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

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**BETWEEN:**

1. VILIAMI FIFITA
2. FINAU FIFITA
3. 'ISILELEI FIFITA
4. MELEKIOLA FIFITA
5. LUPE'AKA FIFITA
6. LOKALESIA FIFITA

- Appellants

**AND :**

SETEFANO FIFITA

- Respondent

**BEFORE HON. JUSTICE NIU**

**Counsel :** Mrs. F. Fa'anunu for the appellants.  
Mr. S. Tu'utafaiva for the respondent.

**Hearing :** 5 June 2019

**Ruling :** 6 June 2019

rec'd w/oc 11/9  
Jato

## RULING

- [1] The appellants (wife and the children) have appealed that the Learned Magistrate was wrong to have held that the act of adultery of the husband with another woman was not and is not domestic violence as defined and provided for under the Family Protection Act 2013, and that the Learned Magistrate was wrong to have refused their application for an order that the husband be removed from the home and for an order that he pay maintenance of \$300 per week for the appellants.
- [2] Was the Learned Magistrate wrong? That is the only issue to be decided in this appeal.
- [3] I asked and both counsel knew of no case in Tonga or elsewhere where this point has been decided.
- [4] The long title of the Act is “An Act to Provide for Greater Protection from Domestic Violence, to Introduce Protection Orders, Clarify the Duties of the Police and Promote the Health, Safety and Well Being of Victims of Domestic Violence and Related Matters”. The words that stand out are “Protection from Domestic Violence” and “Victims of Domestic Violence”. Those words straight away give the purpose of the Act, namely, that there is violence at home and the victims thereof need greater protection than what the law before then could give.
- [5] And S.4 defines what is domestic violence. It provides as follows:

**“4. *Meaning of domestic violence***

*For the purpose of this Act, a person (the “perpetrator”) causes domestic violence to another person (the “victim”) if—*

- (a) The perpetrator and the victim are in a domestic relationship; and*

*(b) Beyond the reasonable expectations and acceptances of family and domestic life, an act or omission or threat thereof by the perpetrator –*

*(i) Causes physical abuse, sexual abuse, or mental abuse to the victim or other person at risk; or*

*(ii) Otherwise harms or endangers the health, safety or well-being of the victim or other person at risk.”*

[6] Mrs. Fa’anunu argues that the act of adultery of the respondent with another woman was, and is (because the respondent still continues to see her) “beyond the reasonable expectation and acceptances of family and domestic life” and it caused and causes “mental abuse” to the wife who is the victim and to the children as persons at risk. She points out that the definition of “mental abuse” in S.2 includes “emotional abuse” and “a pattern of degrading, humiliating, aggressive or intimidating conduct towards the victim”. She argues that the acts of adultery of the respondent causes pain to the appellant wife and children and are therefore acts of mental abuse and the acts of adultery are therefore acts of domestic violence within the meaning of S.4 of the Act. She says that as long as what the respondent does (which is the act of adultery) causes pain to the appellant wife, it is mental abuse, irrespective of any intent on his part to cause such pain to the wife, because he knew and knows that it would cause such pain if, and before, he went and did such act. By so doing, he was, and is, intentionally causing mental abuse towards the wife.

[7] I regret to say that I do not consider that the Act, or the provisions that she has referred to, be interpreted to go that far. If the Act had intended that adultery (or desertion) be included in the definition of domestic violence, it would have expressly said so, but it does not. What it provides for is “physical abuse”, “sexual abuse” or “mental abuse”. All 3 terms are quite easily ascertained and understood. It is an abuse that is carried out physically, sexually or mentally to the victim. The word “abuse” is defined (as in Websters Dictionary) as “1. a corrupt practice or custom. 2. improper use or treatment: misuse. 3. a deceitful

act: deception. 4. abusive language. 5. physical maltreatment.” When applied to S.4, it is an improper act done to the victim, that is to her person, her body, to her. S.4(b)(1) specifically so provides: “(1) causes physical abuse, sexual abuse, or mental abuse to the victim.”

[8] That is borne out in the definition of mental abuse where it provides that it “means a pattern of degrading, humiliating, aggressive or intimidating conduct towards a victim ...” The pattern of conduct must be one perpetrated “towards” the victim.

[9] It is possible that the act or acts of adultery was or were or are being committed solely for the purpose and with the intention of inflicting pain upon the victim. But that was not and is not what is being claimed to have happened or is happening in the present case. And the Learned Magistrate did allude to that in her decision when she stated that she was not satisfied that the respondent had intended to cause pain to the wife or to the children. And Mrs. Fa’anunu did not and does not argue that the Learned Magistrate was wrong in that. She argues that the Magistrate was wrong to require that intent was needed to be proved to establish mental abuse under S.4(b)(i). That of course is not correct. Intent to cause abuse to the victim is a necessary ingredient of physical abuse, sexual abuse and mental abuse.

[10] What is important to note in this Act is its provision in S.28(1)(a) and S.28(2). It provides as follows:

#### ***“PART 6 – OFFENCES AND PENALTIES***

#### ***28. Domestic violence offence and breach of protection order***

- (1) *A person who –*
- (a) *commits domestic violence*
- ...
- commits a domestic violence offence.*

- (2) *A person who commits a domestic violence offence referred to in subsection (1) shall be liable on conviction –*
- (a) *for a first offence, a term of imprisonment not exceeding 12 months or a fine not exceeding \$2,000 or both;*
- (b) *for a second or subsequent offence, a term of imprisonment not exceeding 3 years or a fine not exceeding \$10,000 or both, and in addition to any other penalty, the Court may make an order that the respondent pays compensation in accordance with section 30.”*

[11] The penalty for domestic violence is quite high and it would be breach of the principles of fairness and justice in a civilised society to convict and penalise a person of an offence which is not clearly enacted as an offence. As I have stated above, this Act does not expressly say that adultery is a domestic violence. If it only implies it, such as Mrs. Fa’anunu has argued, by interpretation this Court may give to its provisions, that would offend the principle of fairness and justice which requires that all offences be clearly enacted and promulgated before it can be enforced. There is a fundamental common law presumption that the Legislature does not intend to make any substantial alteration in the law beyond what it specifically declares. Ragnar Hyne J applied that presumption in *Tu’ipulotu v Kavaonuku* Vol. II Tonga LR 143, 146.

[12] Not only is a person faced with conviction for domestic violence when he commits adultery, he also faces a police safety order which may be issued under S.22. That section provides that if a police officer suspects on reasonable grounds that a person has committed a domestic violence offence he may issue a police safety order to that person and that person shall vacate any land or building occupied by a person at risk, whether or not he has any legal or equitable interest in the land or building.

[13] Such drastic measures are warranted but they must be applied only upon clear statutory provisions that the person has committed or is likely to commit a domestic violence offence by committing adultery (or desertion).

- [14] The consequences of holding that adultery is a domestic violence is serious, and I consider that the provisions of the Act upon which the application of the appellants to the Magistrate Court was made do not support it. The Learned Magistrate was correct to have dismissed their application.
- [15] Accordingly, I order that this appeal is dismissed with costs to the respondent, to be taxed if not agreed.

NUKU'ALOFA: 6 June 2019



  
L. M. Niu  
JUDGE