

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

Seen, file & Upload

#1
[Signature]
06/05/19

AM 2 of 2019

BETWEEN: POLICE

Appellant

AND: TONGA BROADCOM LIMITED

Respondent

Counsel: ✓ **Mr 'A Kefu SC for the Appellant**
Mrs K Tohi for the Respondent

Date of Hearing: 1 May 2019

Date of Ruling: 6 May 2019

RULING

[1] This is an appeal from a decision of the Principal Magistrate on 14 January 2019 acquitting the respondent of an offence against s. 23(1)(g)(i) of the Electoral Act. That section makes it an offence to broadcast at any time on polling day before the close of the polls any statement 'advising or intended or likely to influence any elector as to the candidate for whom the elector should or should not vote'.

The facts

[2] The respondent is a broadcaster.

[3] On 16 November 2017 there was a General Election in Tonga.

- [4] The Hon. Semisi Sika, was the Deputy Prime Minister and Minister of Tourism and Infrastructure. He was standing for re-election as a Peoples Representative in the Tongatapu No. 2 electoral constituency.
- [5] At around 7am on polling day the respondent broadcast a lengthy interview with Hon. Semisi Sika including accompanying commentary by an employee of the respondent.
- [6] The interview had been given by Hon. Semisi Sika a few days earlier. He was aware that it would be broadcast by the respondent but was not aware that it would be broadcast on polling day.
- [7] The broadcast highlighted that the General Election was being held that day. It then focused on the work and achievements of the Hon. Semisi Sika as Deputy Prime Minister and Minister of Tourism and Infrastructure, the need to continue this good work and his desire to be returned to finish off the work for the benefit of Tonga. It then urged listeners to exercise their vote.
- [8] Another candidate standing for election in the No 2 Tongatapu constituency heard the broadcast and was upset by it and laid a complaint. A prosecution was commenced in the Magistrate's Court.
- [9] In his decision the Principal Magistrate set out s 23(1)(g)(i) and the elements of the offence it created. He considered all the evidence and concluded that the elements of the offence had been proven. However, he acquitted the respondent because he found that the second proviso to the section applied. That proviso states:
- Provided also that this paragraph shall not restrict the publication of any candidate's name in any news which relates to an election and which is published in a newspaper or other periodical or in a radio or television broadcast.
- [10] The transcript does not record that the Principal Magistrate provided any reasons for his conclusion that the proviso applied.

- [11] The Police appeal on the grounds that the Principal Magistrate was wrong in fact and law to find that the proviso applied. Mr Kefu argued that the broadcast went well beyond the publication of Hon. Semisi Sika's name in connection to the election and was a clear statement of support for him. It was, he submitted, intended and likely to influence electors as to the candidate they should or should not vote for.
- [12] The respondent argues that the appeal must be dismissed. The submissions ranged over a wide area but can be summarised as follows:
- (a) The Court has no right on appeal to review the evidence or reach a conclusion contrary to that of the Magistrate;
 - (b) The Police did not prove to the required standard that the broadcast was intended or likely to influence any elector; and
 - (c) The broadcast was a news broadcast and therefore protected by the proviso.

Discussion

- [13] Section 23 appears in Part IV of the Electoral Act which is headed 'Election Offences'. This Part creates offences to ensure that elections are conducted fairly and honestly.
- [14] Section 23(1)(g)(i) creates a blackout period prohibiting on polling day the publication, distribution or broadcast of statements likely to influence any elector as to how they should vote. It balances, in the public interest, rights to campaign and free speech with the maintenance of a free voting environment.
- [15] An offence may be committed under s. 23(1)(g)(i) when the effect of a statement is likely to influence an elector whether or not that is the intention and whether or not it is proven to have had that effect in fact.

- [16] The proviso is unambiguous and of very narrow compass. It does not, as the respondent submits, create a general exception for publications or broadcasts that might be considered 'news'. It recognises that on polling day the media has a legitimate interest in reporting on the election but not to the extent of disseminating information influencing the manner in which electors vote. For that reason, the proviso applies only to the publication of 'any candidate's name' in news as it relates to an election.
- [17] I agree with the appellant that the proviso does not apply. This was a broadcast of an entire and lengthy interview with Hon Semisi Sika emphasising his achievements in Government and his desire to be returned to carry on and finish his work. It portrayed him in a positive light and as a selfless servant of the people. All of this was sandwiched between comment stating that the General Election was being held that day and encouraging electors to vote because 'Every vote is vital because we are to elect those who will represent us in Parliament.' The broadcast was, notwithstanding Mrs Tohi's assertions to the contrary, a clear expression of support for Hon. Semisi Sika in the election.
- [18] I do not accept the respondent's argument that on appeal this Court cannot review the evidence and reach a conclusion contrary to that of the Magistrate. This appeal is brought under s. 74 of the Magistrates' Court Act. On such an appeal this Court is not bound to accept the findings of the Magistrate on the facts or the law. The correct approach was described in *Austin, Nicols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC) as follows:

Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even when that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to

the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[19] Any doubt about this is removed by s. 79 of the Magistrate's Court Act which provides that this Court may on the hearing of an appeal examine witnesses and admit fresh evidence. That section provides:

The decision of the Supreme Court on the hearing of appeals shall be given on the written evidence forwarded by the clerk, but the Supreme Court may in its discretion examine all or any of the witnesses produced before the Magistrate and, on good cause shown by either party, may in its discretion admit fresh evidence and if necessary may adjourn the hearing for that purpose.

[20] The respondent's next argument is that it was not established that the broadcast was intended or likely to influence any elector. As I have noted above, it was not necessary to prove an intention to influence the vote but, considering the broadcast as a whole, it is an inescapable inference that was indeed the respondent's intention. The Principal Magistrate held that the content of the broadcast was convincing that Hon. Semisi Sika 'is a good guy to vote for Parliament'. I agree that was the impression created and plainly it was the very sort of information that was likely to influence electors to vote for him.

[21] Finally, the respondent submits that the broadcast was a 'news' broadcast and therefore protected by the proviso. In the written submissions of the respondent it was argued that any broadcast on polling day is allowed if it is a news item and that this was a news item because, amongst other reasons, Hon. Semisi Sika did not pay for it to be broadcast and it did not contain 'trailers' identifying it as an advertisement for him. These arguments are fallacious because the proviso does not protect news items. It protects the publication of candidates' names in news items and no more than that.

Result

- [22] The Principal Magistrate was correct to find that all elements of the offence under s. 23(1)(g)(i) were proven beyond reasonable doubt. He was wrong to find that the proviso applied and acquit the respondent.
- [23] The appeal is allowed. The decision of the Principal Magistrate is quashed and the respondent is convicted of the offence under s. 23(1)(g)(i) of the Electoral Act.
- [24] Mrs Tohi asked to be allowed a chance to make submissions on penalty. This case will be called again at **9am on 9 May 2019** when I will hear from her.



A handwritten signature in blue ink, consisting of a large, stylized loop followed by a series of smaller, wavy lines.

O.G. Paulsen

LORD CHIEF JUSTICE

NUKU'ALOFA: 6 May 2019.