

13/05/16

AM 25 of 2013 Scan, email + File.

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

- | | |
|-----------------------------------|----------------------------|
| BETWEEN: SOLOMONE PALU | - First Appellant |
| MATENI TAPUELUELU | - Second Appellant |
| LAUCALA TAPUELUELU | - Third Appellant |
| NUSIPEPA KELE'A | - Fourth Appellant |
| AND: WILLIAM CLIVE EDWARDS | - First Respondent |
| VILIAMI UASIKE LATU | - Second Respondent |
| SOSEFO FE'AO VAKATA | - Third Respondent |
| SAMIU KUITA VAIPULU | - Fourth Respondent |
| DR. 'ANA TAUFE'ULUNGAKI | - Fifth Respondent |
| LORD TU'IVAKANO | - Sixth Respondent |
| SIONE SANGSTER SAULALA | -Seventh Respondent |

Mr. S. Tu'utafaiva for the Appellants
Mr. W. Edwards for the Respondents

Recd 12/05/16
HSC

JUDGMENT

- [1] The First Appellant is a self-described subsistence farmer. He has a keen interest in politics and frequently writes to the newspapers.
- [2] The Fourth Appellant is a newspaper published in Nuku'alofa. Although its main circulation is in Tonga, it is also read in the Tongan Community abroad.
- [3] The Second Appellant is the publisher of the newspaper while the Third Appellant is its Editor.
- [4] The Sixth Respondent was the Prime Minister of Tonga on the date a letter from the First Appellant was published in the Newspaper. A copy of the letter is attached to this judgment as an appendix. The other Respondents were all Ministers in the Government at the time.
- [5] The Respondents each commenced proceedings in the Nuku'alofa Magistrate's Court alleging that they had been defamed by the publication of the letter and seeking damages.
- [6] Defences were filed. Although the Defences were not entirely clear it is accepted that the Defendants did not plead justification but asserted an honest belief in the truth of the matters complained of. They also

asserted that the letter was published on an occasion of qualified privilege and that it consisted of fair comment on a matter of public interest.

- [7] After a lengthy trial the Magistrate found for the Respondents. Both grounds of defence were rejected and damages and costs were awarded. Amended grounds of appeal were filed on 5 April 2016.
- [8] On 21 April grounds 1, 2 and 4 were discontinued and, after Mr Edwards explained how the costs had been calculated, ground 5 was also discontinued. The sole remaining ground of appeal was therefore ground 3 which was that the Magistrate had erred in rejecting the claim of qualified privilege.
- [9] In paragraphs 3(i) to (iv) of the written submissions filed in support, Mr Tu'utafaiva argued that the Magistrate had erred in rejecting the defence on the ground that such a defence cannot avail when the communication in question consists of false assertions of fact or when the communication is also published overseas. Whether the Respondents had proved malice was not argued.
- [10] Mr Tu'utafaiva referred to the recent case of *Tapueluelu & Ors v Vaipulu* [2015] TOSC; AM 24 of 2012 in which the 2nd, 3rd and 4th Appellants were also parties and in which the Lord Chief Justice held that the same Magistrate had erred in rejecting the defence of qualified

privilege on the ground that the defence was not available when the communication involved untrue statements of fact. The Court found that the defence was "rightly rejected by the Magistrate albeit for different reasons that I have set out". Mr Tu'utafaiva conceded that if the reasons given by the Lord Chief Justice were held to be equally applicable to this publication then he would be unable to take the matter any further.

[11] Mr Edwards filed two sets of extremely comprehensive submissions in Answer. I acknowledge the very hard work which plainly went into their preparation.

[12] The intricacies of the law of defamation are not altogether easy to grasp and it may be helpful to elucidate the nature of the defence advanced.

[13] Section 10 of the Defamation Act Cap 33 is as follows:

"No criminal or civil proceedings for defamation of character shall be maintainable in respect of any communication made *bona fide* by any person in discharge of a legal, moral or social duty or in reference to a matter in which he has an interest and the person to whom such communication is made has an interest in hearing it unless it is proved that the person making such communication was actuated by ill-will or other improper motive".

[14] In *Tuʻiʻonetoa v Pohiva* [2001] To. L.R 58, 62 the Court of Appeal stated:

“We consider that sections 10 and 11 are intended to express the common law”.

[15] The defence of qualified privilege reflects the view that there are occasions upon which, on grounds of public policy and convenience a person may, without incurring legal liability make statements about another which are defamatory and in fact untrue (*Watt v Longsdon* [1930] 1 KB 130, 142).

[16] The occasion on which the privilege arises must be:

“an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral to make it to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential”. (*Adam v Ward* [1917] AC 309, 334).

[17] When a defence of qualified privilege is set up it is for the Defendant to allege and prove all such facts and circumstances as are necessary to bring the words complained of within the privilege and it is for the Judge (in this case the Magistrate) to decide whether the Defendant was under a duty to make the communication (*Adam v Ward*, supra). When it is claimed that there was a duty on the Defendant to make the communication and an interest in the party to whom it is made, such duty must have existed in fact. It is not sufficient that the Defendant honestly and reasonably believed that he was under a duty to make the

communication (*Stuart v Bell* [1891] 2 QB 341, 359) or that the person to whom he made the communication had an interest in the subject matter (*Hebdich v MacIlwayne* [1894] 2 QB 54, 60).

[18] As the Lord Chief Justice pointed out in *Tapueluelu & Ors v Pohiva* (supra) "the Courts throughout the Commonwealth have to one extent or another recognised the obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information". Citing *Jameel v Wall Street Journal* [2006] 4 All ER 1279, 1321 the Lord Chief Justice however emphasised that the subject matter of the article must be "of real public interest". It is not sufficient if the information merely interests the public: there must be some real public interest in having information of this kind in the public domain.

[19] There is a further consideration. While the publication in a newspaper of a report of proceedings in Parliament will, absent malice, be privileged (*Wason v Walter* (1868 LR 4 QB 73) in general the law does not recognise an interest in the public strong enough to give rise to a duty to communicate in the press. In *Cutler v McPhail* [1962] 2 QB 292, 296 Salmon J stated:

"So far as I know there is no authority in which a letter published in the press has been held to be privileged except when it was published as a matter of duty as in the case of *Adam v Ward* or where it is published

by a defendant in answer to a public attack which has been made upon him".

[20] At this point it will be convenient to refer to the letter itself and to the Respondent's Statement of Claim. As will be seen from the Claim the Respondents alleged that the first, third and fourth sentences of the first paragraph of the letter, the first sentence of the second paragraph and the second sentence of the fourth paragraph stated that inter alia, the Prime Minister and his Ministers were guilty of theft and embezzlement. Such claims are obviously defamatory and the question therefore was whether, in the absence of a defence of justification, the occasion on which they were made was privileged.

[21] The First Appellant was cross examined at length. A transcript of his evidence may be found at pages 377 et seq. of the bundle. The evidence makes it quite clear that the basis for the First Appellant's letter was what he had heard on the radio about the proceedings then current in Parliament. However, as pointed out by Mr Edwards the letter itself makes no reference to any such proceedings and cannot viewed objectively be seen as any kind of report of what had there transpired.

[22] In my opinion the First Appellant's letter contains no information which it is in the public interest to have published. The bulk of the letter is a harmless commentary on current affairs but the matters complained of

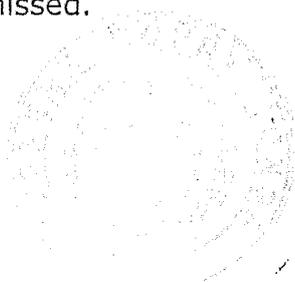
are not information at all: they are statements of fact for which no justification was attempted by reference to any transcript of what had actually been stated in Parliament.

[23] If the Appellant had accurately reported that it had been claimed or even proved in Parliament that the Respondents had acted as dishonestly as was alleged in the letter then the Respondents' claim could not have succeeded. This however was not, as I find it, the case. Merely listening to proceedings in Parliament may justify a person in coming to a private conclusion that a person has acted dishonestly but cannot possibly justify the publication of a letter stating that person's dishonesty to be the case.

[24] I can find no duty or public interest in the Appellants publishing this letter. The Magistrate's conclusion that the Appellants had failed to discharge the onus upon them to prove that the publication of the letter was an occasion of qualified privilege was correct. In these circumstances the questions of malice or publication overseas do not arise for consideration.

Result: The appeal is dismissed.

DATED : 6 MAY 2016




M.D. Scott
JUDGE