IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY **CR 7 of 2019**

REX

-v-

'EIKI TU'IVAKANO a.k.a NGALUMOETUTULU KAHO

Defence application: whether s.50 of the Criminal Offences Act can apply to the accused

RULING

BEFORE:	LORD CHIEF JUSTICE WHITTEN
Counsel:	Mr J. Lutui with Mr T. 'Aho for the Prosecution
	Mr W. Edwards Snr SC with Mr Latu for the Accused
Date of hearing:	10 February 2020
Date of ruling:	11 February 2020

Introduction

1. The trial of this matter commenced this morning.

2. The Amended Indictment filed by the Crown on 7 February 2020 includes five counts of accepting a bribe by a government servant contrary to s.50 of the *Criminal Offences Act* ("**Act**"), which provides:

> ***50 Acceptance of bribe by government servant***
>
> *Every person employed as or acting in the capacity of a Government servant who shall demand or accept any money or valuable consideration of any description whatever as an inducement to do or abstain from doing any act in the execution of his duty as such Government servant or as an inducement for showing favour or disfavour to any person shall be liable to imprisonment for any period not exceeding 3 years.*

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3. Last Friday, 7 February 2020, Mr Edwards, on behalf of the accused, filed an application for a determination as to whether s.50 can apply to the accused as he was a Minister of the Crown at the time of the alleged bribery offences under that provision.

4. Notwithstanding that this proceeding has been on foot for well over a year, this is the first time that the accused has raised this issue.

5. Both Counsel provided helpful written outlines of submissions. However, neither referred to any previous decision on the point. My researches have not unearthed any. In *Rex v Veikune* [2006] TOSC 4, the Speaker of the Legislative Assembly and a Nobles' Representative was found guilty of the offence of bribery of a Government servant. Mr Edwards said that he acted for the then Hon. Veikune in the trial of that matter. The point now raised was not raised in *Veikune*. In his memorandum of submissions on this application, Mr Edwards described this issue as being of "some importance to the country".

6. A jury has been selected and sworn in. Argument on this application then ensued in the jury's absence. At the conclusion of submissions, I reserved my decision. I indicated to counsel that I would endeavour to complete my ruling overnight, in order for the trial to resume today. In the time available, therefore, this is my ruling on the application.

Submissions for the Accused

7. The submissions made on behalf the accused may be summarised as follows:

   (a) s.50 only relates to "a person employed as or acting in the capacity of a Government servant";

   (b) as Minister of Foreign Affairs at the time, the accused was not a civil servant or public servant;

   (c) by s.2 of the *Public Service Act* ("**PSA**"), and Schedule II thereto, the accused, as a Minister of the Crown, was excluded from the application of that Act;

(d) s.2 of the "Acts Interpretation Act" defines "civil servant" as any person in the permanent or temporary employment of the Government, which does not include a Minister of the Crown;

(e) a 'civil servant' has the same meaning as a 'public servant';

(f) a Minister executing a statutory power under the *Passport Act* is not acting as a person employed in the civil service; and

(g) it is not for the court to seek to cure any deficiency or fill any gap in the Act.

8. Mr Edwards' submissions may be condensed to one central proposition: that because the accused, as a Minister of the Crown at the time, was excluded from the application of the PSA, he is therefore not a person to which s.50 of the Act can apply.

Submissions for the Crown

9. Mr Lutui submitted, in summary, that:

(a) in framing the bribery charges on the indictment, the Crown relies on the second limb of s.50, namely, that the accused was "acting in the capacity of a Government servant", not that he was *employed* as a Government servant;

(b) the premise of the application is flawed because "civil servant" or "public servant" are not terms used in s.50 and the term "Government servant" is wider in scope;

(c) the purpose of the PSA being "to reform the law relating to the Public Service and to establish the Public Service" does not assist nor is it to be applied in conjunction with another Act, let alone the *Criminal Offences Act*;

(d) the definitions of "civil servant" and "civil service" were deleted from the *Interpretation Act* by amendment in 2002;

(e) the *Interpretation Act* does, however, define "officer" or "Public officer" in s.2 as being "any person, other than a labourer, in the permanent or temporary employment of the Government";

(f) the moment the accused became a Minister (and at the same time, Prime Minister), he became a person of temporary employment in the Government;

(g) the proper and ordinary meaning of the phrase "Government servant" must be any person in the permanent or temporary employment of the Government or acting in the capacity of a Government servant. The phrase "any person" in the *Interpretation Act* must encompass any person who served in the Government.

10. During his oral submissions, Mr Lutui explained that the rationale for the positions included in Schedule II to the PSA (discussed further below) was that they are all appointments by His Majesty in Council or other enactments. In other words, they are not positions employed by the Public Service Commission. Disciplinary forces such as the Police force, his Majesty's Armed Forces and prisons are all the subject of separate statutes with appointments to those forces made under those Acts. The *Tonga Police Act* is an example. Prior to 2010, when the *Tonga Police Act* was enacted, all police officers were subject to the bribery offences prescribed by the *Criminal Offences Act*. Since the inception of the *Tonga Police Act*, which contains its own offences concerning bribery, that specific legislation applies.

11. Further, Mr Lutui drew attention to subsequent sections within the same Part of the Act, namely sections 51 to 57. They create offences for bribery of Government servants, extortion by Government servants, fraudulent conversion by Government servants, the issuing of false receipts by Government servants, assaulting or obstructing Government servants, intimidating Government servants and the use of threatening language to a Government servant. Each of those provisions contains either identical or analogous terms and phrases to those under consideration in s.50 such as 'any person in the service of the Government', 'any Government servant' and 'any officer in the service of the

Government'. He submitted that if Mr Edwards' interpretation is to be accepted, then, for example, any person who assaulted a Minister of the Crown in the lawful execution of his duty could not be charged under s.55.

Reply

12. Mr Edwards did not reply to the submissions summarised in paragraph 10 above.

13. In relation to the Crown's submission at paragraph 11 above, Mr Edwards contended that that was the appropriate effect of excluding Ministers such as the accused (at the relevant time) from any definition of the phrase "Government servant" and that in the example concerning assault, s.112 - common assault - would apply. It is to be noted that the special provisions for assaults and other wrongs on Government servants carry approximately double the maximum sentence to the corresponding offences in other Parts of the Act not involving Government servants.

14. When, during argument, an alternative scenario was posited, one involving assaults on, say, judges in the performance of their duty, Mr Edwards submitted that the same outcome would apply. Similarly, he submitted that if a judge was involved in taking bribes, s.50 would not apply, and, as I apprehend his submission, the only statutory sanction might arise out of clause 87 of the Constitution which provides that judges shall hold office during 'good behaviour'.

Correct approach

15. The primary issue here therefore is the proper interpretation of s.50 and the words "person employed as or acting in the capacity of a Government servant".

16. Neither counsel referred to any authority on the approach to be taken to this task.

17. The approach I propose to take is informed by the following principles of statutory interpretation:[1]

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[1] Referred to, in part, in *'Atenisi Institute Inc v Tonga National Qualifications and Accreditation Board* [2019] TOSC 52; CV 13 of 2018 at [157].

(a) The natural and ordinary meaning of the words of the Act must be read in their context and in light of the purpose of the Act: *Crown v Schaumkel* [2012] TOCA 10, referring to *McKenzie v Attorney General* [1992] 2 NZLR 14 at 17. See also *Pacific International Commercial Bank Ltd v National Reserve Bank of Tonga* [2018] TOSC 26 at [88].

(b) The elementary rule must be observed that if the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning: *Gough Finance Ltd v Westpac Bank of Tonga* [2005] Tonga LR 390 at 394.

(c) To ascertain context, the document must be read in its entirety: *Wiebenga v 'Uta'atu* [2005] TOCA 5 at [8.]. This principle recognises the risks that can arise in giving meaning to particular words viewed in isolation from the context in which those words appear. Necessarily, words take their colour from their context: *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56 at [96]. See also *Tu'itavake v Porter* [1989] Tonga LR 14 citing Viscount Simonds in *Attorney-General v Prince Ernest Augustus of Hanover* (1957) 1 All ER 49:

> *"For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense..... as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."*

(d) The Court must also give effect to the ascertained purpose of the legislature when it enacted the contested law. Statutory provisions and common law rules in courts of high authority repeatedly lay emphasis on the need to go beyond a purely semantic approach to the discovery of statutory meaning: *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56 at [96]. Strict grammatical meaning must yield to sufficiently obvious purpose: *Crown v Schaumkel* (supra).

(e) A prime principle of statutory interpretation is a presumption that the legislature intended to pass legislation that would work. The whole statute must be considered for this purpose, not just the words being interpreted. Another prime principle in statutory construction is common sense: *Edwards v Fifita* [1999] Tonga LR 75.

(f) Parliament is presumed not to have intended to legislate in a manner which is absurd: *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 at [28] (CA); *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407; [2008] 2 NZLR 182 at [57]; *Sheehan v Watson* [2010] NZCA 454, [2011] 1 NZLR 314.

(g) The Court will strive for an interpretation which will make the Act work in the manner that the Court presumes Parliament must have intended; and to avoid one which will lead to a result which is absurd in the sense that the result may be unworkable, impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial or productive of a disproportionate counter-mischief: *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389; *Sheehan v Watson* (supra).

(h) Definitions are not to be treated as substantive provisions. Their function in a statute is merely to indicate that when particular words or expressions, the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way: *Gibb v FCT* (1966) 118 CLR 628 at 635.

Text, context and purpose

18. The Act came into force on 6 September 1926. Section 50 resides within Part VII entitled "Offences against the State". It does not appear that the provision has ever been amended. The phrase "Government servant" has never been defined.

19. In my view, and notwithstanding the absence of any definition of the term, the natural and ordinary meaning of the words "Government servant" is a person who serves the Government. I do not consider there is any ambiguity in the term.

20. For the purposes of s.50 then, the words under consideration may be understood to mean any person who is employed, or acts in the capacity of, serving the Government.

21. The context in which s.50 (through to s.57) is found is also instructive. Part VII creates offences which are against the State, which may be compared to other Parts relating to offences such as against persons and property. Neither counsel submitted that regard ought not be had to the heading to the Part. The *Interpretation Act* is silent on that although s.8(2) permits reference to the preamble of any Act for assistance in explaining its scope and object.

22. 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. Mr Edwards did not refer to any legislation which expressly seeks to exclude Ministers of the Crown from being subject to the criminal provisions of the Act. As mentioned above, disciplinary forces such as the police and the armed forces are subject to specific legislation[2] governing their conduct in the performance of their appointed functions. The *Tonga Police Act*, for instance, contains specific provisions prohibiting police officers, in the performance of their functions, from demanding or accepting bribes.[3] It is notable that those provisions carry maximum penalties including seven years imprisonment compared to s.50 which carries a maximum of three years.

23. I also have regard to the evident purpose of this Part of the Act and the mischief or vice it was intended to address. Contrary to Mr Edwards's submission that s.50 was intended to deter 'public servants' (in the limited sense used by the PSA) in their dealings with the public from demanding or accepting bribes, I incline to the view that the use of broader language in s.50 reflects an intention by Parliament

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[2] Tonga Police Act and His Majesty's Armed Forces Act

[3] Sections 164 and 165.

to deter (and punish where they are not deterred) all persons who act in the service of the Government from demanding or accepting bribes to perform their duties in that capacity. Some support for that view may be found in clause 73 of the Constitution which provides immunity to the members of the Legislative Assembly from arrest or judgment whilst the assembly is sitting, except in the case of indictable offences.

24. The question then arises whether Ministers of the Crown act in the capacity of serving the Government?

25. Clause 31 of the Constitution defines the Government as comprising the Cabinet, the Legislative Assembly and the Judiciary.

26. Members of Parliament (Legislative Assembly) are duly elected. The Prime Minister is appointed by Parliament. In the ordinary course, the Prime Minister will select the members of his Cabinet, whereupon His Majesty issues warrants for the appointment of Ministers forming the Cabinet.

27. Following such appointments, each minister, as the head of their respective ministries, and during the time they hold office, is paid a salary and other entitlements. As Mr Edwards explained, ministers' salaries and entitlements are specified within the 'vote' for each ministry which is the government's allocation of funds to meet the expenses of each ministry. The vote for each ministry will specify the salary and other entitlements payable to each minister. In short, for the performance of their ministerial functions, or service to the government, ministers of the Crown are paid salaries and other entitlements by the Government. It follows, as Mr Edwards conceded during argument, that if a minister is wrongly denied his or her salary or other entitlements, he or she would have a right of action against the Government for recovery of same.

28. In the instant case, the performance by the accused of his functions when he was Minister of Foreign Affairs included, inter alia, the exercise of discretion in approving applications for passports as conferred by, and in accordance with, the *Passport Act*. Every statute represents the will of the Government. Therefore, in the performance of his statutory functions, the accused was giving effect to the will of Government. He was serving the Government.

29. Accordingly, based on the statutory interpretation exercise undertaken above, in my view, it is at least arguable that Ministers of the Crown are employed to serve the government; and, they certainly act in the capacity of servants of the Government.

30. Further, the interpretation contended for on behalf of the accused would lead to absurdity. If accepted, the accused's interpretation would lead to a result whereby any Minister of the Crown (along with all those occupying the other positions referred to in Schedule II to the PSA) who might ever engage in giving or receiving bribes for the performance of their duty would be exempt from any criminal sanction but might, at worst, only be dismissed from office. And yet, any other government servants within each minister's ministry who engaged in the same conduct would face disciplinary proceedings under the PSA most likely leading to dismissal as well as criminal prosecution with a maximum penalty of three years imprisonment. In my view, that is not an outcome which Parliament could be taken to have intended.

31. In the absence of any express or implied indication within the Act to exclude Ministers from the ambit of sections 50 to 57, a result in which such acts committed by them or to them would fall outside the operation of those provisions, but would nonetheless apply to other Government servants, could not sensibly be presumed to be Parliament's intended operation of this Part of the Act.

Resort to the PSA?

32. The accused's application is founded almost entirely on an asserted approach of adopting what were said to be the defined concepts of 'public servant' within the PSA, including its exclusions, and to implant them into s.50 (and 51 to 57) of the Act as a form of de facto definition for the term "Government servant" therein.

33. At this point, one is reminded of Mr Edwards' submission during argument to the effect that because the Act is a criminal statute, it is to be interpreted strictly. In the case of any ambiguity, so much may be accepted. However, the rationale for strictly interpreting s.50 of the Act by resorting to allegedly analogous defined terms in the PSA went unexplained.

34. In any event, for the reasons which follow, the accused's argument must be rejected.

35. The relevant provisions of the PSA are among those which commenced on 1 May 2003. The preamble to the PSA describes it as an "Act to reform the law relating to the public service and to establish the Public Service". Section 4B specifies its objects as to:

> *"(a) establish an apolitical public service that is effective and efficient in serving the Government and the public;*
>
> *(b) provide a legal framework for the effective and efficient management and leadership of the Public Service;*
>
> *(c) define the powers, functions and responsibilities of the Prime Minister, the Commission, relevant Ministers and Chief Executive Officers; and*
>
> *(d) establish rights and obligations of Public Service employees.*

36. Section 2 provides that the PSA shall not apply to the persons listed under Schedule II. That Schedule lists 22 positions including Cabinet Ministers appointed under the Constitution, judges, members of the Tonga Police appointed under the *Tonga Police Act* and employees of the Legislative Assembly appointed under the *Legislative Assembly Act*.

37. The PSA otherwise 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, prescribes a code of conduct and dispute and disciplinary procedure and establishes the Public Service Tribunal to hear appeals from decisions of the Public Service Commission regarding employees under the Act.

38. In order to permissibly use one statute to assist in interpreting another, a number of principles must be observed.[4]

39. Firstly, 'in the absence of any context indicating a contrary intention, it may be presumed that the Legislature intended to attach the same meaning to the *same*

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[4] Pearce & Geddes on "Statutory Interpretation in Australia", 6th edition, Lexis Butterworths at 3.36 to 3.38.

words when used in *a subsequent statute in a similar connection*': *Lennon v Gibson and Howes* [1919] AC 709 at 711-12; 26 CLR 285 at 287.[5]

40. Here, that principle presents three insuperable obstacles to the accused's approach, namely:

    (a) there is nothing in the context in which the term 'public servant' appears in the PSA which suggests that the Legislature intended it to be used to define 'Government servant' in the Act;

    (b) the Act predates the PSA; and

    (c) the words "Government servant" in the Act are nowhere to be found in the PSA.

41. Secondly, one statute may be used to assist in the interpretation of another where the two are '*in pari materia*' (literally: in an analogous case). Statutes are *in pari materia* where they relate to the same person or thing or to the same class of persons or thing; although similarity of subject matter may not always be sufficient.[6] The principle has particular force if the legislation under consideration, and that with which it is compared, have their origins in the same source. For example, in *Kerr v Verran* (1989) 88 ALR 125 at 136-7, Jenkinson J concluded that provisions in Commonwealth Public Service Acts in which the word 'seniority' was used were *in pari materia* with a provision of an Australian Capital Territory Ordinance dealing with employment of a particular group of ACT public servants, in which the same term appeared. In *Alfonso v Northern Territory* (1999) 131 NTR 8 at 10, Mildren J considered the underlying purposes of two Acts, to reach the conclusion that they were not *in pari materia*.

42. In *M. Collins & Son Pty Ltd v Bankstown Municipal Council* (1958) 3 LGRA 216, Sugerman J cast doubt on the use that could be made of the definition of a word or phrase in a statute in the interpretation of that word or phrase in a similar statute in which it was not defined. He considered that the attachment of a meaning to a word in the interpretation clause of the statute very commonly

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[5] Referred to more recently in *Kwok v Maresch* [2019] NSWSC 1151 at [57].

[6] *United Society v Eagle Bank* (1829) 7 Conn 457 at 470.

involved some artificial extension or limitation of the natural meaning of the word for the purposes of that statute. Accordingly, statutory definitions are dependent so much upon context that little, if any, benefit was to be derived in the consideration of the meaning of the defined word for the purposes of another statute. Similar doubts arise on the present application.

43. In my view, the PSA and the Act are not *in pari materia*. They do not have their origins in the same source. They are concerned with very different subject matter. The purpose of the PSA is to establish and regulate the Public Service. Its scope of application is expressly confined to chief executive officers and employees in a Government Ministry who are employed by or through the Public Service Commission and excludes other servants of the Government who are not so employed, but who are appointed by the King in Council or other enactment. Its objects are principally concerned with the employment conditions of those to which it applies and have no relationship whatsoever with the criminal law.

44. By contrast, the purpose of the Act is to provide for criminal offences. Apart from the limited group of disciplinary forces who are subject to specific legislation regulating their conduct in the performance of their duties, the criminal offences prescribed by the Act generally apply to all persons within Tonga. So much is reflected by the ubiquitous references throughout the Act to "a person" or "every person". The specific provisions considered here – ss.50 to 57 – are one of the few parts of the Act which qualify its application to a subset of 'all persons', namely those employed as or acting in the capacity of Government servants.

45. Finally, even if there was a basis for treating the two statutes as *in pari materia*, had Parliament intended the term "Government servant" to be synonymous with and limited to those employees[7] of the Public Service to which the PSA applies, one would have expected to see in the PSA use of the term "persons employed as or acting in the capacity of Government servants" or even just "Government servants". Neither appear anywhere in the PSA.

46. For completeness, for a piece of legislation which is far more likely to be regarded as *in pari materia* with the relevant Part of the Act with which this application is

[7] Which is in fact the term used throughout the PSA with only two references to 'public servant'.

concerned, one need look no further than a statute referred to by Mr Edwards in submissions. Section 2 of the *Anti-Corruption Commissioner Act* defines "public official" as an individual having public official functions or acting in a public official capacity, and includes a Minister of the Crown, a member of the Legislative Assembly and an officer or temporary employee of the Public Service. The purpose of that Act includes investigating 'corrupt conduct' which, by s.6, is defined to include any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his official functions.

Gap in the Act?

47. Mr Edwards submitted that the current application highlights deficiencies in the relevant Part of the Act, which, he said, are a matter for the Legislature to remedy and that it is not for the court to seek to 'fill the gap'.

48. Where the relevant words of a provision are plain and admit of only one meaning, judges should apply the words, even if the meaning may seem at odds with the purpose of the legislation. There are limited exceptions to that rule. They include where the words, literally interpreted, would be so far outside the purpose of the statute that to apply them literally would lead to an absurdity.[8] In such circumstances, a judge has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.[9]

49. Here, in my view, there is no gap or deficiency in the relevant Part of the Act. The submission is a product of circuitous reasoning. Only by impermissibly seeking to import terms or concepts used in the PSA, with its exclusion of application to Ministers of the Crown, does the accused seek to arrive at the erroneous conclusion that s.50 of the Act does not apply to Ministers and therefore any conduct by them involving bribery in the performance of their functions must escape criminal sanction, thereby creating a philosophical 'gap' in the Act. For the reasons explained above, there is no warrant to resort to the PSA in an endeavour to interpret the relevant words in s.50, and to do so, contravenes

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[8] 2003 article by the Hon. Justice Susan Glazebrook of the Court of Appeal of New Zealand entitled "Filling the Gaps https://www.courtsofnz.govt.nz/speechpapers/Speech05-05-2003.pdf/?searchterm=%22filling%20the%20gaps%22

[9] Sir Rupert Cross on Statutory Interpretation (3ed, 1995) 49 referred to in fn 8.

stated principles of statutory interpretation. The natural and ordinary meaning of the relevant words is capable of providing an interpretation and application consistent with the context in which the section appears in Part VII of the Act as a whole and the purpose of the Act.

Result

50. Insofar as the application seeks a ruling on the question of whether s.50 is applicable to the accused at the time of the alleged offending, when he was the Minister for Foreign Affairs, the answer is that it does.

NUKU'ALOFA
11 February 2020

M.H. Whitten QC
LORD CHIEF JUSTICE