

The facts

- [2] Mr. Lavulavu and his wife are facing criminal charges in the Supreme Court. The charges, alleging that they obtained money by false pretences and knowingly dealt in forged documents, arise out of their involvement in the affairs of an educational institutional called 'Unuaki-'o-Tonga Royal Institute.
- [3] The charges against Mr. and Mrs. Lavulavu were laid following a special audit conducted by the first three accused under the authority of the fourth accused. The fourth accused is the Auditor General of Tonga.
- [4] Mr. Lavulavu has responded to the criminal charges by commencing civil proceedings for judicial review of aspects of the special audit. He has also commenced private prosecutions against the first three accused, alleging theft of work documents (contrary to ss. 143 and 145 of the Criminal Offences Act) and against the fourth defendant, alleging that he received the said documents (contrary to s. 148 of the Criminal Offences Act).
- [5] When the private prosecutions came before the Magistrate's Court for committal under Part III of the Magistrate's Court Act, the then Acting Attorney General applied to intervene and take over the prosecutions and to terminate them. The Acting Attorney General relied upon cl. 31A (1)(b) of the Constitution which, he argued, gave him the authority on behalf of the Crown to manage all criminal prosecutions in the Kingdom.
- [6] In seeking to terminate the private prosecutions, the Acting Attorney General provided detailed reasons. These included that there was insufficient evidence to support the prosecutions, there was no public interest in the pursuit of the prosecutions, the prosecutions were an abuse of the Court's processes and, the interests of justice required them to be terminated.
- [7] Mr. Lavulavu opposed the Acting Attorney General's applications.

- [8] On 9 April 2019, Principal Magistrate Mafi refused the Acting Attorney General's applications. He ruled that the Acting Attorney General has no right to intervene to conduct the prosecutions without Mr Lavulavu's consent. He did not consider the merits of the Acting Attorney General's reasons for wanting to terminate the prosecutions. However, he stayed the prosecutions until after Mr Lavulavu's trial in the Supreme Court.
- [9] The Acting Attorney General appealed from the Principal Magistrate's ruling. The recently appointed Attorney General, Mrs. Folaumoetui, appeared at the hearing of the appeal.
- [10] Mr. Lavulavu has filed a cross-appeal. He seeks the lifting of the stay, so that he may pursue the private prosecutions.

The Office and the statutory provisions

- [11] The Office of the Attorney General was first established in Tonga in 1988 by decision of His Majesty in Council (PC Decision 278 of 27/11/1987). Prior to 1988, His Majesty and the Government obtained legal advice from the Crown Solicitor. Upon the appointment of the first Attorney General, a Crown Law Office was established run by the Solicitor General. It was (and is) primarily responsible for providing the legal services required by the Kingdom. At that time, the Attorney General was also the Minister of Justice and responsible to Cabinet for the Crown Law Office (Guy Powles, *Political Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (2012) 18 *Comparative Law Journal of the Pacific*, at 53-54). The position changed with the constitutional reforms of 2010.
- [12] Clause 31A of the Constitution was introduced with the Act of Constitution of Tonga (Amendment) (No. 2) Act 2010 and amended a year later, by the Act of Constitution of Tonga (Amendment) Act 2011 (adding a new sub-clause (5)). Clause 31A presently reads:

31A Attorney General

(1) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall appoint an Attorney General, who shall:

- (a) be the principal legal advisor to Cabinet and Government;
- (b) be in charge of all criminal proceedings on behalf of the Crown; and
- (c) perform any other functions and duties required under law.

(2) The Attorney General shall, unless otherwise provided by law, have complete discretion to exercise his legal powers and duties, independently without any interference whatsoever from any person or authority.

(3) The Attorney General shall be a person who is qualified to be a Judge of the Supreme Court and he shall, subject to any contractual arrangements, hold office during good behaviour.

(4) The King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall determine the terms of appointment of the Attorney General, and shall have the power to dismiss him.

(5) In the event of a vacancy in the office of the Attorney General, and pending the appointment of an Attorney General under sub-clause (1), the King in Privy Council may appoint a suitably qualified person to be Attorney General ad interim, to hold office until a substantive appointment has been made. Any such appointee shall have all the powers and privileges and perform all the duties of Attorney General as set forth in this clause.

[13] Also relevant to this appeal are ss. 196 and 197 of the Criminal Offences Act. Those sections deal with which Court, and by whom, criminal prosecutions may be brought. The sections presently read:

196 In what courts prosecutions may be brought

(1) Prosecutions for offences against this Act or any other Act shall be heard and determined as follows —

- (a) offences within the jurisdiction of a Magistrate as defined in the Magistrates' Courts Act: In a Magistrate's Court;
- (b) all other offences: In the Supreme Court with or without a jury according to the accused's election.

(2) If a person may be charged with alternate offences under the sections set out in subsection (3) or under any other Act, the choice of which offence shall be charged and prosecuted shall be decided by the Attorney General: Provided that the Attorney General may delegate to the

Solicitor General or to the Police Prosecutors the authority to make that decision in such cases or classes of cases as he may specify....

197 Who may prosecute

All prosecutions under this Act may be brought by the Attorney General or the person aggrieved.

The submissions of the parties

The Attorney General

- [14] The Attorney General submits that her right to intervene and discontinue a prosecution (including a private prosecution) was recognised by the common law and is now contained in the powers conferred upon her Office by cl. 31A of the Constitution.
- [15] She argues that a citizen's right to bring a private prosecution under s. 197 of the Criminal Offences Act is not absolute and is subject to the powers of the Attorney General; the existence and exercise of which are necessary in the public interest.
- [16] Developing this submission, Mrs Folaumoetui said that to ensure decisions to prosecute are exercised in a lawful manner and for proper purposes, the Attorney General must have powers of supervision and intervention. She referred me to the Crown Law Prosecution Code which ensures that decisions to prosecute on behalf of the Crown are made fairly and consistently and after an objective consideration of the facts. In contrast, private prosecutions are not subject to the Code, nor are they subject to any independent review or supervision, giving rise to the risk of abuse.
- [17] She referred to case law where the Attorney General's right to intervene has been recognised overseas and by the Courts in Tonga (*Pohiva v Tu'ivakano ors* [2014] Tonga LR 9). She also referred me to an instance where the Attorney General had intervened and discontinued a private prosecution in circumstances where the alleged offence had occurred outside the jurisdiction (*Fukofuka v Pikula*, CR 14 of 2014, 27 January 2016, Principal Magistrate Mafi).

Mr Lavulavu

- [18] Mr. Lavulavu spoke of the personal toll that the Auditor General's special audit has had upon him and the steps that he has taken to obtain justice, for what he perceives are wrongs done to him. He argues that there is nothing in cl. 31A which authorises the Attorney General to intervene in a private prosecution. If the Attorney General has the power to do so he will, he argues, be deprived of his right to justice.
- [19] Mr Lavulavu referred at length to the doctrine of the separation of powers, with its system of checks and balances. He emphasised the need to maintain a divide between the three branches of Government. He referred to cl. 4 of the Crown Law Prosecution Code, which recognises the independence of Crown Prosecutors as of fundamental constitutional importance. He submitted that the Attorney-General is not impartial or independent as she is the advisor to the executive and legislative branches and is also effectively representing the Auditor General in the prosecution against him. The Attorney General should not therefore have the power to discontinue private prosecutions.
- [20] Mr Lavulavu also argued that his right to bring a private prosecution is guaranteed by s. 197 of the Criminal Offences Act which, he contends, was amended to support changes to the Constitution. It follows that s. 197 takes precedence over any powers the Attorney General may have had to intervene in a private prosecution under the common law.
- [21] The decisions of the Courts relied upon by the Attorney General are distinguishable, he argues. In respect of the *Pohiva* case, Mr. Pohiva was not a "person aggrieved" for the purposes of s. 197 and not, therefore, entitled to bring his prosecutions. The overseas decisions can be distinguished on the ground that in those other countries the Attorneys General were able to act independently.

- [22] In relation to the question of stay, Mr Lavulavu argued that there can be no stay unless and until the accused have been committed for trial to the Supreme Court and, as of yet, he has had no opportunity to present any of his evidence and been deprived of due process.

Case law and the interpretation of cl. 31A

- [23] The powers of the Attorney General that are in issue are derived from prerogatives of the Monarch relevant to the administration of justice. The existence of the Monarch's prerogative powers have always been recognised in the Constitution. The existence of prerogative powers over the administration of justice were recognised in *Tu'ipulotu v Kingdom of Tonga* [1997] Tonga LR 258, 263 (referring to cl. 41 of the Constitution, as it then was).
- [24] At common law, the prerogative powers included the right to take over proceedings commenced privately. The powers also include the right to stay criminal proceedings and to strike out private prosecutions (*Hallett v Attorney General* [1989] 2 NZLR 87 (HC)).
- [25] In *R v Comptroller-General of Patents, Designs and Trade Marks* [1899] 1 Q. B. 909, 913-914, A.L. Smith L.J. said:
- [The Attorney General]... has had from the earliest times to perform high judicial functions which are left to his discretion to decide....Another case in which the Attorney General is pre-eminent is the power to enter a *nolle prosequi* [unwilling to prosecute] in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is satisfied that there is no case; but the Attorney General alone has power to enter a *nolle prosequi*, and that power is not subject to any control.
- [26] *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) is authority for the proposition that at common law the Attorney General had the power to

stay a private prosecution (see Lord Wilberforce, at pg. 79 and, Lord Edmund Davies, at pg. 107).

[27] In *Gouriet*, Viscount Dilhorne said, at pg. 88:

The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish to continue. He need not give any reasons.

[28] In the same case, Lord Fraser of Tullybelton said, at pg. 116:

[A] private prosecution is always subject to the control of the Attorney-General through his power to enter a *nolle prosequi*, or to call in any private prosecution and then offer no evidence. By exercise of those powers the Attorney-General can prevent the right of private prosecution being effectively exercised in any particular case.

[29] The powers of the Attorney-General are now set out in cl. 31A of the Constitution. In *Pedras v Prime Minister* [2014] Tonga LR 217, the Court of Appeal held that powers forming part of the prerogative may cease to be available or may be supplanted by statute.

[30] The Attorney General relies specifically upon cl. 31A (1)(b), which states that that Attorney-General is to “be in charge of all criminal proceedings on behalf of the Crown”.

[31] In *Pohiva*, Scott LCJ identified a possible ambiguity in these words, but went on to express the view that all prosecutions should be under the control of the Attorney General. He said, at [34] and [36]:

In Blackstone’s *Criminal Practice* 1993 paragraph D2.36, the main functions of the Attorney General in England and Wales are explained. These include instituting and conducting cases of exceptional gravity or complexity and the taking over of the conduct of private prosecutions. The Attorney General may also stop a prosecution without the need to provide any reason for doing so....

.....

As presently defined by Clause 31A, the Attorney General's duties in this area seem to me to be somewhat unclear. Does the Clause mean that the Attorney General is in charge of all the criminal proceedings, including private prosecutions, on behalf of the Crown, or does it mean that he is only in charge of criminal proceedings actually commenced by the Crown? If the latter, then there has been a constitutional departure from the position explained in paragraph 34. Given the very wide ambit of section 197 I am of the opinion that all prosecutions, whether private or not, should be within the purview of the Attorney General in order to avoid prosecutions being commenced which clearly do not conform with the Crown's policy or which, for other good reasons, are not in the public interest.

- [32] Lord Chief Justice Scott's expressed view, whilst *obiter dicta*, is correct as a matter of law, for the following reasons. First, under cl. 31A (1)(b), the Attorney General is in charge of "all criminal proceedings," not only criminal proceedings commenced by the Crown. The meaning of the words is clear. The alternative interpretation, giving rise to an ambiguity, involves straining the plain meaning of the words.
- [33] The plain interpretation of cl. 31A is entirely reasonable and consistent with the common law. As Scott LCJ acknowledged, to interpret the clause as applying only to criminal proceedings commenced by the Crown would involve a very significant departure from the traditional constitutional role of the office of Attorney General. The office is an ancient one developed over centuries in accordance with enduring principles and conventions of British justice, which Tonga has adopted and applied. I was not referred to anything in the cl 31A, or other provisions of the Constitution generally, that would suggest that it was the Legislative Assembly's intention to deprive the Attorney General of such important powers. The indications are, in fact, to the contrary.

[34] The first of these contrary indications is that cl. 31A refers to the appointment of “an” Attorney General. In an approach with which I respectfully agree (and a very similar context), the Court of Appeal of Samoa, when interpreting Article 41 of the Samoan Constitution, said:

We are not persuaded that it matters whether the Attorney-General is a member of the legislature or is an appointed official. The holder of that office in Samoa has all the powers of an Attorney-General at common law unless those powers are restricted or amended by the Constitution or by statute. As well as the power to control prosecutions, private or public, the common law confers on the Attorney-General a wide range of disparate functions (e.g. guardian of charities, protector of children and mentally-disordered persons, being but two examples). The specific provisions of the Constitution do not deprive the people of Samoa from the benefit of having an Attorney-General able to exercise these useful functions in the public interest. Indeed Article 41(1), referring to the appointment of “an Attorney-General” indicates otherwise”

[35] Second, although the 2010 constitutional reforms involved the relinquishment of some of His Majesty’s powers in favour of Cabinet, subclause 51(7) of the Constitution specifically preserved executive powers vested in His Majesty “whether by this Constitution, or any Act of the Legislative Assembly, any subordinate legislation, and Royal Prerogatives.” As I have mentioned, the powers of the Attorney General with which we are concerned are derived from the Royal Prerogative.

[36] Third, cl. 31A(1)(c) provides that the Attorney General shall “perform any such other functions and duties required by law,” which must include the powers to perform a wide range of traditional “disparate functions” as well as such functions as might be enacted by law. Clause 31A cannot be interpreted to deprive the people of Tonga from having the benefit of an Attorney General to exercise the traditional useful functions associated with that Office in the public interest (*Teo*, and see PA Joseph *Constitutional and Administrative Law in New Zealand*, 4th ed at 27.8 for a discussion of the responsibilities of the Attorney General).

[37] The approach that I take to the interpretation of cl. 31A(1)(b), finds further support from provisions of the Criminal Offences Act, emphasising the

pre-eminent position of the Attorney General in matters concerning criminal prosecutions. Of particular relevance is the wide discretionary powers the Attorney General has in criminal cases (recently discussed in *R v Fukofuka* (Unreported, Court of Appeal, 17 April 2019, AC 20 of 2019)), and, s. 196, dealing with alternate offences.

[38] Of importance also, is the wide ambit of s. 197 of the Criminal Offences Act, which Scott LCJ referred to in *Pobiva*. Whilst the right to bring a private prosecution has a long history in Tonga, there is a need for safeguards in the prosecution system when the right is abused. Problems associated with private prosecutions include that a private prosecutor is not bound by the Crown Law Prosecution Code, it is unlikely there will be a separation between the investigation and prosecution functions (which is vital to the integrity of the prosecution system), there may be inadequate disclosure to accused persons and, some prosecutions may be pursued for vengeful or vexatious reasons (*Criminal Prosecutions*, New Zealand Law Commission Report No. 66, at 93-94). The power of the Attorney General to intervene or stay private prosecutions is one of the safeguards against such problems, and I would not readily conclude that it was the Legislature's intention to do away with it.

[39] This takes me to Mr Lavulavu's submissions. It will be apparent, from what I have said above, that I do not accept his submission that cl. 31A does not authorise the Attorney General to intervene and discontinue a private prosecution. As the Constitution is the supreme law of Tonga, his argument that the powers of the Attorney General are subject to his rights under s. 197 of the Criminal Offences Act must fall away.

[40] Concerning his reliance upon the separation of powers doctrine, the Attorney General is not in Cabinet nor is she a member of the Legislative Assembly. She is an officer of the Crown and whilst her functions include being the principal legal advisor to Cabinet and the Government, she is not answerable to them (except in relation to the giving of advice) and has

“complete discretion to exercise [her] legal powers and duties, independently without any interference whatsoever from any person or authority” (cl 31A (2)).

[41] I do not accept Mr. Lavulavu’s attempt to distinguish *Pohiva* and overseas cases. The *Pohiva* case was not decided on the basis that Mr. Pohiva was not a person aggrieved; the Lord Chief Justice found that he was (at [31]). Mr. Lavulavu failed to provide anything to support his submission that other decisions can be explained on the basis that in other countries the constitutional structures ensured the Attorney General’s independence. In some instances Attorneys General are members of the legislature and/or in cabinet.

[42] One can see a tension in a case such as this, where on the one hand the Attorney General is, on behalf of the Crown, prosecuting Mr Lavulavu and, on the other, seeks to bring to an end to private prosecutions brought by him against his accusers. However, Mr Lavulavu is not correct that he has no recourse to justice. As was noted in *Teo*, whilst in the past decisions of the Attorney General acting pursuant to the prosecutorial discretion have been considered unreviewable by the Courts, this is no longer the case in all jurisdictions. After reviewing authorities in Canada, New Zealand, Fiji and Australia, the Court of Appeal of Samoa found that:

....the Attorney-General’s decision to discontinue a private prosecution is reviewable but only on the grounds of “flagrant impropriety” in the exercise of the discretion.

[43] The Attorneys General in Samoa and Tonga fill similar constitutional positions and I can see no reason why the same approach would not apply in Tonga. A private prosecutor aggrieved by a decision of the Attorney General to intervene would, in my view, be entitled to seek a judicial review of that decision in this Court.

[44] It follows that the position in Tonga is that under cl. 31A of the Constitution the Attorney General's powers include the right, in exercise of her discretion, to intervene in, stay or discontinue private prosecutions and that such power may be exercised without the consent of the private prosecutor.

The stay

[45] Given my decision above, the appeal must be allowed and it is not necessary for me to deal with the issue raised by Mr Lavulavu concerning the stay.

The appropriate relief

[46] Although in the notice of appeal the Attorney General sought orders quashing the Principal Magistrate's ruling and dismissing the charges, Mrs Folaumoetui asked that, if I allow the appeal, the prosecutions be referred back to the Magistrate's Court to give her time to re-consider whether to discontinue them. I will adopt that course.

Result

[47] The Attorney General's appeal is allowed and the ruling of the Principal Magistrate is quashed in its entirety.

[48] The Attorney General is granted leave to intervene and conduct the private prosecutions brought by Mr. Lavulavu against the four accused under CRs 54, 55, 56 and 57 of 2018 (Magistrate's Court).

[49] The cases are referred back to be called before a different Magistrate on the first available date after 1 August 2019, at which time the Attorney General is to advise if she will pursue the prosecutions or discontinue them. I have nominated a date after 1 August 2019, as I understand Mr. Lavulavu is out of Tonga at the present time.

[50] Mr Lavulavu's cross appeal is dismissed.

[51] I reserve costs. This may be a case where costs should lie where they fall, but that is not a final view. If the Attorney General seeks costs she may do so by filing memoranda within 7 days with a further 7 days for Mr. Lavulavu to reply.



NUKU'ALOFA: 9 July 2019.

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

**O.G. Paulsen
LORD CHIEF JUSTICE**