

[2] The respondent is the complainant who was the prosecutor in the Magistrate's Court (as the person aggrieved as allowed under S.11 of the Act). She was represented in the Magistrate's Court by Mr. Tu'utafaiva who also represents her in this Court.

[3] The charges were written and issued in Tongan and I set them out (as relevant) in English as follows:

(a) **no. 22/18**

that on 13 June 2018 at Tu'atakilangi, you committed disorderly behavior (anga fakamoveuveu) in a public place in that you were angry with the decision of the Commission relating to advertising of the position of CEO in that you spoke to the Electricity Commissioners not to listen to Seinimili because she is insane (vale) and that she had done a regrettable act (pango) in Parliament and other disorderly words, in the Office of the Electricity Commission, but which is a public place, contrary to S.4 (a) of the Order in Public Places Act.

(b) **no. 23/18**

that on 13 June 2018 at Tu'atakilangi you were angry with the decision of the Commission relating to advertising of the position of CEO and you spoke abusive words (lea kovi) and did insulting behavior (anga fakatu'a) in a public place which people in a public place could hear, that Seinimili Fonua is insane (vale) and that Seinimili had done a regrettable act (pango) in Parliament and other abusive words (lea kovi) and insulting behavior (anga fakatu'a) which were heard by the members of the Electricity Commission and secretary and other people at the Office of the Electricity Commission which is a public place, contrary to S.3 (h) of the Order in Public Places Act.

(c) no. 24/18

that on 9 July 2018 at Tu'atakilangi you spoke abusive words (lea kovi) and committed insulting behaviour (anga fakatu'a) in a public place by speaking to Seinimili Fonua that she was "very stupid" (vale ngangau) and other words and other insulting behavior (anga fakatu'a) which would be heard by the members of the Electricity Commission and secretary and other people at the Office of the Electricity Commission which is a public place, contrary to S.3 (h) of the Order in Public Places Act.

(d) no. 25/18

That on 9 July 2018 at Tu'atakilangi you committed disorderly behavior (anga fakamoveuveu) in a public place by saying "very stupid" (vale ngangau) to Seinimili Fonua and other disorderly words but it was public place contrary to S.4 (a) of the Order in Public Places Act.

[4] The provisions of the two sections of the Act under which the 4 charges were brought are as follows:

(a) S. 3 (h) provides as follows:

"3. Any person who shall commit any of the following acts shall be liable upon conviction to a fine not exceeding \$100 and in default of payment to imprisonment for any term not exceeding 4 months, that is to say, every person who –

...

(h) in any public place or within the hearing of the persons then in any public place make use of any threatening or abusive or insulting or challenging words or behavior,

...."

(b) S. 4 (a) provides as follows:

“4. Every person who shall commit any of the following acts shall be liable on conviction therefore to a fine not exceeding \$250 and in default of payment to imprisonment for any term not exceeding 6 months, that is to say, every person who –

(a) In any public place or in any Court or police station or in any place of public entertainment is guilty of any riotous, disorderly or indecent behavior;

....”

[5] The appellant has appealed on 2 grounds:

- (a) that the Magistrate Court erred in holding that the words spoken by the appellant were abusive because the words were neither abusive nor disorderly or insulting behavior for the purpose of sections 3(h) and 4(a) of the Act, and that even if they were, the appellant was entitled to freedom of speech and expression as granted by clause 7 of the Constitution; and
- (b) that even if the words were abusive or disorderly or insulting and were not protected by the Constitution, they did not constitute an offence under either S.3 (h) or S.4 (a) of the Act because they were not spoken in a public place as required by the Act and that the Magistrate’s Court erred in holding that they were.

The facts

[6] The respondent (Seinimili) was a member of the Electricity Commission, a body constituted under the Electricity Act and comprising 4 persons of whom the appellant, as CEO of the Commission, was also one.

[7] The Commission had its office in a house which used to be a dwelling house at Tu’atakilangi, Nuku’alofa. It had a reception room or area at which members of

the public were received. It also had the office of the CEO, to which, with his permission, members of the public may attend for their matters. When the Commission held its meetings, it held them in the CEO's office, but at a separate table in the same room. No member of the public was allowed to attend the meetings of the Commission.

- [8] On 13 June 2018, the Commission held its meeting there to consider the contents of the job description of the position of the CEO in order that the position could be advertised. The appellant (Paula) had prepared a draft of the job description in which he had stated that a minimum requirement was that an applicant was to hold an Electrical Engineering degree, which as it was, the qualification Paula held, and which, at the suggestion of Seinimili, was deleted by the Commission.
- [9] Paula was angry with Seinimili about that and he spoke loudly from his desk to the Commissioners not to listen to her because she was stupid and that she should go and get a reference from Parliament (where she had worked) because she would then find out how regrettable her work there had been. He said to the Commissioners that Seinimili was very insane (vale ngangau) but that she had come and did as she pleased.
- [10] Seinimili was very embarrassed and hurt and she asked the chairman to instruct the care taker of the place (a man, Etimoni) to take Paula away because he was noisy, but the chairman did not and the meeting continued.
- [11] On 9 July 2018 the Commission met again, in the same room. There were only 3 members of the Commission at that meeting – the Chairman, Seinimili and Paula, and the secretary.
- [12] At that meeting, Seinimili proposed that Paula's position as CEO be terminated because he had only been appointed as interim CEO, and also because he was being obstructive to appointing another CEO. She suggested that the Accountant Officer be appointed as interim CEO. Paula then said to her "you

are very stupid, your qualification is that you are the niece of the Minister of Finance.”

[13] The members of the Commission are appointed by the Cabinet upon the recommendation of the Minister of Finance, and the Minister of Finance was indeed an uncle of Seinimili.

[14] When Paula said that, the Chairman said to Paula, “Paula, stop shooting down the people like that because it is horrible.” Seinimili also said to Paula, “How many times have you now called me very “stupid” ”? And Paula said to her “It is. It is”.

[15] Only Seinimili gave evidence.

Charge no. 22/18

[16] In this charge, Paula was charged that he committed disorderly behavior (anga fakamoveuveu) in a public place in that he spoke to the Electricity Commissioners that Seinimili was insane and that she did a regrettable act in Parliament, in the office of the Electricity Commission, but which is a public place, contrary to S.4 (a) of the Order in Public Places Act.

[17] The Magistrate found that Paula did speak the alleged words and that they constitute disorderly behavior for the purposes of S.4 (a) of the Act. He also found, according to him, that the office where the meeting was held was a public place. He based that on what he thought Seinimili had stated in her evidence. This is what he said in the second to last paragraph of page 3 of his decision:

“The Court believes that this building which is used by the Electricity Commission at Tu’atakilangi is a public place because the public are entitled to have access to it without condition, as stated by the complainant in her evidence. They come to the meeting in the office of the Electricity Commission, there are other people who come to the employees for their matters and they leave.”

[18] The word “They” which I have underlined is the word which I understand the Magistrate to have used to mean “the people” or members of the public “who come to the meeting at the office of the Electricity Commission”, as different from “other people” who come to the employees for their matters and then leave. He says that because he thought that that was what Seinimili had stated in her evidence. But that was not what Seinimili had stated in her evidence. What she had stated, as shown in the fourth paragraph of the second page of the transcript, was as follows:

“We go to the Office of the Commission nearly once a month to meet, and that is the meeting of the Commission and employees are there to help in the meeting, but there are employees who come for their matters and they leave.”

[19] And she further clarified who attended the meetings in the fifth paragraph:

“At the time of the meeting those attending are only us the Commissioners and Secretary (Mele Folau) and care taker (Etimoni Havea), and Lord Dalgety has his office there and he often joined the meeting.”

[20] Accordingly, there was no evidence that the members of the public were present at either the meeting of 13 June 2018 or the meeting of 9 July 2018 or that the members of the public “were entitled or permitted to have access either without condition or upon condition of making any payment” as is required by the definition of the words “public place” in section 2 of the Act. That definition is as follows:

“2. In this act the following expressions have the meanings hereby assigned to them (that is to say)-

...

“public place” means any public way and any building, place or vessel to which for the time being the public are entitled or

permitted to have access either without condition or upon condition of making any payment and any building or place which is for the time being used for any public or religious meeting or assembly or as an open Court;

...”

- [21] A public place is a place which is at the time of the act a place to which the public are entitled or permitted to have access (with or without condition). And the office of the Electricity Commission, that is, the place to which the public are entitled to enter and have their matters dealt with by the employees of the Commission, is a public place for the purpose of the Act. That place is the reception room in the house into which any member of the public may enter without seeking permission from any one. To enter the CEO's office, permission of the CEO must be sought, unless he has already given approval that any member of the public can enter it without seeking his permission. Only if such approval had already been given can the CEO's office be a public place, like the reception room. But no evidence was given that the CEO or the Commission had given any such permission.
- [22] The Commission itself can also given permission that when it holds its meetings, or certain of its meetings, the members of the public can enter and listen or participate in its discussions. Only then can the place in which it holds its meeting be said to be a public place for the purposes of the Act. But no evidence was given that the Commission had given any such permission.
- [23] So that at the time of the acts of the appellant in these charges, that is, 13 June 2018 and 9 July 2018, the respondent must prove that the public were allowed to enter the CEO's room and listen to or participate in the meetings of the Commission. She did not do that. She seemed to think that the whole house was the office of the Commission and that it was a public place because the public were entitled to come to it without condition. She stated in all four charges:

- no. 22/18 : "... in the Office of the Electricity Commission, but which is a public place ..."
- no. 23/18 : "... at the Office of the Electricity Commission which is a public place ..."
- no. 24/18 : "... at the Office of the Electricity Commission which is a public place ..."
- no. 25/18 ; "... but it was a public ...".

And consistent with that she gave no evidence that members of the public attended the two meetings or were entitled to be present and called no witness to give evidence to that effect.

- [24] And as I have found, the Magistrate was wrong to have thought that she did give such evidence. As prosecutor, the respondent had the burden of proving that the two meetings of the Commission were open to the public beyond a reasonable doubt. From the transcript of her evidence before the Magistrate, she did not even begin to give such evidence, because of her mistaken belief that the "Office of the Electricity Commission" was already a public place and that she did not need to give any evidence of it. She was wrong because the definition of a public place required that she did.

Other charges

- [25] Because the other charges (no. 23/18, no. 24/18 and no. 25/18) were all the same as charge no. 22/18, that is, that the acts were required to have been committed in a public place to be an offence under either S.3 (h) and S.4 (a) of the Act, they also suffer the same fate as charge no. 22/18.

Other grounds of appeal

- [26] Because of the finding which I have made with regard to public place in charge no. 22/18, I consider that I do not need to make any ruling on the other grounds of appeal of the appellant.

Orders

[27] Accordingly, I make the following orders:

- (a) The appeal is allowed.
- (b) The convictions of the appellant on all charges nos. 22/18, 23/18, 24/18 and 25/18 are quashed.
- (c) The fines imposed are to be refunded to the appellant, if they have been paid.
- (d) The respondent shall pay the costs of the appellant in this Court and in the Magistrate's Court, to be taxed by the Registrar if not agreed.



L. M. Niu
J U D G E

NUKU'ALOFA: 15 April 2019