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

**AM 15 of 2019**

**BETWEEN:**

**POLICE**

**Appellant**

**-and-**

**SIONE VUNA FA'OTUSIA**

**Respondent**

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**JUDGMENT**

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**BEFORE:** LORD CHIEF JUSTICE WHITTEN  
**Counsel:** ✓ Mr T. 'Aho of the AGO for the Appellant  
Mr S. Fonua for the Respondent  
**Date of hearing:** 19 March 2020  
**Date of judgment:** 25 March 2020

**Introduction**

1. At all material times, the Appellant is and was the Minister of Justice.
2. On 12 January 2019, during a police investigation concerning a stolen cow, the Appellant is alleged to have telephoned the police officers involved and said:

*"Why did you take Faioso's cow? And stop working like a tough guy before I shoot the shit out of a Police and had Faioso found you all of his farm, he would have shot the shit out of you."*

3. The Appellant was subsequently charged with having breached sections 57 and 65 of the *Criminal Offences Act* ("the Act").
4. On 22 October 2019, at the preliminary enquiry of the said charges, counsel for the Appellant made no case submissions in respect of both charges. Principal Magistrate Mafi rejected the submission in respect of s.57, but upheld the submission in respect of s.65 and thereby ruled that there was insufficient evidence for that charge to be referred to the Supreme Court.

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5. Both decisions have been appealed. This proceeding concerns the decision in respect of s.57. The Crown's appeal in respect of s.65 is the subject of proceeding AM 21 of 2019. Submissions were also received on that matter on 19 March 2020, following which, it was adjourned part heard to enable the Crown to file an Amended Notice of Appeal.

### **Section 57**

6. Section 57 provides:

*Use of threatening, etc., language to Government servant*

*Every person who uses threatening, abusive or insulting language or behaviour towards any officer in the service of the Government shall be liable on conviction to imprisonment for any period not exceeding 2 years, or to a fine not exceeding \$5,000, or to both such fine and imprisonment.*

### **No case submission below**

7. It is difficult to understand exactly what submissions were made below on behalf the Appellant. The only record before me is the Prosecution's response to the no case submission annexed to its submissions on this appeal. There, the Prosecution described its understanding of the Defendant's submissions as being, relevantly, that:
- (a) s.57 did not apply to the Defendant as a Cabinet Minister or anyone in the service of the Government; and
  - (b) the Tongan version of the provision should be applied in favour of the Defendant.
8. Before me, Mr Fonua explained that the case had originally been conducted by previous counsel who has since passed away. He assured me, however, that the point sought to be agitated on this appeal was in fact run before the Magistrate that he ruled on it.

### **Magistrates decision**

9. Unfortunately, the Principal Magistrate's reasons for decision contain only a passing reference to the s.57 charge (CR 49 of 2019). It is fair to say that the majority of the decision is devoted to the s.65 count.
10. At paragraphs 20 to 22, the Principal Magistrate appears to have formed the view that the charge under s.65 should have been under s.57, "use of threatening language" and that

because that was an offence within the Magistrate's jurisdiction he would not deal with it then and there.

11. Strictly speaking then, it does not appear that the Principal Magistrate in fact decided the Defendant's no case submission on the s.57 count. However, the fact that it also appears that he was intending to deal with it at some later point in time suggests that he did not agree with the Defendant's no case submission and was not prepared to summarily dismiss it.
12. In any event, it was common ground at the hearing of this appeal, that the Principal Magistrate did not dismiss the s.57 charge, as contended for by the Defendant, and that this Court should determine the appeal from that decision (or lack thereof).

### **Submissions on appeal**

13. By Notice of Appeal dated 18 November 2019, the Appellant contends that the learned Magistrate erred in law, in effect, by failing to interpret s.57 as meaning that "any officer in the service of the Government" does not include police officers, but only civil servants of the Government.
14. Mr Fonua's written submissions in support of the said ground of appeal may be summarised as follows:
  - (a) police officers are governed separately and independently by the *Tonga Police Act* ("TPA") and are expressly excluded from the operation of the *Public Service Act* ("PSA") which deals with 'normal employees of the Government';
  - (b) Section 2 of the *Interpretation Act* defines "officer" as any person, other than a labourer, in the permanent or temporary employment of the Government; whereas the term "police officer" is defined to include any member of the police force of the Kingdom of Tonga;
  - (c) as Ford LCJ in *Fononga v Police* [2003] Tonga LR 298 suggested in the circumstances of the case before him, consideration should be given to whether the offending in question is covered by some other legislative enactment (there, s.4(a) of the *Order in Public Places Act*), and that here, the appropriate charge was under s.146 of the TPA; and

- (d) by entering Faioso Vake's (the man who bought the stolen cow) property to retrieve the cow without a search warrant, the police officers concerned carried out an illegal act by trespassing on that land and therefore s.57 does not protect such police officers.
15. The Respondent contends that s.57 does apply to police officers as they are officers in the service of the Government. It's submissions on this appeal may be summarised as follows:
- (a) s.57 is within Part VII of the Act which creates offences against the State;
- (b) there is nothing in the Act which expressly excludes from its operation any specific persons or category of persons;
- (c) by analogy of reasoning in *R v Tu'ivakano* [2020] TOSC 5,<sup>1</sup> when police officers perform their statutory functions by upholding the laws of Tonga, they are serving the Government; and
- (d) before the TPA commenced in 2010, there was never any question that s.57 applied to police.

### Consideration

16. I will address each of the Appellant's four arguments in turn.

#### *PSA v TPA*

17. The Appellant's textual interpretation of the relevant words in s.57 - "any officer in the service of the Government" – consists of a comparison of the operation of the PSA with that of the TPA. The argument proceeds on the assumption that the answer lies in who is and who is not a civil servant subject to the operation of the PSA.
18. Similar arguments were advanced, and rejected, in *Rex v Tu'ivakano*, *ibid.* There, the question was whether the accused, when he was a Minister of the Crown, was a person employed as or acting in the capacity of a Government servant, for the purposes of s.50 of the Act.

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<sup>1</sup> CR 7 of 2019 (11 February 2020).

19. I adopt the same approach to the statutory interpretation task required on this appeal as I did in the *Tu'ivakano* ruling.<sup>2</sup>
20. The English meaning of the words under consideration are plain and unambiguous. They are capable of a broad and beneficial interpretation. There are only two descriptors, namely (i) any person who is an officer, and (ii) in the service of the Government.
21. The Act does not define “officer”. As Mr Fonua identified (in his second argument), the *Interpretation Act* does. There, it means ‘any person in the permanent or temporary employment of the Government’. The question then is one of employment. Is a police officer a person employed by the Government?
22. A prominent factor in determining whether a person is employed is the degree of control which the putative employer can exercise over the person. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it. Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee: *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 at [9].
23. Despite Mr Fonua's valiant efforts in contending otherwise, I am satisfied that a police officer is an officer employed by the Government. That a police officer may be appointed pursuant to the TPA is not to the point, save that perhaps, the very fact that Police officers are employed pursuant to an Act of Parliament is powerful evidence of the Government's control over their terms of employment. All officers in the employment of the Government, in any particular Ministry, are paid by the Government. The police force, like other departments within the public service, are administered by their respective relevant Ministry. Those Ministries are arms of the Executive branch of the Government. Even though s.20 of the TPA confers certain operational independence on the Commissioner of Police, s.17 makes the relevant Minister responsible for the proper administration of the TPA and the efficient management of Tonga Police. The fundamental function of Tonga Police is to uphold and enforce the laws of the Kingdom.<sup>3</sup>

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<sup>2</sup> At [11].

<sup>3</sup> S.9 of the TPA.

The statutory laws of the Kingdom are enacted by another arm of the Government: the Legislative Assembly. Therefore, it may be said that the very *raison d'etre* of the Tonga police is to serve the Government in effecting important aspects of the Government's role and responsibilities to the King and the people of Tonga in upholding the law.

24. The preamble to the Act states simply that it is an Act relating to criminal offences. There are no objects stated. Nothing in the Act expressly excludes from its operation any specific persons or category of persons.
25. By analogy if the reasons employed in *Tu'ivakano*,<sup>4</sup> the Appellant's argument here that police officers are not "officers in the service of the Government" because police officers are excluded from the operation of the PSA, must be rejected:
  - (a) Firstly, the rules of statutory interpretation do not permit resort to that Act for the purposes of seeking to define terms used in the *Criminal Offences Act*. The PSA is not *in pari materia* to the Act.
  - (b) Secondly, even if it was, the PSA does not, and does not purport to, define those persons who are officers in the service of the Government for the purposes of s.57 of the Act. If Parliament had intended to delimit the protection afforded by s.57 in the manner contended for by the Appellant, then one would expect that after the relevant words "any officer in the service of the Government" one would find the words "who is subject to the *Public Service Act*". No such limitation is to be found within the Act.
  - (c) Thirdly, the PSA establishes and provides for the operation of the Public Service Commission, the operation of the Public Service and appointments to key positions within the said service, it prescribes a code of conduct and dispute and disciplinary procedures and establishes the Public Service Tribunal to hear appeals from decisions of the Public Service Commission regarding employees under the Act. It applies to certain officers in the service of the Government. It expressly does not apply to those officers listed in Schedule II thereto, which includes police officers. But that of itself is not determinative.

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<sup>4</sup> [32] to [46].

- (d) Fourthly, the TPA separately provides for the establishment, organisation, discipline and powers of Tonga Police and for related matters. Section 6 in fact clarifies that the PSA may apply to police officers to the extent that the TPA does not deal with a matter that is dealt with by the PSA. That means no more than that matters concerning terms of appointment or employment, promotion, conduct and discipline of police officers are not governed by the PSA, but if there are matters concerning a police officer's employment which are not covered by the TPA but are covered by the PSA, then the PSA will apply. Further, Part 7 of the TPA provides for specific offences by or against police officers. Sections 164 and 165 deal with bribery of or by police officers. Sections 50 and 51 of the Act concern bribery of Government servants. This is an apt example of where Parliament considered that police officers accepting bribes or those offering bribes to police officers should be dealt with more severely than bribery offences concerning other Government servants. The other offences provided in Part 7 are specific to police operations and have no equivalent counterparts in the Act. In that context, the fact that Parliament has seen fit to legislate separately for the police force does not, in my view, alter their status police officers as officers in the service of the Government any more than a Minister of the Crown, who is also excluded from the operation of the PSA, is nonetheless a servant of the Government.

***Section 2 of the Interpretation Act***

26. In this argument, the Appellant contends that because the definitions of "officer" and that of "police officer" in s.2 of the *Interpretation Act* are different, a police officer is not included in the definition of 'officer' for the purposes of s.57.
27. In my view, this argument too must be rejected. Clearly, the definition of "officer" is intended to be general; whereas the definition of "police officer" it is intended to be specific. Therefore, on a plain reading of those definitions, a police officer is nothing more (or less) than a specific type of officer. The two definitions may be rationalised thus: a police officer is simply any person employed by the Government as a member of the Police Force of the Kingdom of Tonga.

***s.146 of the TPA***

28. The Appellant submits that s.57 does not apply to police officers because there are specific provisions in the TPA which provide adequate protection in respect of conduct of the kind the alleged against the Appellant in this case. Specifically, the Appellant identifies s.146 of the TPA as the more "appropriate" charge.
29. The submission is misconceived.
30. Section 146 provides as follows:

***146 Dealing with persons who obstruct a search***

*(1) If a person obstructs a police officer who is conducting a lawful search of the person, another person, premises, a vehicle, vessel or aircraft or anything in the premises or vehicle, vessel or aircraft, a police officer shall, if reasonably practicable —*

*(a) warn the person that it is an offence to obstruct a police officer in the performance of the police officer's duties; and*

*(b) give the person a reasonable opportunity to stop obstructing the search.*

*(2) Any person who obstructs a police officer in the circumstances mentioned in subsection (1) commits an offence.*

*(3) Any person who commits an offence under subsection (2) shall be liable upon conviction to pay a fine not exceeding \$250, or a term of imprisonment for a period not exceeding 3 months, or both.*

31. Section 146 bears no resemblance to s.57. The former is concerned with obstructing a police officer during a lawful search. The latter is concerned with threatening, abusive or insulting language or behaviour towards a police officer. A person could obstruct police officer during a search without being exposed to any of the language or behaviour proscribed by s. 57.
32. I note in passing that, in fact, the generalised equivalent of s.146 of the TPA is s.113 of the Act (obstructing a police officer in the execution of his/her duty, for which a higher penalty is prescribed).



33. The TPA does not contain any provision, whether a specified offence or otherwise, equivalent to s.57. Therefore, if the Appellant's argument were to be accepted, any person who used threatening, abusive or insulting language or behaviour towards a police officer whilst on duty would not commit any offence. That, in my respectful view, is an absurd outcome which could not have been intended by Parliament.
34. Mr Fonua's fallback argument was that by reference to comments made by Ford LCJ in *Fononga v Police* [2003] Tonga LR 298,<sup>5</sup> the scenario posited could be covered by a summary charge of disorderly behaviour under s.4 of the *Order in Public Places Act*. That offence concerns, relevantly, riotous, disorderly or indecent behaviour in any public place, court, police station or any place of public entertainment. Any such behaviour outside of those places is not covered. Here, the police officers were in their vehicle when the Appellant alleged telephoned them. Section 3(h) of the above Act prohibits any threatening, abusive, insulting or challenging words or behaviour in any public place or within the hearing of the persons in any public place. Again, that offence is limited to public places.
35. In any event, it is evident that Parliament intended more severe consequences for those who engage in threatening, abusive or insulting language or behaviour towards officers when in the service of the Government. That important and express distinction from ordinary citizens in society cannot be overlooked and effect to it must be given. Ordinary citizens (who arguably include government officers when not in service or 'on duty') may be afforded sufficient protection by the Order in Public Places Act for the sort of conduct alleged in this case (subject to the public places limitation). Other statutory provisions may also afford protection for similar behaviour in private places. But in my view, s.57 was deliberately designed by Parliament to respond to the language allegedly used in this case directed to the police officers concerned. In that regard, the Respondent's observation that prior to the introduction of the TPA in 2010, there was no question<sup>6</sup> that s.57 applied to police officers, is apposite.

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<sup>5</sup> Where the application of s.57 to a police officer was not disputed.

<sup>6</sup> As illustrated in *Fonunga*.

***Illegal search***

36. The Appellant's fourth submission is that, when they went to Faioso's property to retrieve the cow, the police officers committed an unlawful trespass, and that therefore s.57 does not apply to them.
37. During submissions before me, Mr Fonua confirmed that this submission was not raised before the Principal Magistrate below. It was therefore not determined by him. Moreover, it could not have been determined 'on the papers' as required by s.32 of the *Magistrates Court Act*.
38. Therefore, any issue of alleged illegality does not and cannot arise for determination on this appeal. It may be a matter for trial.

**Result**

39. The appeal is dismissed.
40. Directions in relation to the hearing of the charge under s.57 (Magistrates Court proceeding CR 49 of 2019) should await the outcome of the part heard appeal concerning the charge under s.65 in proceeding AM 21 of 2019 in this court (Magistrates Court proceeding CR 48 of 2019).



NUKU'ALOFA  
25 March 2020

A handwritten signature in blue ink, appearing to read "M.H. Whitten".

M.H. Whitten QC  
LORD CHIEF JUSTICE