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JUSTICE DEPARTMENT,
NUKU'ALOFA, TONGA.

IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY

Criminal Appeal No. 28/1988

B E T W E E N :

SIONE LOLOA - Appellant

- a n d -

VILIAMI 'APISAI - Respondent

HEARD BEFORE MR JUSTICE WEBSTER AT NUKU'ALOFA ON 6TH JULY, 1989.

D E C I S I O N
* * * * *

This is an appeal by Sione Loloa against the decision of the learned Magistrate at Nuku'alofa on 6th May, 1988 dismissing the summons which Sione had brought against Viliami 'Apisai and finding Viliami 'Apisai not guilty.

The learned Magistrate's decision was based on the point of law that the summons, which alleged wilful and unlawful damage done to Sione's dwelling house, was brought under section 178 of the Criminal Offences Act whereas it should have been brought under Section 169 of that Act.

Mr Finau for the Appellant submitted that section 169 only refers to wilful damage to houses or buildings on the shoreline and that accordingly section 178, which refers to wilful damage "to any land animal or thing not specially provided for" in the Act, was the correct section under which the Respondent should be charged for his alleged offence.

Mr Talanoa for the Respondent submitted that it was clear that section 169 covered any building and therefore that section 178 did not include buildings and that the learned Magistrate was therefore right to dismiss the case. He said that this question had caused much confusion with different magistrates giving different decisions and asked the Court to make a ruling to resolve the difficulty.

With the consent of both counsel, the Court also had the benefit of submissions by Mr Martin on behalf of the Crown and the Attorney General. He submitted that it was clear that section 169 covered any building or vessel and was not restricted in any way.

Section 169 is in the following terms -

"Every person who in any manner intentionally and unlawfully causes damage, to any building or vessel or to any wharf or to any machinery or tools or to any building structure, machinery, apparatus or vessel constructed or used for the purposes of any harbour or wharf or for the purpose of regulating the action of the sea or protecting any land from erosion or inundation by the sea shall be liable where the damage does not exceed \$500 to imprisonment for any period not exceeding six months and where the damage does exceed \$500 to imprisonment for any period not exceeding ten years."

As a matter of literal grammatical construction of the section, it creates the offence of causing intentional and unlawful damage to four classes or groups of objects, each group being preceded by the word "to". The first group is "any building or vessel" and it is clear that this is completely general and not restricted in any way. The second group is "any wharf" and the third group is "any machinery or tools", the final group being "any building structure, machinery, apparatus or vessel" but this is qualified by a long phrase about harbours and wharves and the sea.

There are two reasons why this long phrase can only qualify the final group. The first reason is that in ordinary construction the word "to" at the beginning of each group effectively acts as a divider and isolates each group so that the long phrase only refers to the final group. But even if the long phrase might be thought to be the Parliamentary draftsman's feared "dangling modifier" affecting all groups, it would make no sense because the words building and vessel and machinery would then each appear in 2 groups and the second mention of them would be superfluous. So from the standpoint of literal interpretation the long phrase only applies to the final group and section 169 covers wilful damage to any building.

While this interpretation is based on the English version, I have also considered a literal translation of the Tongan version and am satisfied that there is no substantial difference.

The Appellant's counsel referred to clause 81 of the Constitution as supporting his argument to the contrary, but this clause provides for Acts of Parliament to deal with only one subject and is not relevant in the interpretation of an individual section of an Act.

But in the interpretation of an Act of Parliament it is proper to look not only at the individual words or section in question, but at the context of the section in the Act and the purpose of the Act as a whole. The purpose of the Act is clearly to set out a complete code of criminal law and offences and Part IX, in which section 169 is the first or leading section, deals with wilful damage to property and animals. One would expect the leading section to deal with a major or general item such as buildings and vessels and not the very specialised case of buildings by the sea, and this is what I believe it does. Section 170 - 177 then go on to deal with other variants of wilful damage, finishing with section 178 which is a kind of sweep-up section covering wilful damage to things not otherwise provided for.

So this part of the Act deals with wilful damage in a logical manner, as would be expected in a complete criminal code. It would make no sense if section 169 were to be construed as covering only buildings by the sea and leaving the major item of other buildings to the catch-all section 178.

Nor is there any apparent logical reason why wilful damage to buildings by the sea should be a different offence from wilful damage to other buildings.

For all these reasons therefore, an examination of the section, in the context of its Part and of the Act as a whole, reinforces the literal interpretation of the section.

Wilful damage to buildings is therefore specifically covered by section 169 and cannot be an offence under section 178 as wilful damage to any "thing not specially provided for in this Act."

For these reasons the learned Magistrate was right to dismiss the summons and find the accused not guilty and this appeal is therefore refused.

R.M. White

Dated 7th July, 1989.

