

Mr KEFU

**IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY**

AC 07 of 2009

BETWEEN : LAVINIA MALUPO - Appellant

**AND : 1. KAUTAI TAUNAUTA
2. MINISTRY OF POLICE
3. KINGDOM OF TONGA
-Respondents**

**Coram : Ford CJ
Burchett J
Salmon J**

**Counsel : Mr. Fifita for the Appellant
Mr. Kefu for the Respondents**

Date of hearing : 3 July 2009.

Date of judgment : 10 July 2009.

JUDGMENT OF THE COURT

[1] This is an appeal from a judgment of Shuster J setting aside, on an appeal under s.74 of the *Magistrates' Courts Act*, a decision of a magistrate awarding to the Appellant the sum of \$1,000 plus costs for defamation.

[2] The Appellant, a married woman and mother of a number of children who was aged 40 years, brought her claim in these circumstances. She was involved on 13 May 2008 in a domestic dispute with her husband, resulting in the police being called by her to their home. When two police officers arrived, one of them, the Respondent Taunauta, asked her, in the presence of her husband and the other officer, "whether she was the one staying in de facto with the bald headed guy." That elicited an immediate response, hostile to the Appellant, from her husband :

"Look at what you're doing."

Officer Taunauta insisted, saying :

"You came and lodged a complaint against the bald head guy that you stayed in de facto with."

The Appellant's evidence to the magistrate included, after repeating the foregoing words : "He told me not to lie for it was me."

[3] The Appellant told the magistrate on 19 August 2008 she "still [had] problems with [her] husband because he still thinks that [she was] having a de facto relationship with the man alleged by Taunauta", and "has sworn at [her] saying 'slut, whore and bitch'". She said her husband was "a jealous man" and it is clear there were previously some problems between them, for she had called the police.

[4] The husband also gave evidence before the magistrate which confirmed the defamatory statement by the police officer and that, as a result, as he said : "I feel that my wife is not rightful to me".

[5] It is claimed, for the Respondents, that in cross-examination he said he did not really believe the defamation of his wife. Two things should be said as to this :

(1) The alleged admission is not in the transcript, and a correction of the transcript on an appeal from a magistrate heard on the transcript, can only be made by affidavit if at all – see *Taufa v Ma'u* [1994] Tonga LR 97 at 98 - 99 ;

(2) Mixed feelings about beliefs are common, and if the admission was made, it does not follow the husband would not also, as he said in chief, have feelings against his wife based on, or perhaps even in an argument unfairly taking advantage of, the allegation.

[6] The magistrate held the Appellant was defamed and the officer did not apologise. He also held "the plaintiff's ... relationship with her husband" was affected, referring to the evidence that he was a jealous man. He awarded, as has been said, \$1,000 plus costs which he assessed at \$600.


[7] Shuster J, did not refer to s.16 of the *Defamation Act*, and described the defamation as a "defamatory question", overlooking the express evidence that the officer insisted upon his observation, telling the Appellant not to lie about it. The judge concluded the "defamatory words used were *de minimis*", and allowed the appeal, substituting for the magistrate's award of \$1,000 an award of \$25 and awarding costs to the Respondents (appellants in the Supreme Court).

[8] But s.16(1)(d) of the *Defamation Act* provides that if defamatory words "impute unchastity to a woman or girl, it shall not be necessary for the plaintiff to prove that he [she] has sustained any monetary or other actual loss by reason of the publication of such defamatory matter". That is a statutory indication of the seriousness, rather than triviality, of such an imputation, which is made actionable *per se*.


[9] In any case, the most sensitive area of the relations between husband and wife was here attacked, and the magistrate, who heard and saw the witnesses, had accepted the reality of the complaint.

[10] In our opinion his Honour fell into error by overlooking s.16(1)(d), and it was not open to him to reverse the view of the facts taken by the Magistrate. Therefore the appeal must be allowed with costs ; his Honour's orders must be set aside; and the award of the Magistrate which, though at the upper end of the permissible range is

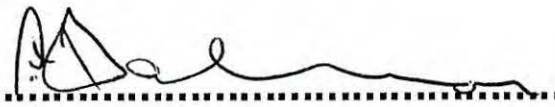
within it, should be restored.



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Ford CJ



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Burchett J



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Salmon J