Minister of Police v Moala, 'Akau'ola & Pohiva

Court of Appeal
Morling, Burchett & Tompkins JJ
APP.19/96

11 & 20 June, 1997

Constitution - power of Court - proceedings of Legislation Assembly
Habeas corpus - power of Court - privilege of parliament - contempt
Legislative Assembly - contempt - Constitution - Court

The judgment below, when the respondents were released on their application for writs of habeas corpus, is reported in [1996] Tonga LR, the respondent having been imprisoned for 30 days by the Legislative Assembly for contempt. The Minister appealed.

Held:

1. The position in Tonga as to parliamentary powers privileges and immunities is not the same in some other Commonwealth countries, because of the provisions of the Constitution; and it confers specific and limited powers in relation to contempt by cl.70.
2. So those powers and privileges in Tonga, depend on a true understanding of the Constitution.
3. The jurisdiction to determine the meaning and application of the Constitution is conferred on the Supreme Court; and an exclusive power and jurisdiction to hear appeals from the Supreme Court is conferred on the Court of Appeal.
4. The Supreme Court has a jurisdiction to determine whether in a particular case the Legislative Assembly has exceeded the powers conferred on it by the Constitution. The Legislative Assembly may not enjoy, hold and exercise privileges, immunities and powers which are inconsistent with fundamental rights guaranteed by the Constitution.
5. A general warrant cannot preclude further enquiry by a Court if there is a challenge to an assertion of a parliamentary privilege defined by terms of a written constitution.
6. There is no constitutional right for the Legislative Assembly to deal with a person for an offence which did not exist at the time of the alleged commission of it, still less to deal with a person for an offence which never existed.
7. The warrant here was not a warrant that stated a contempt in general terms; but was a warrant that stated no offence at all, instead relying on an asserted Order of the Legislative Assembly, by virtue of the power in cl.70 a direct appeal to the Constitution, which must entitle and require the Court, as the guardian and the interpreter of the Constitution, to investigate whether, in the

particular circumstances, the "power" claimed was vested in the Assembly.

8. The summons to the respondents stated an offence which simply did not exist under the Constitution. Guilt was founded on that allegation. The Assembly erred in its interpretation of the Constitution and acted beyond its powers under cl.70 in preferring the charge and finding it established.

9. In addition the Constitution guarantees the procedural requirements of natural justice at such a trial before the Assembly. The respondents were entitled to natural justice.

10. The right to obtain a writ of habeas corpus is not lost by virtue of previous refusals.

11. The appeal was dismissed.

Cases considered:
R v Richards exp. Fitzpatrick & Browne (1955) 92 CLR 157
Speaker (Victoria) v Glass [1871] LR 3 PC App 560
Kielly v Carson (1942) 4 Moore PC 63
Fotofili v Siale [1996] Tonga LR; [1987] SPLR 339
Bank of NSW v Commonwealth (1948) 76 CLR 1
Cmmsr Taxation v Lutovi (1978) 140 CLR 434
Clayton v Heffron (1960) 105 CLR 214
Armstrong v Budd (1969) 71 SR (NSW) 386
Smith v Mutasa [1990] LRC 87
Special Reference No.1, 1964 (1965) 1 SCR 413
Cormack v Cope (1974) 131 CLR 432
Robati v Cook Isl. (17-12-93) CA, Cook Is.
Sheriff of Middlesex case (1840) 11 ADa E 273
Cmmsr Police v Tanos (1958) 98 CLR 383
Touliki Trading v Fakafanua [1996] Tonga LR
Doyle v Falconer (1866) LR1 PC 328
Stockdale v Hansard (1839) 9 AD & E114
Eleko v Nigeria [1928] 1 AC 459

Statutes considered: Constitution

Counsel for appellants : Mr Waalkens
Counsel for respondents : Mr N. Tupou
Mr Tu'utafaiva & Mrs Taufaeteau

Judgment

This appeal raises important questions concerning the privileges of the Legislative Assembly of Tonga, and no less important questions concerning the liberties guaranteed to Tongan citizens by the Constitution.

Clause 70 of the Constitution finds its place within a group of clauses that relate to the Legislative Assembly. In that group of clauses, clause 69 makes it "lawful for the Legislative Assembly to pass judgment upon its members for their acts or conduct as members of the Legislative Assembly". Then clause 70 provides:

> "If anyone shall speak or act disrespectfully in the presence of the Legislative Assembly it shall be lawful to imprison him for thirty days and whoever shall publish any libel on the Legislative Assembly, or threaten any member or his property, or rescue any person whose arrest has been ordered by the Legislative Assembly, may be imprisoned for not exceeding thirty days."

Although clause 70 does not specify by express words the tribunal which is to try an offender against that clause, the nature of the subject with which it deals and its setting in the Constitution, suggest that the Legislative Assembly itself shall have the power to hold a trial. That is how the clause has hitherto been understood, and how the original 1875 version of the Constitution read. (In that version, the provision now made by clause 70 was made in closely similar language by clause 73.)

As was pointed out in the joint judgment of the High Court of Australia in The Queen v Richards; Ex parte Fitzpatrick and Browne (1955) 92 CLR 157 at 162, the powers privileges and immunities of the Parliament of the United Kingdom have been defined, not by the Parliament, but by the courts. One of those privileges, Lord Cairns said in Speaker of the Legislative Assembly of Victoria v Glass [1871] LR 3 PC App. 560 at 572, "is the privilege of committing for contempt; and incidental to that privilege, it has ... been well established ... that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a Warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is." Under the Australian Constitution, and until restrictions were accepted pursuant to the Parliamentary Privileges Act 1987, the Senate and the House of Representatives had, by s 49, the same "powers, privileges and immunities" as "those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth". Because the Australian Constitution did not define these powers privileges and immunities, but conferred them by reference to those obtaining in the United Kingdom, the High Court in Fitzpatrick and Browne held (at 162) that "it is for the House to judge of the occasion and of the manner of [the privilege's] exercise".

But the position in Tonga is not at all the same. The Legislative Assembly is not the beneficiary of what Baron Parke, in Kielley v Carson (1842) 4 Moore PC 63 at 91 (13 ER 225 at 236), described as "the peculiar powers of Parliament", powers which are a result of an historical process in the distant past and, his Lordship thought, "ought not ... to be extended any further". (For a more modern criticism in some detail of the utility of a broad privilege with respect to contempt, see D.C. Pearce : Contempt of Parliament - Instrument of Politics of Law? (1969) 3 Fed.L.Rev.241.) Rather than leave the powers of the Legislative Assembly to common law, or implication, or, as in the case of Australia prior to the Parliamentary Privileges Act 1987, to a general grant of the powers of the United

Kingdom House of Commons, the Constitution of Tonga has chosen to confer specific and limited powers, which are contained in clause 70.

As was pointed out by Martin J and by the Privy Council in Fotofili v Siale [1987] SPLR 339, and [1996] Tonga LR the definition by the Tongan Constitution of the powers and privileges of the Legislative Assembly makes all the difference. Those powers and privileges are not at large, and whether the occasion for their exercise has arisen must depend on a true understanding of the Constitution. The Privy Council accepted (at 348) that "when a matter is a 'proceeding' of the House beginning and terminating within its own walls it is outside the jurisdiction of the courts". But it added (at 349 - 350) the significant statement:

> "In determining it 's jurisdiction to inquire into internal proceedings of the Assembly [the Court] must apply the English common law regarding the privilege of Parliament to determine the regularity of its own proceedings, *provided of course the Assembly has not acted contrary to the provisions of the Constitution in the course of those proceedings*, for in such a case the Court is given jurisdiction by Article 90 of the Constitution ... .
>
> We conclude then that there is no jurisdiction in the Court to inquire into the validity of the Assembly's internal proceedings *where there has been no breach of the Constitution*.
>
> . . . If, in the process of making its decision concerning allowances [ie., allowances payable to members, a peculiarly internal matter] the Assembly had breached a provision of the Constitution then we agree that the Court would have jurisdiction ... ." (Emphases added.)

By the Constitution, the jurisdiction to determine its meaning and application has been conferred on the Supreme Court, and an "exclusive power and jurisdiction to hear and determine all appeals . . . from the Supreme Court" has been conferred on the Court of Appeal. See clauses 90 and 92. Relevantly for present purposes, clause 90 provides:

> "The Supreme Court shall have jurisdiction
> in all cases in Law and Equity arising under
> the Constitution and Laws of the Kingdom".

The words "in Law and Equity" do not limit the width of the conferral of power in all cases arising under the Constitution, for those words are words of extension, not of limitation: *cf* Bank of New South Wales v The Commonwealth (1948) 76 CLR 1 at 383; The Commissioner of Taxation of the Commonwealth of Australia v Lutovi Investments Proprietary Limited (1978) 140 CLR 434 at 443-444. In Clayton v Heffron (1960) 105 CLR 214 at 233 "law" and "equity" were treated, in the joint judgment of Dixon CJ, Mc Tiernan, Taylor and Windeyer JJ, as comprehending the entire spectrum of legal jurisdiction. It is interesting to compare the direct conferral of jurisdiction on the Supreme Court by clause 90 of the Constitution of Tonga with the indirect conferral of jurisdiction on the High Court of Australia under s76 of the Australian Constitution, which relevantly provides:

> "The Parliament may make laws conferring original jurisdiction
> on the High Court in any matter -
> (i) Arising under this Constitution, or involving its
> interpretation ... ."

The Tongan position, as distinct from that in England and that under s 49 of the

Constitution of the Commonwealth of Australia, which assismilates the Australian Parliament to the English House of Commons, is well illustrated by the New South Wales case Armstrong v Budd (1969) 71 SR (NSW) 386, where Herron CJ said (at 398):

> "This Court [the Supreme Court of New South Wales] has a jurisdiction to determine whether in a particular case the House [he was referring to the Legislative Council, one of the Houses of Parliament of New South Wales] has exceeded the powers conferred on it by the Constitution. In the exercise of that jurisdiction the Court will determine whether the limits upon the power of expulsion [this was the power there in question] enjoyed by the House have been exceeded or not .... This Court has power in a proper case to declare a resolution for expulsion null and void."

The effect of a written constitution, in curtailing the very wide parliamentary powers and privileges that have been conceded to the House of Commons in the United Kingdom, has been repeatedly affirmed by the highest courts of countries that have written constitutions. In Smith v Mutasa [1990] LRC 87, a decision of a unanimous Supreme Court of Zimbabwe delivered by Dumbutshena C.J., the Court was concerned with a finding of contempt of Parliament made in general terms by the Zimbabwean House of Assembly against Mr Ian Smith M.P., the former Prime Minister of Rhodesia, by which his parliamentary salary was suspended for twelve months. Although, in terms, the Zimbabwean House had been accorded powers much wider than those in cl.70 of the Constitution of Tonga, Dumbutshena C.J. declared (at 92) that "all privileges and powers enjoyed by Parliament are subject to and must be consistent with the provisions of the Constitution". "Parliament", he continued (at 94), ". . . may not enjoy, hold and exercise privileges, immunities and powers which are inconsistent with fundamental rights guaranteed by the Constitution. If in Zimbabwe there is a conflict between fundamental rights and theprivileges of Parliament ***the conflict can only be resolved by the courts of justice***". (Emphasis added). Therefore, the Court said (at 95), "If ... a dispute had arisen between the appellant and the respondents on whether [what Mr Smith did] was a breach of parliamentary privilege or not, it would have been within the jurisdiction of the courts of this country to determine the dispute."

Pursuant to a power in the Zimbabwean Constitution, the Parliament had passed an Act to make a certificate of the Speaker conclusive that a matter concerned privilege. But Dumbutshena C.J. said (at 109) that "the court must examine the certificate in order to establish the legitimacy of the privilege claimed". For, "it is the duty of the courts to decide whehter the impugned statements or acts are properly a matter of privilege or not."

In reaching its conclusions, the Supreme Court of Zimbabwe placed some reliance on the decision of the Supreme Court of India in Special Reference No.1 of 1964 (1965) 1 SCR 413. There, the opinion of the Court, delivered by Gajendragadkar C.J. asserted (at 492) that to the constitutional right to seek redres from the Court "no exception is intended to be made by the Constitution by reference to any power or privilege vesting in the Legislatures of this country."

Both the Indian and the Zimbabwean Supreme Courts rejected the idea that a general warrant could preclude further inquiry where there was a challenge to an assertion of a parliamentary privilege defined by the terms of a written constitution. Dumbutshena C.J. referred to the statements of Gajendragadka C.J. (at 445):

> "It is necessary to remember that though our Legislatures have plenary

powers, they function within the limits prescribed by the material and relevant provisions of the Constitution."

And again (at 493):

"If in a given case, the allegation made by the citizen is that he has been deprived of his liberty not in accordance with law, but for capricious or *mala fide* reasons, this Court will have to examine the validity of the said contention, and it would be no answer in such a case to say that the warrant issued against the citizen is a general warrant and a general warrant must stop all further judicial inquiry and scrutiny."

Dumbutshena C.J., for himself and his court, said (at 101):

"It would be wrong ... in this country to follow all United Kingdom precedents on the law of parliamentary privilege without regard to the statute law and the Constitution of this country. Some of the precedents of the United Kingdom are part of our law of parliamentary privilege. Others have been overtaken by the provisions of our Constitution."

He added (at 103):

"What is important for present purposes in that the Act imposes limitations on the power of Parliament to punish for a contempt."

This accords with the views of Barwick C.J. in the Australian High Court case Cormack v Cope (1974) 131 CLR 432. There, reliance was placed in argument upon the privileges and immunities of the House of Commons of the United Kingdom, attracted to the Australian Parliament by s.49 of the Australian Constitution. "But the submission", Barwick C.J. said at 452, "was basically misconceived. We are not dealing here with a Parliament whose laws *and activities* [emphasis added] have the paramountcy of the Houses of Parliament in the United Kingdom. The law-making process of the Parliament in Australia is controlled by a written Constitution."

Smith v Mutasa was followed by a unanimous Court of Appeal of the Cook Islands (Quilliam, Barker and Dillon JJ. A.) in Robati v The Privileges Standing Committee of the Parliament of the Cook Islands (unreported, 17 December 1993). There, the Plaintiff was summonsed by the Speaker of the Parliament (and the Court had regard to the terms of the summons) for, as it was alleged, wilfully misleading Parliament; but the precise offence charged (on the facts accepted at the hearing) was not made an offence until thenext day. Although the Constitution of the Cook Islands provided for parliamentary privilege in very broad terms, and contained an express provision denying that "the validity of any proceedings in Parliament" could be "questioned in any Court", it also contained guarantees of liberty and the rule of law, and conferred on the High Court jurisdiction "as may be necessary to administer the law". Quilliam J.A. described Smith v Mutasa as "of compelling persuasion", and held that where Parliament, though claiming to pursue its privilege, acts unconstitutionally, "it must be proper for the Court to intervene". He cited also the remarks of Barwick C.J. in the High Court of Australia in Cormack v Cope (supra, at 453):

"Whilst it may be true the Court will not interfere in what I would call the intra-mural deliberative activities of the Parliament, it has both a right and a duty to interfere if the constitutionally required process of law making is not properly carried out."

And (at 454):

> "There is no Parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law making are observed."

No sensible reason can be advanced why the Court should be more chary of interfering to prevent a gross excess of Parliament's right to deal with a breach of privilege (reaching beyond its constitutional limits) than of interfering to prevent an irregularity in the procedure for the adoption of a Bill. Quilliam J.A., and the other two judges who concurred with him, were right to treat the remarks of Barwick C.J., as in point, and to conclude that "there never was any constitutional right for Parliament to have dealt with the Plaintiff for an offence which did not exist at the time it was alleged to have been committed."

And, if that is right, still less can Parliament deal with someone for an offence which never existed. Should it attempt to do so, as Barker J.A. said in his concurring judgment, "the Constitution entitles the Court to consider whether Parliament is acting within its rights."

The proceeding from which this appeal comes was an application for habeas corpus, brought by each of the respondents in respect of his imprisonment by virtue of an order or warrant under the hand of the Speaker of the Legislative Assembly. That warrant was addressed to the Minister of Police, and was to the following effect.

> "The Legislative Assembly ordered to imprison [here each of the Respondents was named] for thirty days commencing 5 o'clock on the afternoon of 19 September 1996 by virtue of the power vested in the Legislative Assembly by clause 70 of the Constitution and the judgment of the House on this day regarding their imprisonment. They are not to be released until after the expiration of thirty days or otherwise ordered by Parliament for a shorter time.
> I ask that immediate effect be given to this order."

This, it should be noted, is not a warrant that "states a contempt in general terms" (see Case of the Sheriff of Middlesex (1840) 11 AD. & E.273 at 290; 113 ER 419 at 425), but is a warrant that states no offence at all, instead relying on an asserted order of the Legislative Assembly "by virtue of the power vested in [it] by clause 70" - a direct appeal to the Constitution which must entitle and require the Court, as the guardian and interpreter of the Constitution, to investigate whether, investigate whether, in the particular circumstances, "the power" claimed was vested in the Legislative Assembly.

The evidence indicated that, before the order to imprison the respondents was made, a summons was served upon them, or at least upon one of them, containing the following allegations:

> "There is a complaint to the Legislative Assembly of Tonga regarding the newspaper 'Taimi 'o Tonga' whereby [sic] you are the assistant editor and advertising manager, published in volume 8 number 36 on Wednesday 4 of September 1996. It publishes [an] article on impeachment by the Legislative Assembly which is not correct and it is disrespectful to the Legislative Assembly.
> You are hereby summoned to attend the Legislative Assembly at Nuku'alofa Thursday 19th of September 1996 at 10 o'clock in the morning.
> And take notice if you fail to comply with the summons and you do not

attend you will be committed to prison.
Dated Wednesday 11th of September 1996.
Chairman of the Legislative Assembly."

It is unnecesary to recount the detail of the article which founded the issue of this summons. The appeal turns, not on what the article actually conveyed, though the appellants argued there was nothing in it offensive to the Constitution, but on the allegations drawn from it and set out in the summons as the charge against the respondents. However, an understanding of the circumstances may be assisted by a summary. The article began by informing its readers that an impeachment of the Minister of Justice had been submitted by the People's Representatives to the Parliament of Tonga. Its language was purportedly quoted, and signatories to it were named. (There was no suggestion in evidence that the article misrepresented the document to which it referred, but rather that at the time of the publication of the article, it had not yet reached the Legislative Assembly, for reaons that seem somewhat obscure.) Prominent among the complaints on which it was proposed to base the impeachment, as the article revealed, was a complaint that the Minister had attended the Olympic Games in Georgia in the United States after the Chairman of the House, not the Legislative Assembly itself, had declined an application for leave. (The impeachment provision of the Constitution, cl.75, refers as a ground to "breach of the ... resolutions of the Legislative Assembly", not of the decisions of its Chairman.) While an article setting out the terms of a document proposing that he be impeached would naturally be offensive to the Minister, there is no comment in it about the Legislative Assembly itself.

Hampton CJ, who ordered the release of the respondents, held in substance that the allegations contained in the form of summons fell outside the terms of clause 70 of the Constitution. He also held that the minimum requirements of a fair trial were not met by the proceedings which occurred in relation to the matter.

The form of summons calls for some immediate comment. It does not allege that any one of the respondents was personally responsible for any particular statement in the article to which it refers. Nor does it allege that any one of the respondents spoke or acted "disrespectfully in the presence of the Legislative Assembly", so as to fall within the first part of clause 70. Nor does it allege that by virtue of the article any one of the respondents did "publish any libel on the Legislative Assembly", so as to fall within a further proscription in clause 70. To state something that "is not correct" is not at all the same thing as to publish a libel. And to be "disrespectful to the Legislative Assembly" by something written in an article is not at all the same thing as to "speak or act disrespectfully in the presence of the Legislative Assembly." Indeed, the allegation in the summons is an amalgam or conflation of two very inaccurate versions of two of the proscriptions contained in clause 70; and it thereby states an offence of writing something that is not correct and is disrespectful to the Legislative Assembly, an offence which simply does not exist under the Constitution.

It was to answer a summons in these terms that each of the respondents was brought before the Legislative Assembly, and there is no suggestion of any other charge being preferred. The appellant, who contended that he held the respondents on a general warrant which should not be further examined, did not contest by evidence the natural inference that the determination of their guilt was made upon the allegation in the summons. In those circumstances, the inference was inevitable. For the Court could not accept

without evidence, as a reasonable possibility, that Parliament denied natural justice to the respondents by convicting them of offences to which they had no opportunity of advancing any defence. The appellant claimed that Parliament was not obliged to accord the respondents natural justice, but this is to miss the point; in the absence of evidence to the contrary, the Court will take it that Parliament, whatever the difficulties of enforcing its duties against it, would act justly. The proper conclusion is that Parliament notified them of the case brought against them by the form of summons that was utilized; but in doing so, Parliament erred in its interpretation of the Constitution, and it acted beyond its powers under cl.70 in preferring that case and in finding it established.

At the hearing of the appeal, the appellant sought to tender, as fresh evidence, a record of the relevant resolutions of the Legislative Assembly. But the terms of these resolutions threw no light on the present point, and it is unnecessary to rule on their admissibility at this late stage.

Although it is also strictly unnecessary to decide whether a person brought before the Parliament under cl.70 has a legally enforceable entitlement to natural justice, the question should be answered. Counsel for the appellant contended that no authority supported an affirmative answer, but he did not produce any authority to support a negative answer. The authorities he relied on were directed to one aspect only of the question - whether Parliament could be called to account if it failed to do whatever was its duty. The solution to the problem must be sought in the provisions of the Tongan Constitution, understood as a consistent foundation of the State. The provision to be construed is cl.70 itself. As has been pointed out, it is necessary to make some implication with respect to the trial which the clause contemplates, for it says nothing about the trier. In general principle, the establishment of any tribunal to try offences that are not negligible involves an obligation to meet the demands of natural justice. As Dixon C.J. and Webb J. said in Commissioner of Police v Tanos (1958) 98 CLR 383 at 396, with the ordinary courts, that "is a matter of course". Because it is a matter of course, no failure to mention it in a constituting enactment will have any significance; to negative it, there must be a clear contrary provision in express terms, or *necessarily* to be implied: ibid, also at 396.

While cl.70 makes no provision at all about the kind of trial it envisages, and cls.69 and 71 specify only the triers, other clause of the Constitution do turn to the details of trials. Clause 75, dealing with impeachment, makes express provision for natural justice. At the beginning of the Constitution, in the group of clauses which this Court described in Touliki Trading Enterprises v Fakafanua [1996] Tonga LR (Burchett, Tompkins and Neaves JJ, unreported, 31 May 1996) as giving "concrete application" to the fundamental affirmation of liberty with which the document opens, are to be found cls.11 and 13, both concerned with the right to natural justice. Clause 11, it was pointed out, refers to "any court", and it also uses the technical word "indictment", which is appropriate to a court. A clause so worded may not be referring to Parliament as a judicial tribunal. But cl.13 uses the larger word "charge", and contains a general provision that "no one shall be tried on any charge but that which appears in the summons or warrant and for which he was brought to trial". This is a guarantee of the central requirement of natural justice, that the case to be met be known. And it refers, without limitation as to tribunal, to any charge. Similarly, cls.14 and 16 contain, respectively, guarantees against forced self-incrimination and forcible searches without legal warrants, which are not limited to charges brought

in the ordinary courts. In the light of the whole of the Constitution, and having regard to cls. 13, 14 and 16 in particular, cl. 70 should be construed as authorizing a trial according to procedure that reflects rights to natural justice and protection against compulsory self-incrimination and arbitrary searches.

Accordingly, this Court should hold that the Chief Justice was right in understanding cl 70 as entitling the respondents to natural justice. But the better view of the evidence is not that they were denied natural justice, but that they were convicted of an offence that did not exist.

Clause 70 does not attempt to pick up the wide ambit of the powers and privileges of the House of Commons, as those powers and privileges were picked up by s 49 of the Constitution of the Commonwealth of Australia. Nor, in a written Constitution such as that of Tonga, would it be appropriate for it to do so. Each of the organs of Government in Tonga has the powers that are defined by the Constitution, which as the Chief Justice pointed out, and as was pointed out by this court in Touliki v Fakafanua (supra), places at its very forefront the li[illegible]ties of Tongan citizens. Clause 70 is intended to trench upon those liberties only so far as is necessary to enable a Parliamentary Assembly to function effectively. The clause is an exception to a principle of liberty, and should be understood, not in any loose or expansive sense, but in accordance with its terms.

Each of the offences created by clause 70 carries the same maximum penalty, and so must have been seen as of equivalent seriousness. In fact, each is in the nature of a direct challenge to the authority of the Legislative Assembly. In this context, the requirement that disrespect, to constitute an offence, must be displayed "in the presence of the Legislative Assembly" is plainly of the essence of the offence to which those words refer. Also, in this context, the words "publish any libel" should be given their ordinary legal meaning. The authority of the Legislative Assembly does not demand that no-one shall write any comments about it, for fear that those comments might be adjudged incorrect; nor would a mere incorrect comment rank with the other offences set out in clause 70. Therefore, although there was evidence in this case that the Tongan version of the Constitution uses a word translatable as referring to lying or deception, in the context, no substantial difference should be seen between the versions. In clause 70, as in other provisions creating offences, a loose meaning should not be given to a defining word so as to extend in an indefinite way the ambit of liability. Here, the meaning of a libel is the appropriate meaning. It is a word that was familiar in comparable 19th century constitutional laws: see, for example, Doyle v Falconer (1866) LR 1 PC 328 at 338. Certainly, the word, in this context, does not refer to something which is merely "not correct".

In the present appeal, the Court is concerned with a charge made on the basis that a newspaper article was "an article on impeachment by the Legislative Assembly which is not correct". That does not allege a "libel on the Legislative Assembly", or even a lie about it, if "libel" means "lie". To discuss legislation or other resolutions proposed, or to be proposed, to the Legislative Assembly, or passed or to be passed by it, is of the very essence of a constitutional polity - which Tonga is, as clause 31 of the Constitution explicity states. Indeed, clause 7 makes freedom of the press subject only to the law of slander (an additional reason to read clause 70 as referring to libel in the legal sense) and the protection of the Crown. What Milton wrote, translating Euripides (Dore ed. of The Complete Poems of John Milton, vol 11, p.665), is embraced by our Constitution:

"This is true liberty, when freedom men
Having to advise the public may speak free;
. . .
What can be juster in a state than this?"

Because the Constitution did not authorise the charge that was brought, the appeal should be dismissed, subject to one further question. The appellant submitted to the Chief Justice that he should not hear the respondents' applications for habeas corpus, because of the refusal of previous applications by Lewis J. However, there are several answers to this proposition.

In the first place, nothing in the nature of an issue estoppel or res judicata could have arisen in the case of the respondent 'Akilisi Pohiva. He had made one previous application to the Court, but not as a challenge to the warrant; his contention had been that, upon the prorogation of the Legislative Assembly, he had become entitled to be released in pursuance of hte principle which applies to a commitment for contempt of the English House of Commons. His argument then was that, as the Minister of Police was justifying his imprisonment upon the basis of a warrant claimed to be of the same kind as that which could be issued by the authority of the House of Commons, the imprisonment should also terminate upon the same basis upon which a similar imprisonment would terminate in England - upon the prorogation of Parliament. (Cf. the order in question in Fitzpatrick and Browne (supra), which was expressed to endure only until the prorogation of Parliament, and see Stockdale v Hansard (1839) 9 AD & E 114). That was not an attack upon the constitutional validity of the resolution of the Legislative Assembly or uponthe warrant. It follows the appellant's point could not affect the order in favour of 'Akilisi Pohiva

More fundamentally, cl.9 of the Constitution provides:

> "The law of the writ of Habeas Corpus shall apply to all people and it shall never be suspended excepting in the case of war or rebellion in the land when it shall be lawful for the King to suspend it."

This entrenchment of the law of habeas corpus as a constitutional right has applied continuously inTonga since the original Constitution of 1875. There is no doubt that the right to obtain a writ of habeas corpus was then and for long afterwards held not to be lost by virtue of one or more refusals at first instance: R v Suddis (1801) 1 East 306 at 314, per Lord Keyon C.J., ; Exparte Partington (1845) 13 M. & W. 679; Cox v Hakes (1890) 15 App. Cas. 506 at 514, per Lord Halsbury; Secretary of State for Horne Affairs v O'Brien [1923] AC 603 at 609; Eshugbayi Eleko v Officer Administering the Government of Nigeria [1928] 1 A.C. 459. The right so entrenched constitutionally in Tonga did not disappear because, nearly a century later, an English Divisional Court in Hastings [1959] 1 QB 358 considered the English law should follow a new path, and its view was accepted by the English legislature in The Administration of Justice Act 1960, without the matter ever being tested in the higher courts of appeal. That Act palliated the problem which the change in the law produced, that an unappealable decision at first instance might deny freedom to an unjustly imprisoned person, by requiring the question of refusal of a writ of habeas corpus to be referred to a Divisional Court in the first instance. This solution is not suitable to conditions in Tonga, which has no Divisional Court, and where any appeal against a refusal of a writ of habeas corpus would be likely to be heard only after

the imprisonment had ended, or been endured for a significant period.

It follows that in Tonga the writ of habeas corpus remains available, as the English Privy Council held it to be in Eshugbayi Eleko (supra), despite an earlier application. In the present case, it should be added,the renewed application was supported by fresh evidence, and raised fresh grounds.

A final question of a technical nature was raised on behalf of the respondents. They referred to the reluctance of the law to permit Crown appeals in criminal cases, contending that the appellant was not entitled to maintain the appeal. However, the real issue is a constitutional one of great importance. Indeed, the appellant made it clear at the hearing
540 that his purpose was not to punish the respondents, but to clarify the law, and he undertook, if successful in the appeal, not to re-arrest the respondents. The Court has decided that, having jurisdiction, it should resolve the questions in dispute and, for the reasons that have been stated, should dismiss the appeal with costs.