

for an extension of time in order to file further affidavits. The reason is to fill a gap in the evidence similar to that which proved fatal to the application in the Saulala case.

Counsel for the respondents in each case have objected but I have allowed the application to file further affidavits. I stated I would give brief reasons in writing. I now do so.

These are both allegations of criminal contempt. In every such case the court must bear in mind the need both to protect fair trial and to protect the rights of the defendants who face criminal sanctions.

In the Saulala case, I pointed out that the courts in Tonga have not followed the strict rule under the English Order 52 in applications before the Divisional Court by which all evidence the prosecution intends to adduce at the trial must accompany the application for leave. The procedure here has been to allow both sides to file affidavits followed by trial on those affidavits. In Saulala's case that procedure was followed but, at the trial, there was still a fatal lacuna in the prosecution evidence.

Following that ruling, Mr Kefu for the Attorney General, having no doubt taken the sensible step of checking its effect on other pending cases, realised he was likely to find himself in a similar position in each of the present cases. As a result he applied for leave to file fresh affidavits. He accepts that, if his application is allowed, the defendants must then be given an opportunity to file further affidavits in reply.

Mr Edwards, for the defendants in case 78/01, relies on the fact that the evidence at the close of the time allowed for filing affidavits showed the same fatal flaw. He points out that, as they stand, the proceedings must inevitably fail because it is clear that there is no evidence of an essential element and to allow the prosecution to patch up its case would deny the defendants the right to challenge the validity of the charge and the sufficiency of evidence.

I cannot accept that proposition. These cases are at a different stage to that reached when I made my ruling in Saulala's case. Before the case is listed for hearing, either side should have an opportunity to add further evidence if, in the discretion of the court, there would be no injustice.

These are summary criminal proceedings. The important principle in criminal trials is that the defendant should know clearly the case he will have to answer and be unhindered in his right to make a defence if he so wishes. It has long been the position in indictable offences that amendment to the indictment may be allowed, even at a late stage, as long as it will not cause injustice to the defendant.

In criminal trials the state generally has considerably superior resources with which to prepare its case and so the court will be diligent to ensure the defendant is given a proper opportunity to challenge the prosecution case and to present his defence. However, the procedures are intended in all cases to ensure that the real issue in controversy is brought before the court for determination.

In the present cases the prosecution has already clearly stated the nature of the charge it intends to pursue against the defendants. The evidence it wishes to adduce by the additional affidavits raises no fresh allegation but simply supports the charge already made in the notice of motion and will ensure the court is able to determine the matters in contention.

Had that application been made after the commencement of the trial different considerations may have applied but, made at this stage in the proceedings, I can see no prejudice to the defendants.

The application is granted. Counsel for the Attorney General is to file further affidavits within 14 days of my original order on 28 June 2001 and the respondents may file affidavits in reply within 14 days thereafter. Upon receipt of those affidavits, I shall set a further chambers hearing in order to set a trial date as soon as possible.



NUKU'ALOFA: 5th July, 2001.

W. C. C. C.
CHIEF JUSTICE