

**IN THE COURT OF APPEAL
HELD AT RAROTONGA**

**CA 14/14
MISC NO. 33/2014**

IN THE MATTER of Section 102 of the
Electoral Act 2004

AND
IN THE MATTER of the constituency of
Teenui-Mapumai on the
Island of Atiu

BETWEEN **NORMAN GEORGE**
Appellant

AND **VAINETUTAI ROSE
TOKI-BROWN**
First Respondent

AND **CHIEF ELECTORAL
OFFICER**
Second Respondent

Coram: David Williams P
Barker JA
Paterson JA

Counsel: Mr N. George in person
Mr P.J Dale and Mr A.M. Manarangi for First Respondent
Ms Catherine Evans for Second Respondent

Hearing: 19 November 2014

Judgment: 21 November 2014

JUDGMENT OF THE COURT

INTRODUCTION

- [1] This appeal by way of case stated is brought under the provisions of section 102(2) of the Electoral Act 2004 (“the Act”). The Appellant, Mr Norman George, had been the unsuccessful candidate standing for the Cook Islands Party in the constituency of Teenui-Mapumai in Atiu in the general election held on 9 July 2014. The First Respondent, Mrs Vainetutai Rose Toki-Brown won the seat by 71 votes to 59. There were no other candidates.
- [2] On 23 July 2014, the Appellant and five constituents issued an election petition under section 92 of the Act, pleading several electoral offences. This petition was amended, without objection, on 8 August 2014 to allege only one electoral offence of bribery with seven particulars.
- [3] The petition was heard by Hugh Williams J in the High Court who sat in both Atiu and Rarotonga. He issued a judgment on 16 September 2014 dismissing the petition.
- [4] In the course of the hearing, the Judge made a procedural ruling in which he said:

...That said, it may be of assistance to the Parties if some observations made about the evidence in this case and indeed other petitions for inquiry. Mr Mitchell submitted that because the Court has directed that possible witnesses for any of the Parties file and serve briefs of evidence prior to the fixture, that those briefs are, as he puts it, half of the corpus or the body of evidence which is available for the Court to consider and he draws the comparison with criminal proceedings and the provision by the Crown at least, of depositions prior to a fixture.

The comparison with criminal proceedings is inapt in the Court’s view even though the allegations in this case are of bribery, that is to say of course, a serious criminal offence. The briefs of evidence are directed to be filed in Court and to be served on the opposite side. That is to ensure that all parties, including the Court become informed of the matters at issue in the petition and opposing parties have a full opportunity to consider their position and meet whatever challenges are brought against them. Again, that is to ensure that only those persons properly elected become Members of Parliament at the conclusion of the process.

But that does not mean that the filing of briefs of evidence results in those briefs becoming evidence in the inquiry. The witnesses still need to be called, they still need to be sworn and importantly, they still need to be available for cross-examination. All the brief amounts to is a statement by the witness of what they might say if they are called to give evidence.

That observation gains additional force in this case because none of the briefs filed on the Court file, have as yet been sworn: many are in affidavit form but it appears that none have been sworn prior to being filed. Understandable enough, because there is no guarantee that that person will give evidence. Its particularly the case in relation to the Petitioner’s briefs in this inquiry because none of those are in affidavit form.

Although the documents might be on the file prior to the fixture, they are not

evidence until such time as the witness is called and elaborates on their evidence in Chief and is available for cross-examination. The next observations is that Mr Mitchell submitted that because the parties have engaged in pre-trial discovery in this case, that in some way makes the documents discovered part of the evidence. Discovery is a pre-trial procedure designed to ensure that all parties are fully informed of the documentary evidence supporting or weakening their case and to avoid a multiplicity of witnesses having to be subpoenaed to come along and produce this document or that.

- [5] The Judge recorded that the First Respondent and her husband, George Taoro Strickland Brown, were not called as witnesses, although the file records that they had filed affidavits prior to the hearing.
- [6] The Appellant complained that the Judge did not require the First Respondent and her husband to be cross-examined on their affidavits but, instead, proceeded to his decision only on the evidence he heard with only limited recourse to their affidavits and to various witness statements from others who had not given evidence. The Judge said in his final judgment that these ‘briefs of evidence’ (as he referred to the documents filed including the two affidavits) were “likely to be of little weight since the authors had not been cross-examined.” “In the procedural ruling quoted, which was made after the First Respondent had submitted that there was no case to answer on the evidence produced by the appellant,” Hugh Williams, J made it clear that the affidavits and briefs of evidence filed before the hearing were not going to be regarded by him as evidence.
- [7] Counsel for the First Respondent informed us from the bar that the Judge had rejected an application by the appellants to cross-examine the First Respondent and her husband in Rarotonga after the Atiu hearing had been completed. The Judge’s reason was that the application had been made too late and that the Appellant had disregarded the procedural arrangements made by the Chief Justice for the conduct of the seven election petitions where the High Court was endeavouring to hear expeditiously. The Appellant did not make comment to this Court on this information.
- [8] This Court cannot on a Case Stated appeal interfere with the Judge’s procedural directions. There is no right of appeal from any interlocutory decision. The Court is required to accept the facts as set out in the case stated by the Judge.
- [9] The Court has to accept the Judge’s findings of fact although he seems not to have considered aspects of the material in the affidavits of the First Respondent and her husband was at variance with the facts recorded in the case stated. For example, Mr George stated that there was evidence as to who paid the freight on the washing machine. That freight was subject of one of the bribery allegations Mr Brown’s affidavit stated that he had paid the freight to the shipping company (as one should have expected) and that the person who received the washing machine agreed to pay for the freight by supplying unga crabs when in season. The Judge indicated in the ruling that he would not consider the affidavits and made that clear to the parties.
- [10] The Judge clearly [] this evidence which was the approach the Court must adopt on an appeal of this nature is that set out in *Wigmore v Matapo & others* (CA

14/04 – Judgments 19 August 2005) which cited with the comments in Case Stated a in *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76, 87.

[11] As there were seven allegations of bribery in the petition at first but only three were pursued on appeal, the relevant facts and findings were set out in the Case Stated as follows:

Washing machine decision

Allegation

The petitioner's allegation was that Mr and Mrs Brown gifted the freight on a washing machine worth about \$150 to Mrs Mata John (also known as Mama Kai John) a Teenui. Mapumai voter.[37]

1. On 27 June 2014 a ship arrived at Atiu Harbour. [9]
2. A Haier washing machine was discharged. [38]
3. The consignee on the bill of lading was Super Brown Ltd. [38]
4. Super Brown Ltd operates shops on Atiu with a branch on Rarotonga. [5]
5. The Super Brown stores retail general merchandise, dry and frozen groceries, petrol and diesel. The company sells and rents motorcycles, and also hires out a forklift and excavator. [6]
6. The bill of lading included a receipt for freight. [39]
7. There was no evidence as to who wrote the receipt or who paid the money. [39]
8. The washing machine was taken from Atiu Wharf by Super Brown representatives and delivered to Mrs Mata John on 27 or 28 June 2014.[39]

I determined on the evidence adduced –

There was no evidence that Super Brown, still less Mrs Brown, made a gift of the freight to Mama Kai and bribery Particular (c) was accordingly dismissed.

Re-roofing allegation

Allegation

The petitioner's allegation was that on 08 July 2014, the day before the election, Mrs Brown and her husband as Mayor of Atiu together with Mr Porio, Manager of the Atiu Government Department of Infrastructure and a member of Mrs Brown's campaign team directly or indirectly gifted to Papa Moe Akai, a Teenui-Mapumai elector, free use of three government carpenters to re-roof his house. [51]

1. Mr Akai is a voter in Teenui-Mapumai and there are several other voters living in his house. [53]
2. Mr Akai's house was substantially re-roofed on 08 July 2014, the day before the election. [53]

3. Other work to complete the job was done shortly after the election. [55]
4. Three carpenters from the Atiu Government Ministry of Infrastructure were among those who worked on the re-roofing. [53] [55]
5. The carpenters from the Ministry of Infrastructure were provided free of charge. [53]
6. The Atiu Island Government has a policy of providing assistance to community projects, organisations and elderly pensioners with the assistance often being in the form of free labour by the Infrastructure Division of the Island Administration. [56]
7. Mr Akai is 85 years old, his roof leaked and its state of repair was so poor it needed replacement. [57]
8. Mr Akai's son, Tere Akai, who lives in Auckland, New Zealand, had decided in January 2013, when visiting Atiu, to return with materials required for re-roofing once he had saved sufficient to do so. [58]
9. Tere Akai returned on 03 July 2014 intending to leave after the re-roofing was done but stayed on an extra week to fence his father's planting area. [58] [60]
10. The materials for re-roofing arrived at Atiu the week before the election. [61]
11. Tere Akai applied to the Atiu Island Government for access to its policy of assisting pensioners by providing free labour.
12. Mr Maurangi, the Executive Officer of the Atiu Island Government approved the provision of free labour and authorised Mr Porio, the Manager of the Atiu Island Infrastructure Division to assign carpenters to undertake the work. [62].
13. Mayor Brown did not approach Mr Maurangi about the matter and Mr Maurangi did not ask Mayor Brown for approval or consult with him before exercising his authority to approve his work. [63] [70]
14. Mr Porio played no part in making the decision. On Mr Maurangi approving the project Mr Porio implemented the decision. [70]

I determined on the evidence adduced –

- i. Mr Maurangi carefully considered the possible allegations of political purpose of approving the provision of labour. He decided to approve provision of the labour out of humanitarian concerns for Mr Akai and his household between the tight time-frame for which the work had to be done. There was therefore no political purpose in Mr Maurangi's actions and no significant purpose. The way in which Mr Maurangi's decision was made pointed towards a conclusion that the elements of bribery have not been approved. [68] [70]
- ii. There was no proof that the giving of the free assistance involved Mrs Brown or her agent with her authority. There was similarly no proof that free labour was provided by the first respondent on the condition that Mr Akai would vote for her, still less that his household would. [72]

iii. Bribery allegation (f) accordingly failed. [73]

T-shirt decision

Allegation

The petitioner's allegation was that in late April 2014, Mrs Brown provided 50 free t-shirts for the Youth of Atiu. [74]

1. There was a National Your Forum at Atiu College between 20-28 April 2014. [75]
2. The date for the Forum and its location at Atiu was set at a previous Youth Forum held in either in 2012 or 2013 in Rarotonga.
3. Super Brown Ltd provided at least 50 (possibly up to 92) free t-shirts for the Forum. [75]
4. The t-shirts were identified as coming from Super Brown by the firm's name appearing on the left breast. [75]
5. Super Brown Ltd did not charge for the t-shirts but the Atiu Youth Division charged attendees \$10 for each t-shirt. [75]
6. The t-shirts were sold to any of the approximately 170 attendees who paid the price. [75]
7. Approximately three quarters of those attending from throughout the Cook Islands were of voting age and about 10 of those lived in the Teenui-Mapumai constituency. [75]
8. There was no evidence that the decision by Super Brown to donate the t-shirts was made after the date the election was announced. [79]
9. The t-shirts only came to be provided a few days into the election period and the gift was only within that period as a result of the unexpected announcement of 17 April that the election would be on 09 July. [79]
10. Evidence was lacking that the provision of the sponsored goods was given to induce any Teenui-Mapumai voter who may have been present to vote for Mrs Brown and on the condition they would do so. [79]

I determined on the evidence adduced –

The sponsorship was not made for political purposes nor corruptly as being on made with the object of doing something s.88 is intended to forbid and that the elements of bribery had not been made out and therefore the allegation was accordingly dismissed.

[12] The Case Stated thus sought this Court's opinion as to whether the High Court's conclusion in each alleged case of bribery was correct. We deal with the each allegations in the order as set above.

Washing Machine Allegation

[13] In respect of the washing – machine bribery allegation the Appellant submitted that the delivery should have been postponed until after the election: There were five other electors living with Mrs John: there was an indirect gift to her of the freight: mixed motives do not matter provided a significant purpose was political: the burden of proof is on the balance of probabilities.

[14] The Judge made no finding as to who paid the freight. Even if it were the First Respondent, or her husband, there was nothing on which an inference of bribery could be based.

[15] The appellant is seeking to convert this appeal into one against the Judge's findings of fact which is not permitted in an appeal by way of Case Stated. This allegation of bribery must fail for the reasons found by the Judge in the Case Stated.

Roofing Allegation

[16] The Appellant submitted that the re-roofing of Mr Akai's house was done free-of-charge by labourers under the control of the First Respondent's husband who was Mayor of Atiu, through his subordinates, on the day before the election. The house had needed repairs for about 18 months and there was no emergency justifying urgent repairs. The policy of providing assistance by the administration of Atiu was largely used for community facilities and direct assistance to individuals and was never given during an election campaign. There were other persons who had to wait for assistance until after the election. Mr Maurangi, the Executive Officer 'covered up' for the Mayor by stating that he had not consulted the Mayor before authorising the work.

[17] Accusations of lying were made against Mr Maurangi which should not have been made by the Appellant in his submissions to this Court. We reject them since there is no evidence and Mr Maurangi was given no opportunity to respond. In fact the Judge found him to be a credible witness.

[18] A Mr Porio implemented Mr Maurangi's decision to authorise the labourer's work on Mr Akai's house. He was said to be the First Respondent's campaign organiser. The Judge found as a fact that Mr Porio had played no part in the decision to deploy the labourers. Despite this, the appellant made unwarranted claims that Messrs Maurangi, Porio and Brown had planned the re-roofing exercise and "conducted a scheme of corruption and deception in order to win the parliamentary seat"

[19] The appellant criticised the Judge's acceptance of Mr Maurangi as an honest witness and claimed there had been no humanitarian motive in having the work done within a right time-frame.

[20] The Appellant submitted that Messers Maurangi, Porio and Brown were electoral agents for the First Respondent and therefore she was liable for their actions under the law relating to electoral agents laid down in such cases as *Re Bay of Islands Election Petition* (1915) 34 NZLR 578.

[21] As in the other allegations of bribery in this appeal, the Appellant has completely failed to grasp the limited scope of an appeal on a question of law by way of Case Stated. The Judge found that Mr Akai's son had brought the roofing materials for his father's house from New Zealand and applied in the Atiu government for the provision of labour only. Mr Akai junior was on a tight timetable.

[22] The Judge decided that Mr Maurangi, although aware of the possibility of a bribery allegation if the work were done so soon before the election, decided to authorise the labour out of humanitarian grounds. Such a finding was available to the Judge on the evidence and cannot be challenged in an appeal of this nature. He also decided that Mr Maurangi had no political purpose and that neither he, Mr Porio nor Mr Brown could be held to be electoral agents. Also, he held that there was no proof that the First Respondent was involved.

[23] The Appellant faced an impossible task in view of these findings of fact to upset the judgment. On a Case Stated appeal

T-shirts Allegation

[24] On the third bribery decision, the Appellant submitted that the donation of the T-Shirts was intended to win approval from the electors. The Court could infer bribery because of the Super-Brown emblem on the garments and the absence of any distancing by the First Respondent.

[25] Although the sponsorship contract was entered into before the election had been called, the First Respondent should have declared that the T-shirts were not being donated to the community for political purposes. The appellant referred to a quotation from *Halsbury* 4th Edition.

714. Charitable gifts may constitute bribery. The distribution of genuine charitable gifts to voters has always been allowed. On the other hand, what are called 'charitable gifts' may be merely a specious and subtle form of bribery. If a gift is charitable, it will not become bribery because of the use made of it, even if political capital is made out of gift, it is not possible by any subsequent act to make that which was legal at the time illegal and criminal.

The imminence of an election is an important factor to be taken into consideration in deciding whether a particular act of charity amounts to bribery. A charitable design may be unobjectionable so long as no election is in prospect, but if an election becomes imminent the danger of the gift being regarded as bribery is increased. It has been said that charity at election times ought to be kept in the background by politicians.

The question is one of degree. An isolated small donation on the occasion of a birth or death may not be bribery although such gifts on an extensive scale would lead to the inference that they were given to influence voters.

[26] The Judge concluded as facts that the sponsorship was not for political purposes nor corruptly made. He was unable to find bribery on the facts as found by him. Such a finding was open to him.

[27] Once again, the Judge's decision on the facts is not possibly challengeable and the allegation of bribery must fail.

Result

[28] The questions posed by the Case Stated are answered as follows:

Washing Machine Decision: "Yes"

Re-roofing Decision: a) "Yes"; and
b) "No."

T-shirts Decision: "Yes".

[29] The appeal is dismissed. The Court certifies to the Second Respondent that the First Respondent, Vainetutai Rose Toki Brown is the duly elected member.

[30] The First Respondent is awarded costs against the appellant of \$3,000.00. The Registrar is to pay out to the First Respondent's solicitor that amount out of the security provided.



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David Williams (President)



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Sir Ian Barker (Justice of Appeal)



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B.J. Paterson (Justice of Appeal)