

BETWEEN : POHIVA - Appellant;

AND : HON. FUSITU'A - Respondent.

CORAM : Mr Justice Roper
Mr Justice Ryan
Mr Justice Morling

HEARING : 17 June 1993

COUNSEL : Pohiva in person
Hon. Fusitu'a in person

JUDGMENT : 23 June 1993

JUDGMENT OF THE COURT

The Appellant is the owner and publisher of a monthly newspaper "Ko e Kele'a" and the No.1 People's Representative for Tongatapu. The Respondent is a Noble of Niuafou'ou and is the Speaker of the Legislative Assembly. He is the Nobles' Representative for the Niuas.

In April 1990 the Appellant published an article in his newspaper reading, in part as follows:

"There was an expectation by the poor Noble Tangipa that he would given a chance by Fusitu'a to become a Parliamentarian for he was given a chance already

in 1984, 1985 and 1986, the Historical year. Anyway Tangipa cast his vote cleanly for there were only two of them.

He expected that they will have the same number of votes and then a draw will be held to decide who goes into Parliament. Tangipa proceeded to vote for Fusitu'a had one vote and Tangipa none. Tangipa is still wondering as to who did Fusitu'a vote for because there was nobody else but only himself.

If poor Tangipa has been betrayed like that, what chance is there for the commoners and lowly people".

The Respondent took the view that the article defamed him and brought proceedings against the Appellant in the Supreme Court. In para. 5 of the Statements of Claim he alleged that the words of the article meant and would be understood by people reading them to mean:

5. "(a) That the plaintiff was the worst type of Noble.
- (b) That the plaintiff acted unfairly towards his poor fellow noble and will do the same to other people.
- 7(c) That the plaintiff was a jealous vicious and most unkind sort of person.
- (d) That there was an arrangement between the plaintiff and the Hon. Tangipa that he will enter Parliament from 1984-1986 the historical year (where allegedly overpayments were made) and Hon. Tangipa will enter this time. The plaintiff did not keep this arrangement and as a result the poor Hon. Tangipa is being cheated as a result of the election. The implication here is that Fusitu'a is a greedy sort of person who wants to earn money from Parliament and not to share that with his fellow Noble who is poor.

- (e) The plaintiff has no regard and is unloyal towards his fellow Noble and is bound to do the same to people and lowly people.
- (f) The election of the plaintiff was obtained by deception.
- (g) That the plaintiff is a wicked person and it is easy for him to betray people just like Hon. Tangipa."

The action was heard by the Chief Justice who found in favour of the respondent and awarded him \$8,000 damages. The appellant brings this appeal against that decision. He claims that Chief Justice was in error in finding that the article defamed the respondent and that, in any event, the damages awarded were excessive.

At the trial the appellant admitted publication of the article but raised three defences, namely:

- (1) That the words of the article did not have the meanings attributed to them by the respondent;
- (2) That the statements made in the article were true;
and
- (3) That the words of the article were fair comment on matters of public interest.

As to (1) the trial judge found that the article conveyed the meanings alleged in para. 5, except for the allegation of "jealous" in 5(c) and the allegations in the last sentence of 5(d).

His Honour states in his reasons, no doubt correctly, that the appellant did not pursue his first defence at the trial. We find this somewhat curious because we would have thought that the article does not convey that the respondent was "the worst type of Noble" (a) or that he was a "vicious" person (c) or that he is a "wicked person" (g).

The article is an attack on the respondent's character as a politician rather than on his personal probity. We shall return to this matter when considering the question of damages.

The trial judge further found that the statements made in the article had not been proved by the appellant to be true. Accordingly the second defence failed. Consequently the third defence of fair comment also failed because such a defence can only succeed if the facts upon which comment is made are truly stated - see s.12 of the Defamation Act (cap. 33).

The trial judge was of the view that the use of the word "betrayed" read with the article as a whole meant that the events described in the first six sentences amounted to an agreement, the failure to honour which was the betrayal. He held that the evidence did not establish the existence of any agreement, and hence no betrayal had been proved.

The appellant argued on the hearing of the appeal that the trial judge was in error in deciding that it was necessary, that an agreement be proved for there to be on betrayal. He contended that what the article conveyed was that there was an accepted practice (not necessarily an agreement) which, if observed by the respondent, would have led to the appellant's election. He claimed the evidence established that such a practice existed.

We think there is some substance in this contention because of the references in the first and third sentences of the article to Tangipa's expectation. Were it not for the subsequent use of the word "betrayal" we think the appellant's contention would be correct. But that word can hardly be applied to a departure from an accepted practice. A person may unilaterally depart from an accepted practice without betraying those who have observed the practice. But if one departs from a settled agreement, the epithet "betrayed" is appropriate. We therefore think the trial judge did not fall into the error claimed by the appellant.

Further, the trial judge was right to conclude that no agreement was proved to exist. It was not sufficient for the appellant to prove that Tangipa had an expectation that adherence to past practice would

result in his election. What the appellant had to prove was that the respondent was party to an agreement which he had broken. This was not proved and hence the appellant's second and third defences failed.

We turn now to consider the appellant's contention that the damages awarded were excessive. As we have observed the trial judge was of the opinion that the article conveyed the meaning inter alia, that the respondent was the worst type of Noble and that he was a vicious sort of person. Indeed, the appellant did not submit to the contrary at the trial or before us.

With respect, we do not think these innuendos can be drawn from the words of the article. However, we agree that the other innuendos alleged by the respondent are contained in the article.

The real sting in the article is that some readers of it would believe that the respondent was a poor representative of the "commoners and lowly people" whose interests it was his duty to protect and advance. This was serious defamation of the respondent, particularly having regard to his position as Speaker of the Legislative Assembly.

The appellant submitted that the respondent was a rich man and did not need money for any damage to his reputation. We cannot give effect to that submission. Even if the respondent has substantial means he is entitled to have his reputation vindicated by an appropriate award of damages. In our opinion, it is impossible to say the award of \$8000 was excessive.

The appeal is dismissed with costs.

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