published calculated to bring a Court or a Judge into contempt or to lower his authority is a contempt of Court. The purpose of this form of contempt is to protect the public (not the Court or the Judge) from the mischief that will occur if the authority of the Court is undermined or impaired.
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> [17] Anyone is free to criticise the decisions of the Court or the conduct of any Judge, even if the criticism is outspoken, mistaken or wrongheaded, provided that it is not likely to undermine the public confidence in the administration of justice. In many cases the good sense of the community can be relied upon as sufficient safeguard against a scandalous disparagement of a Court or Judge.
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> [18] In an action for contempt by scandalising the Court, what must be proved beyond reasonable doubt is the publication of material that is calculated, in the sense of likely, to bring a Court or a Judge into contempt or lower their authority in the eyes of the community. There is no requirement that it be proved that they were in fact so undermined.
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> [19] In reaching its conclusion the Court must take into account the whole of the material and the context in which the material published..."

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[3] There were originally more grounds to the contempt allegation. However, on 23 February 2023 Whitten LCJ gave leave only to pursue one ground, which was at paragraph (6) of the original list.

Publication

[6] In this case the Judge below found that the question and answer set out above were published. In our view there was ample evidence to make that finding. Two officers from the Attorney-General's Office gave evidence as the publication. Mrs Vainikolo was a Crown Prosecutor in the Attorney-General's office. She was asked by her superior to view the offending broadcast. She found it on youtube and she gave the youtube link in her evidence. She also found the broadcast on facebook and she gave the internet link for that as well. Her evidence was that she watched the video on both platforms and she downloaded a copy of it. The broadcast was in Tongan and she gave an English translation of the answer given by the appellant at paragraph [3] above. The comments which viewers of these videos made were apparent to her when the online links were used. This proved that the video footage which contained the impugned question and answer had been broadcast over the internet, and viewed by members of the public.

[7] Mr Vainikolo works in the Information Technology section at the Attorney-General's Office. He also watched the offending interview and downloaded it. The video which he downloaded was tendered in the trial as exhibit P1.

[8] In our view, this evidence was well sufficient to prove publication of the contempt.

[9] Some of the appellant's grounds of appeal relate to publication, and we will deal with them at this part of our judgment. The appellant's arguments do not change our view that publication was properly proved; none of the grounds of appeal as to publication should be upheld, we now explain why.

[10] The appellant acted for himself at trial and acted for himself on this appeal. At the trial he called a witness who was qualified in forensic information technology. The Judge summarized the expert's evidence as follows:

> "30. The gist of Mr. Hopoi's evidence was that the downloaded video produced as PI by Mr. Vainikolo had been tampered with and therefore [was] unfit to be used as an exhibit in Court. He said that the information contained in P2 shows that the video had been tampered with. In particular that it was created and modified on 27 October, 2022. He explained that when you play the video you have already tampered with it. I understand this to be the extend of the tampering claimed as no other evidence was led on the point.

> 31. He said that in his experience, the original must be preserved and cannot be played even before it's produced in court. Any work done must be conducted on a copy, never the original. He agreed that it would take more than half an hour to edit a video as long as the video in this proceeding. I note, the time between the creation and modification shown on P2 in nowhere near half an hour."

[11] The appellant complains that the Judge did not take any notice of Mr. Hopoi's evidence. The above passage shows that this is not true. However, the Judge did not think that Mr Hopoi's evidence assisted the appellant's case. We think she was correct in this view. Perhaps, theoretically, a video is changed or "tampered with" when it is played. However, on any sensible view, playing a video did not amount to tampering with it, and there is no legal rule that an original recording must be preserved, unplayed, before it is produced in court.

[12] There was a slight difference in the time between creation and modification shown in exhibit P2. Exhibit P2 showed that the video was created on 27 October 2022 at 2:08:29pm, and that it was modified on the same date at 2:03:34pm. No one explained what significance that difference in time had, but as the Judge concluded, it was not sufficient time for Mr Vainikolo, or anyone else, to modify the video. Mr Vainikolo's evidence was that he had not modified the video. In our view there is nothing in the appeal ground relating to modification of the video and rejection of Mr Hopoi's evidence.

[13] Another ground of appeal relating to publication is the appellant's assertion that the video which was P1 was not played in Court, and therefore the Crown case must fail. Associated with this ground of appeal is the assertion that it was wrong for the Judge below to view the video which was exhibit P1, and use the internet links provided in Mrs Vainikolo's evidence, to view the video online, after she had reserved her judgment.

[14] There is nothing in either of these two grounds of appeal. The video made by Mr Vainikolo was an exhibit in the trial. It was evidence and the Judge was entitled to look at it herself after reserving her decision in just the same way she could look at a paper exhibit. We understand that the Attorney-General says that exhibit P1 was played at trial, but even assuming Mr Lavulavu is correct on this point, there was no necessity for exhibit P1 to be played during the trial. Similarly, the youtube and facebook links given by Mrs Vainikolo were part of the evidence and the Judge was

entitled to use them to view the interview after she had reserved her decision, even if those links were not used during the trial. There is no such rule as the appellant suggests. The Judge's conduct was perfectly proper.

Contemptuous meaning

[15] The Judge below found that the question and answer set out at the beginning of this judgment had a contemptuous meaning because the statement was of a type which was capable of undermining public confidence in the administration of justice and in the Court. Her Honour's reasoning was as follows:

> "54. Mr. Tonga's question as phrased effectively held the Respondent to a comment he had made the day before about "people from the outside who had been visiting the office of the court". The question aimed at the Supreme Court Judge's decision he said was described as unfair and full of bias by the Court of Appeal. Clearly, the decision against the Respondent that went to appeal was Justice Cooper's and those were the proceedings discussed in the video at the relevant point. Plainly, the reference was to Justice Cooper, it could not be to any other Judge.
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> 55. Considering the Respondent's answer in the context of the interview, the question posed, the plain and literal meaning of the spoken words, the clear imputation was that outsiders were visiting the court office and those outsiders were people interested in politics and persons who occupied a position higher than the Judge, those people misled the Judge and the Judge believed them resulting in the loss of truth.
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> 56. A listener or viewer, in my view, would understand from the statement made by the Respondent that Justice Cooper's decision to convict him was driven by outside forces, namely, person interested in politics and persons above his level; that Justice Cooper in believing those persons is not impartial; that the Supreme Court is not an independent institution and is susceptible to political influence and authorities higher than the court.
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> 57. The statement strikes at the core function of a Judge and his oath to perform truly and with impartiality his duties as a judge, sufficient to shake the "confidence of ordinary people in the proper, safe and efficient administration of Justice".

[16] In our view, that finding of the Judge was correct on the evidence below. We reject the grounds of appeal which are aimed at attacking that finding, we explain why.

[17] First, the appellant argued with the English translation at paragraph [3] above. He argued that the words "political figures" was a mistranslation, and that the Tongan

words he used meant "people interested in politics". This was an argument which the appellant ran before the Judge below. She did not deal directly with the argument, she preferred to say that even if the appellant's translation was correct, the publication was still contemptuous. We can find no fault with this approach. Even if the appellant spoke of "people interested in politics" he was speaking about two people who were "in a higher level than the Judge" who visited the Court, where they were seen by him and by others. These people were "trying to mislead [the Judge] from the side and that's where the truth was lost". We agree with the Judge below that even if the appellant's interpretation of the Tongan words is correct, his statement is still contemptuous.

[18] Next, the appellant cavilled with the word "influenced" in the charge against him. He relied upon the fact that the answer he gave to the journalist did not say "influenced" but instead talked about "misleading the Court" and "trying to mislead[the Judge]". This argument was also run below. The Judge below took the same approach as she had with the argument about the meaning of the Tongan words translated as "political figures". That is, she did not concern herself with the finer points of the semantic argument, she simply assumed that the appellant's translation argument was right, and found that the charge was proven even if the word "misled" was used rather than the word "influenced". Once again we find no fault with the reasoning of the Judge below. In the context of the question and answer which were the subject of the contempt charge, the word "misled" and "influenced" have a very similar meaning, especially when the part of the answer, "trying to mislead him from the side and that's where the truth was lost" is considered. Whether the word used was "misleading" or "influencing", the statement was contemptuous.

[19] The appellant had another argument about the wording of the charge against him. He objected to the used of the word "gist" and the words "can be perceived as alluding to" in the charge. His argument was that the Crown had to bring a case of contempt relying on the literal meaning of the words he spoke, and that the Crown could not rely on inferences to be drawn from those words. This argument is simply wrong in law. Whether particular words amount to a contempt in any particular case is a question of fact.[4]It is the Court's task to look for the plain meaning of the words said to be contemptuous. That can include meanings implied in the words used. This is

[4] Halsbury's Law of England, 4th Ed, Vol.9, para 3-6.

what the trial Judge did, in the passage set out in paragraph [15] above, and did correctly in our opinion.

[20] Next, the appellant said that the words he spoke were ambiguous, but the obvious meaning of his words was an attack on the persons who misled the Court, rather than an attack on the Court. We reject that submission. The words spoken by the appellant were to the effect that high ranking people interested in politics, visited the Court and misled it "from the side", that is, outside the normal judicial process, and that the effect was that "the truth was lost". Even if the statement can be read as an attack on those who sought to mislead the Court, the statement is still one which is likely to undermine confidence in the Courts and the administration of justice. Its meaning is still that the Courts are open to outside influence, misleading and manipulation, and that in this case misleading did take place so that "the truth was lost".

[21] The appellant also advanced an argument that the real meaning of the answer he gave was that, although persons interested in politics of high rank were involved, he did not wish to speak about those people, but wished only to speak about "a different set of people who "misled" the Court". We reject that argument. It does not accord with the plain meaning of the question and answer which were the subject of the contempt trial.

[22] The last ground of appeal which related to meaning was that the trial Judge erred in looking only at the question and answer set out above, and not "the whole statement of the interview which gave context". In his oral submissions, the appellant relied upon a later part of the broadcast interview where he affirmed that, "I still trust in the Court." However, even in this part of the interview the appellant insisted it was necessary for him to speak out "so that it does not happen to anyone else". He said, "We need to address and fix all this... because if we keep going down the wrong path there will be many more people in Tonga going to prison for the wrong reasons...."

[23] In our view the context relied upon by the appellant does not change the contemptuous meaning of the answer relied upon by the Attorney-General.

Other grounds of appeal

[24] The appellant advanced several other grounds of appeal asserting unfairness to him in various ways during the trial.

[25] First, it was said that the trial Judge disregarded the evidence of the journalist, Mr. Tonga. The Judge did not disregard Mr Tonga's evidence, she summarises it, as it set out above. Mr Tonga did not say anything else in his evidence which could have assisted the appellant. There is nothing in this ground of appeal.

[26] Secondly, the appellant said that the Crown case failed because the Attorney-General did not produce anyone from the "General Public" to give evidence and swear that after they listened to this interview, they had less confidence in the administration of Justice. As the trial Judge explained in the part of her judgment which is set out at [5] above, the law does not require such evidence before a contempt is proved. All the law requires is proof of a statement which is published and which is likely by its nature to undermine public confidence in the administration of justice and the Courts. It is an objective question to be decided by the Judge.

[27] Thirdly, the appellant submitted that there had been unfairness because his accuser in the trial was the Attorney-General, and the witnesses called for the Attorney General, Mr and Mrs Vainikolo, were employees of the Attorney-General who had investigated the case, in the sense that they had located the broadcast on the internet and made a recordings of it.

[28] It is true that in the common law system of justice the investigator and the prosecutor are usually separate, and perform separate roles. However, this was a proceeding for contempt, and regard must be had to the specific rules which govern such proceedings.

[29] The *Supreme Court Rules* provide that an application for contempt may be brought with leave of a Judge - O38 r4. In this case Lord Chief Justice Whitten KC gave the Attorney-General leave on 23 February 2023. Therefore the application was regularly brought under the *Supreme Court Rules*.

[30] The Attorney-General is, in practice, the person who brings the application in the United Kingdom, at least since 1953.[5] There is nothing specific in the *Constitution of Tonga* or in the *Supreme Court Act* about who is to investigate and place evidence

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5 *R v Hargreaves, ex p Dill (No2)* [1954] Crim LR 54, per Lord Goddard CJ, cited in Borrie & Lowe, "The Law of Contempt" 3rd Ed, Butterworths, 1996.

before the Supreme Court on a contempt application. However, Clause 3A(b)(2) of the *Constitution* gives the Attorney-General all the power she needs to do so:

> "The Attorney-General shall, unless otherwise provided by law, have complete discretion to exercise his legal powers and duties, independently without any interference whatsoever from any person or authority."

It is in the highest traditions of the Common Law, and part of the role of the Attorney-General, to protect the Courts.

[31] In truth, in this case, there was little investigation; the totality of it is summarized in the discussion of Mr and Mrs Vainikolo's evidence above. We can see nothing inappropriate in the Attorney General taking the role she did in preparing (and to some extent, investigating) the application before the Supreme Court. There was no miscarriage of justice or unfairness to the appellant because of the course taken by the Attorney General; it was a lawful and proper course.

[32] Fourthly, in the appellant's written outline of argument, at paragraph 2.32 onwards, he listed large parts of the transcript which he said demonstrated that the trial Judge was unfair to him because she allowed the Prosecution to asked leading questions and she interrupted him when he was giving his evidence. He made some more references to other parts of the transcript orally. The parts of the transcript referred to did not support the appellant's argument. In fact, the prosecutor was careful not to ask leading questions. The appellant did not object to any of the questions he now says were unfair. It is true that the trial Judge asked the appellant questions when he was giving evidence, but it is clear that she did so in order to try to understand the relevance of what he was saying. The questions she asked were in no way improper. There is nothing in this ground of appeal.

[33] Lastly, the appellant alleges that the trial Judge had a conflict of interest which she did not declare.

[34] At the trial the appellant gave evidence that when he said "persons interested in politics" in the offending broadcast, he was referring to the Director of Prosecutions, Crown Prosecutors, or the Probation Officer. That is, he tried to argue that the

meaning of the statement was just that persons legitimately involved in the Court's process had misled the Court. That argument was plainly bound to fail when the words of the offending publication are considered. It is very plain that the appellant was talking of people with an interest in politics who were in a higher role than a Judge, and who misled the court, not as part of its regular process, but "from the side". That could not be a reference to the Crown Prosecutor or the Probation Officer.

[35] As part of this argument, and really by way of inadmissible self-corroboration, the appellant tendered evidence of previous complaints he had made about the criminal proceeding for false pretences. The Judge lists the letters of complaint which the appellant tendered as part of this process at paragraph 24 of her judgment. She marked them as exhibits D1 to D10.

[36] The argument which the appellant was trying to run was not sustainable having regard to the words of the answer he gave in the broadcast. Exhibits D1 to D10 were not relevant to the contempt proceeding. They were not admissible evidence; no doubt the trial Judge simply allowed the tender of the documents as an indulgence to a litigant in person.

[37] As it turns out, one of the complaints, (exhibit D8) was a letter addressed to the Prime Minister. The letter was 9 pages long. At page 8 it makes a complaint about the trial Judge's husband who works at the Ministry of Education. The appellant asserts that therefore the Judge should have declared "a conflict of interest".

[38] A Judge has a duty to alert parties to matters which they might regard as showing that the Judge has a bias, or an apparent bias concerning a case. The fact that the appellant tendered an irrelevant letter did not mean that this Judge had to disclose any matter. The letter, and the complaint about the Judge's husband, had nothing to do with the contempt case.

[39] An independently sufficient reason for this appeal point failing is that it was the appellant who chose to put exhibit D8 into evidence. There was no necessity for him to do so, it was not relevant or helpful to his case. Having so chosen, he cannot complain about what he speculates might be the result.

[40] Another independently sufficient reason for this point to fail is that the appellant did not raise any concern with the trial Judge below when he tendered the letter which

became exhibit D8. He knew what was in the letter he chose to tender. As he did not raise a concern about it with the trial Judge, he cannot raise a concern on appeal.

[41] Before the trial began, the appellant made an application to the trial Judge that she recuse herself. The transcript of that hearing was not before this Court. The prosecutor told us that application was not about the contents of exhibit D8 and further, the appellant withdrew that application. The trial Judge records in her judgment that an application was made by the appellant for her to recuse herself, but that he withdrew it. This accords with what the prosecution says. The appellant could not point us to any transcript to the contrary, despite having been given extra time to do so. It is his appeal, and he has failed to persuade us that what the Judge records in her judgment is incorrect.

[42] The appeal is dismissed.

[43] We record that, during the hearing, at the invitation of the Court, the appellant apologised to the Court for what he said about Justice Cooper, and withdrew it. This will no doubt be relevant on his sentencing hearing.

Randerson J

Harrison J

Dalton J

COURT OF APPEAL
TONGA