

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

**AC 15 of 2008**

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**BETWEEN : SIOSIUA PO'OI POHIVA - Appellant**

**AND : R E X - Respondent**

**Coram : Burchett J  
Salmon J  
Moore J**

**Counsel : Mr. Tu'utafaiva for the Appellant  
Mr. Kefu for the Respondent**

**Date of hearing : 3 July 2009.**

**Date of judgment : 10 July 2009.**

**JUDGMENT OF THE COURT**

[1] This is an appeal from the conviction of the appellant, Mr Siosiu Po'oi Pohiva, of defaming His Majesty the King. Shuster J found Mr Pohiva guilty. His Honour was in error in doing so and the appeal should be allowed.

[2] In explaining why we have reached this conclusion, it is necessary to refer to the evidence and findings of fact of Shuster J. It is also necessary to refer to the provisions of the *Defamation Act* (Cap 33) ("the Act") which creates the criminal offence with which Mr Pohiva was charged.

[3] The evidence was straightforward. Mr Pohiva represented himself at the trial. It was not in issue that on 6 December 2006 an article in the form of a letter to the editor appeared in that day's edition of the Kele'a newspaper. The letter was highly critical of His Majesty. The police arrested Mr Pohiva on 26 March 2007. They conducted a record of interview. The record of interview became an exhibit which Shuster J said was admitted by consent though Mr Pohiva did not expressly consent and claimed that the statements in the record of interview were not made voluntarily. The record of interview was tendered through a police Constable who gave evidence and who had been involved in interviewing Mr Pohiva. In the record of interview, Mr Pohiva admitted he was the publisher of the Kele'a newspaper and had been for three years. He said that the content of the newspaper was up to the editor and that he had no involvement in it. He said that the newspaper was published in New Zealand. He said that he was involved in the newspaper by distributing the newspaper after it had arrived from New Zealand. He accepted that he had some knowledge about information published in the newspaper before it was published but believed it was up to the editor to edit the information. Importantly, Mr Pohiva said he knew about the statement published on 6 December 2006 when he came back from the United States in February. This is plainly a reference to February 2007. It is appropriate to set out precisely what he said:

*"Q: When was it then you knew about the statement as it appears in the Summons 804/2007 [the article the subject of the charge]?"*

*A: I just knew when I came back from the United States in February of this year and read the newspaper Kele'a in December."*

[4] In addition to the police Constable, the prosecution called four other witnesses. Each read, at some stage, the article. The transcript is incomplete in relation to the first witness though one question recorded in the transcript suggests the witness gave evidence that he did not read the article in 2006 or 2007. The second witness said that he bought the newspaper containing the article from the store. His



evidence was that when he first read the article he was not concerned but when the police came to him and asked a few questions he was concerned. He thought the article indicated, as to the King's reputation, that the King was stupid. The witness thought that was not a good thing. When asked whether it changed the King's reputation, the witness indicated that from reading the material it was not "really good to me". The third witness also only read the article after it was shown to him by the police. His evidence was that the article hit the King's reputation and had the effect that royalty would not be trusted. He also thought that the article expose the King to hatred. The fourth witness read the article in 2006. He then thought the article was alright for him. He said "but I felt that since now its bad because I am here". Probably this meant that he initially thought the article was unexceptionable but having been contacted by the police and asked to give evidence, his view had changed. He thought that the article had a bad effect on the King's reputation though he did not accept that it exposed the King to hatred ridicule and contempt. He accepted in cross-examination that he thought the article was bad only when the police showed it to him. None of the witnesses gave evidence which indicated, clearly, that for them the article had diminished the standing or otherwise damaged the reputation of the King.

[5] In his reasons for judgment, Shuster J made a number of findings. As to the knowledge of Mr Pohiva about the publication of the article (reflected in the question and answer quoted earlier), his Honour said:

*"He accepted - the first he knew about what appeared in summons 804 - 07 - was (1) when he came back from the United States - and that was in February 2007 and (2) when he read the letter in the Kele'a Newspaper - in December."*

[6] It is not clear what his Honour meant in this passage. On one view, his Honour appears to be saying that Mr Pohiva said he first knew of something (the publication of the article and its contents) at two points in time, one following some time after the other. If this is what his Honour meant, it is a conclusion which is very difficult to sustain as a matter of logic. Ordinarily a person first knows of something only once. Obviously there will be exceptions to this general proposition involving issues of memory loss and the like but there is nothing to suggest in this case that we are in the realm of these exceptions.



[7] Later in his reasons, his Honour addressed this question again by saying:

*"The defendant infers he was out of the country on the 6<sup>th</sup> December 2006 but he admitted to reading the article in December 2006."*

[8] It is true that the clear implication of Mr Pohiva's answer quoted earlier, is that Mr Pohiva was out of Tonga in December 2006 and only returned to Tonga from the United States in February 2007. But in any event, it is plainly wrong to find to the criminal standard (beyond reasonable doubt), having regard to what Mr Pohiva actually said, that Mr Pohiva admitted to reading the article in December 2006. Even without applying the high criminal standard, it is more likely, having regard to the words used, that Mr Pohiva was saying in the answer that he first came to know of the article and its contents when he returned from the United States in February 2007 and the words "in December" are intended to identify the date of publication of the edition of the newspaper he read in February 2007. That is, the clear import of his answer is that he first read the December edition containing the article in February 2007.

[9] This is important. In order to explain why it is necessary to refer to some of the provisions of the Act. Section 2 defines defamation and provides:

*"(1) Defamation of character consists in speaking or in writing, printing or otherwise putting into visible form any matter damaging the reputation of another or exposing another to hatred, contempt or ridicule or causing him to be shunned.*

*(2) The repetition by any person of defamatory matter concerning another also constitutes defamation of character."*

[10] Section 3 deals with defamation of the sovereign and provides:

*"Every person who shall defame the character of His Majesty the King or Her Majesty the Queen shall on conviction thereof be liable to a fine not exceeding \$2000 and in default of payment to imprisonment for any term not exceeding two years."*



[11] It is clear from section 8 (which speaks of "criminal proceedings for violation of sections 3, 4, 5 or 6") and from the judgment of the Court of Appeal in *Pulu v R* [2000] Tonga LR 293 that section 3 creates a statutory offence of defaming the sovereign (as the heading to the section describes it). The Court of Appeal said (at 298):

*"In Tonga the King is the embodiment of the state. By ridiculing and damaging the reputation of the King, the appellant was, ridiculing and damaging the reputation of Tonga itself. The seriousness of the offence of defaming the King or the Queen is reflected in Parliament making such an action a separate and distinct offence."*

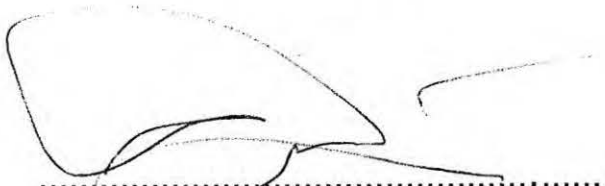
[12] Because the offence is a statutory offence, it is necessary to apply appropriate legal principles in determining the content of the offence. One principle is that there is a presumption that mens rea is required before a person can be held guilty of a criminal offence. This and related principles were helpfully discussed by the Chief Justice in *R v Taungahihifo*, an unreported judgment of 12 October 2007 (in CR121/05). The Chief Justice referred to the judgment of the Privy Council in *Gammon (Hong Kong) Ltd v A-G* [1984] 2 All ER 503. The Privy Council set out (at 508) five propositions concerning mens rea. The second proposition was to the following effect. The presumption of law that mens rea is required before a person can be held guilty of a criminal offence applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute. The Chief Justice also referred to a later judgment of the English Court of Appeal in *R v Muhaamad* [2003] QB 1031 which held that the question of whether the presumption applies will be influenced by the seriousness of the offence. While, in the present case, the maximum fine for defaming royalty is comparatively modest at \$2000, it is nonetheless probably fair to characterise the offence as a serious one (as the Court of Appeal did in *Pulu v R*) because of the broader social context in which the offence might be committed and the implications of committing it. In any event it is clear that neither expressly nor by necessary implication is mens rea excluded as an element of the offence. This was conceded by the Crown in this appeal.

[13] Accordingly it is necessary for the prosecution to prove that an accused intended to speak, write, print or otherwise put into visible form (to adapt the language of section 2) any matter damaging the reputation of His Majesty the King before the accused can be convicted. In the present case, Mr Pohiva was unaware that the article

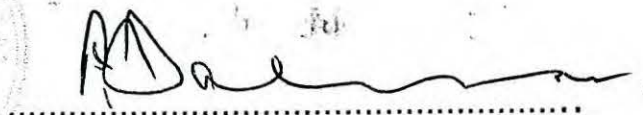
critical of His Majesty was going to be published in the newspaper at the time it was published. In our opinion, it is not possible to conclude that Mr Pohiva had the requisite criminal intention in order to satisfy the mens rea element of the offence. The Crown accepted that it could not point to any evidence that would justify a finding that Mr Pohiva did. Mr Pohiva should have been acquitted.

[14] It is true that almost two centuries ago, the publisher of a publication could be liable for criminal libel at common law even if the publisher was unaware that the libellous content was in fact being published. The common law concerning a publisher's liability was discussed in *The Queen v Holbrook* (1878) 4 QBD 42 at 46-49 per Lush J. However in England the effect of the common law was ameliorated by legislation commencing with the *Libel Act* 1843. Ultimately, the legal question we must decide is one of statutory construction.

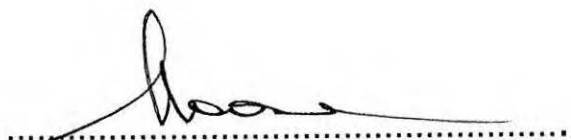
[15] The appeal should be allowed and the conviction quashed.



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**Burchett J**



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**Salmon J**



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**Moore J**