Attorney General v Fusitu'a, 'Akau'ola & Moala

Supreme Court, Nuku'alofa
Lewis J
C.1329/96

12 December, 1996, January & 4 February, 1997

Contempt of court - administration of justice
Constitution - impeachment - contempt
Sentencing - contempt of court

The Attorney General sought orders for the committal to prison of the respondents for contempt of court in respect of words to the effect that if an earlier Parliamentary contempt/habeas corpus judgment (sec [1996] Tonga LR) of the Chief Justice was overturned on appeal then perhaps the Chief Justice should be prosecuted/impeached. The words were allegedly spoken by the first respondent, the Speaker of the House, to the second respondent and then reported for a newspaper by the second respondent, and published in that newspaper by the third respondent. The third respondent had not been served so the motion against him was adjourned. A further motion was brought by the Attorney General against the first respondent in relation to further words allegedly uttered by him, to the same or similar effect, to the Deputy Registrar of the Court. It was claimed that the words were calculated to threaten the Chief Justice with prosecution, bring the justice system into contempt, interfere with the proper exercise of the office of the Chief Justice, interfere with lawful processes of the court, give the impression the Chief Justice was not independent, and suggest that the Supreme Court is subject to manipulation by the Legislative Assembly.

Held:

1. The words alleged to have been spoken to the Deputy Registrar were spoken by the first respondent. There was no evidence that those words were the direct cause of the Chief Justice discharging himself from the further hearing of a trial in progress. Nor could they be seen as falling into the category of scandalising the Court and that motion was discharged.
2. As to the newspaper article the word "Faka'ilo" alleged to have been used may mean, depending upon the context "to prosecute" or "to impeach". Either meaning was equally powerful in the context of the complaint against the respondents.
3. The court was satisfied beyond any resonable doubt that the words the second respondent used in writing the article were words spoken to him by the first

respondent.

4. In effect the second respondent was asserting that the Chief Justice by delivering the habeas corpus judgment was in breach of a resolution of the Assembly and therefore liable to impeachment under cl.75 Constitution. The court concluded that the Chief Justice had not so offended in the delivery of his reasons and judgment. It was never open to anybody to seek the impeachment, prosecution or dismissal of the Chief Justice yet here the Speaker of the House was solemnly asserting that the Law Committee of the Assembly would be doing work towards that. It was there that the gravity of the article, its authorship and its publication had its worst consequences.
5. The Contempt of Court Act 1981 (UK) did not apply to these proceedings as they related to allegations of interference with the administration of justice as a continuing process.
6. The first respondent at all material times spoke and acted in a personal and private capacity but in any event it was immaterial in what capacity he attered the words once he is found to be a contemnor. Even Ministers of the Crown are, like any other citizen, subject to the law, the rule of law and the full jurisdiction of the Courts.
7. It is open to one judge to commit for the established contempt of another judge.
8. The former categorisation of contempts into civil and criminal is no longer of assistance. Interference with the due administration of justice is a characteristic common to all contempts. It is the fundamental supremacy of the law which is challenged.
9. The court concluded that the first respondent had intended to interfere with the proper course of the administration of justice by putting about misleading information. That could only be a most serious contempt of court. He knew full well that what he was saying was wrong in law and in fact and that he intended to put misleading information about. It was contempt of the court to do so for it is interference with the administration of justice.
10. The second respondent was also found quilty of comtempt by participating in publishing the words.
11. On sentence - punishment consequent upon a conviction for contempt is inflicted not for the purpose of protecting the court as a whole or the individual judges from a repetition of the attack, but of protecting the public (and especially those who either volunlarity or by compulsion are subject to the jurisdiction of the court) from the mischief they will incur if the authority of the court is undermined or impaired.
12. The clear implication of the words was that the Chief Justice and the court was not independent making the administration of justice unreliable and unsafe for those who may have cause to use it.
13. Fines were imposed and a retraction ordered to be published (Refer to the case immediately following as to the non-publication of the retraction by the second respondent).

Note - The second respondent, 'Akau'ola, succeeded on appeal in the Court of Appeal. That report follows hereunder.

Cases considered:

R v Gray [1890] QB 336
M v Home Office [1992] 4 All ER 97
Balough v St Albans Crown Court [1975] QB 73
Att. Gen v Newspaper Publishing [1988] Ch 333
Att. Gen v Leveller Magozine [1979] AC 440
Att. Gen v Butterworth [1963] 1 QB 696
110 Johnson v Grant (1923) SC 789

Statutes considered:

Constitution cl.75
Contempt of Court Act 1981 (UK)

Counsel for Attorney General	:	Mrs Taumoepeau & Mr Cauchi
Counsel for first respondent	:	Mr W Edwards & Mr Paasi
Counsel for second respondent	:	Mrs Taufaeteau

Judgment

1. PRELIMINARY

By notice of motion dated 29 November 1996 the Hon. Attorney General moved seeking orders of this court requiring the respondents to show cause why they ought not be committed to prison for contempt of court in respect to words allegedly spoken by the first respondent Fusitu'a and published by the second and third respondents, 'Akau'ola and Moala in the Taimi 'o Tonga Newspaper Volume 7 No.48 of Wednesday 27 November 1996. An affidavit in support of the motion has been filed by 'Alisi Taumoepeau Acting Solicitor General of Tonga.

On November 29, 1996 the Hon, The Chief Justice having heard an application by the Hon. The Attorney General for leave to summons the respondents granted leave for summonses to issue against to each respondent to appear in the Supreme Court and show cause why the respondents ought not be committed for contempt of court.

Two respondents, Fusitu'a and 'Akau'ola appeared to show cause on the day appointed. Moala had not been served on the appointed day of the first hearing of this motion on 3 December 1996. Leave was given to serve Moala at an address in New Zealand.

On 3 December a second notice of motion, (hereinafter the "Deputy Registrar Motion") was filed by the Acting Solicitor General together with an affidavit in support of the notice. The motion alleged that Hon. Fusitu'a had used words which constituted contempt. The motion seeks an order that the Hon. Fusitu'a be required to show cause why he ought not be committed to prison.

Since he appeared in response to the summons on the first motion (hereinafter the "Taimi 'o Tonga Motion"), this court odered that he appear in respect of the Deputy Registrar motion simultaneously with the Taimi 'o Tonga Motion. A hearing date was fixed for the matters to be heard together on 12 December at 9.00 am or so soon thereafter as counsel may be heard.

2. THE ALLEGED CONTEMPTS

2.1 The Taimi 'o Tonga words and publication

The Attorney General alleges that there are three distinct contempts; one attributable to each respondent:-

Fusitu'a

Is alleged to have spoken words to the journalist 'Akau'ola to the effect that -

> "He was dissatisfied with the decision of the Chief Justice and went on to say that if an appeal proves the Legislative Assembly right, may be it would be right that something be done about the Chief Justice, that he be prosecuted/impeached".

The motion alleges that the words spoken were calculated to:

- threaten the Chief Justice with prosecution,
- bring the judicial system into contempt,
- interfere with the proper exercise of the office of Chief Justice.
- interfere with the lawful processes of the court,
- give the impression that the Chief Justice is not independent,
- suggest that the Supreme Court of Tonga is subject to manipulation by the Legislative Assembly.

'Akau'ola

Is alleged in his capacity as a journalist and assistant editor of Taimi 'o Tonga to have republished the words spoken by Fusitu'a. The complainant repeats the particulars.

Moala

Is alleged to have in his capacity as editor and publisher of Taimi 'o Tonga to have published the words spoken. The complainant repeats the particulars.

It is useful to set out in full the article of which complaint is made. It is as follows:- (the article is then set out both in Tongan and in English).

2.2 The Motion containing the allegation of Temaleti Pahulu

Temaleti Pahulu is Deputy Registrar of the Supreme Court of Tonga. In her affidavit sworn on 3 December 1996, she recounts a telephone conversation she had with the respondent Hon. Fusitu'a.

The Deponent says that Fusitu'a during the conversation said to her words to the effect of:-

"I think it is proper for the Chief Justice to be prosecuted,
What do you say about that?"

That she replied

"It's entirely inappropriate for me to comment on such matters".

Fusitu'a said

"It's not a comment but just a family discussion between us".

The complainant alleges that the words spoken were calculated to:-

- Threaten the Chief Justice with prosecution.
- Bring the judicial system into contempt,
- Interfere with the proper exercise of the Office of Chief Justice,
- Interfere with the lawful processes of the Court.

The accused and each of them submit that no contempt of court has occurred either by virtue of the matters alleged or at all and both appear to show cause why they ought not be committed.

The evidence led in support of the motions is led by affidavit. Some deponents were presented for cross-examination.

3.0 EVIDENCE AND FINDINGS

Findings in these reason s are made once the court has concluded that from the whole of the evidence a matter has been proved by the Attorney-General beyond any reasonable doubt.

For reasons which I delivered ex tempore at trial I have placed no weight on the evidence of the witnesses 'Eseta Fusitu'a and Lesina Tonga called by the Second Respondent. The ruling reflects in no way upon their credit. It was the way in which their evidence was sought and obtained by counsel calling them which caused me to exercise my discretion to exclude it.

4.0 THE MOTION CONCERNING THE DEPUTY REGISTRAR

The claim of the Crown in this motion is that:-

"Seeking the views of the Deputy Registrar of the Supreme Court as to the prosecution of the Chief Justice is in contempt of court as scandalising of the court."

The affidavit of Ms. Pahulu is exhibit P3. It is before the Court without objection. Ms Pahulu's evidence is brief. She says that on the afternoon of the 29 November 1996

she had a telephone call from the Hon. Fusitu'a which she took in the computer room of the court office. Her evidence is that the exchange was as follows:

He said "I think it is proper for the Chief Justice to be prosecuted, what do you say about that?"

She said "It's entirely inappropriate for me to comment on such matters".

He said "It's not a comment but just a family discussion between us".

Ms. Pahulu's evidence is that the conversation was in Tongan that the word used which she took to mean "Prosecuted" was "Faka'ilo". The proper English meaning the verb "Faka'ilo" should be given in the context of this motion, is to "Impeach" or to "Prosecute". Either meaning has the same potency in my view.

The Acting Registrar was cross-examined by counsel for Fusitu'a who plainly put to her that Fusitu'a had not called her on the 29th November. Ms Pahulu responded that the words complained of were spoken on the 29th. She said that Fusitu'a has called her on four occasions. The occasions were on the 28 and 29 November and that the words were used by Fusitu'a during the fourth conversation "Out of the Blue".

For his own part Fusitu'a refers to the alleged conversation in his sworn evidence. (He had been served with motion No.1352/96 on the eve of trial and had no time to file an answering affidavit). His evidence is that he "categorically denies" saying the words complained of; that he had conversations with the Deputy Registrar but not on the 29 November. He said "I was looking for a copy of the judgment" (of the Chief Justice in which the Chief Justice released two journalists and the representative 'Akilisi Pohiva). His call to Registrar Pahulu he said was long before the 29th of November. (The order of the Chief Justice releasing the men is dated 14 October 1996).

There is a second order of the Chief Justice dated 29.11.96 which assumes significance in this he ring. The order has become exhibit P5. By his order, the Chief Justice discharges himself from the hearing of the prosecution of Samiuela 'Akilisi Pohiva with certain ancillary paras added. The discharging order was made on the 29 November. It is clearly not the discharging order that Fusitu'a sought from the Registrar - He says so himself - "What I was looking for was the Judgment it was long before the 29th November". - that is the judgment releasing the three men from prison.

The evidence is that at the time of the incident with the Registrar there had been no meeting of the Legislative Assembly Law Committee which on Fusitu'a's account was about to be convened to consider an appeal against the judgment of the Chief Justice.

During the cross examination of Fusitu'a he was asked

"You have no idea why the Deputy Registrar lied?"

He replied

"I am not saying she lied. I categorically deny saying it to her."

I have anxiously considered the evidence and the witnesses. There is no reason in evidence as to the Deputy Registrar having cause to or motive for making so serious an accusation falsely. Importantly she was unshaken in her evidence. She impressed me as an utterly reliable witness giving her evidence accurately unhesitatingly and to the best of her recollection about very recent events. I am convinced of her honesty and the accuracy and truthfulness of her evidence beyond any reasonable doubt.

The evidence of the Deputy Registrar is that she was surprised on reading the conversation in "Taimi 'o Tonga", which she had been asked to translate after the telephone conversation with Fusitu'a, to find that it related to the same subject.

I am driven to conclude beyond any reasonable doubt that the account of Deputy Registrar Pahulu is to be preferred to that of the respondent Fusitu'a. I find that the conversation to which she deposed occurred as the Deputy Registrar related it to this court. I prefer her evidence about the matter to that of the respondent Fusitu'a.

But is the exchange something which amounts to contempt of Court? The motion Para.3 alleges that:-

"3) That the words spoken were the direct cause of the Chief Justice discharging himself from the further hearing of a trial which was in progress at the time".

There is no evidence which supports such an assertion. The Acting Solicitor-General concedes as much.

The Acting Solicitor-General submits that in seeking the views of the Deputy Registrar of the Supreme Court as to the prosecution/impeachment is to be in contempt of court as "Scandalising the Court" in the sense that the phrase was used by Lord Russell C.J. in Regina v Gray [1890] Q.B. 36 at 40.

> "Any Act done or writing published calculated to bring a Court or a Judge of a Court into contempt, or to lower his authority, is a contempt. Further any act done or writing published calculated to obstruct or interfere with the due course of Justice or the lawful process of the court is a contempt of court. The former process belongs to the category which Lord Hardwicke, Lord Chancellor, characterised as scandalising a Court or a Judge".

There is nothing about the "Deputy Registrar Incident" which would in my opinion constitute contempt of court. An intention to do the proscribed act or acts on the part of Fusitu'a cannot be inferred from the evidence before this court beyond any reasonable doubt.

This is a convenient point to make it plain that in the hearing of these two motions together I have not used findings (of Credit) concerning the decision to be made on one motion in coming to a conclusion (on Credit) about the other. Neither respondent consented to that course being adopted and accordingly I have treated each motion as being separate from and different to the other as I think must be done in circumstances such as the present.

The remarks by Fusitu'a were thoughtless in the sense that they were an invitation to Ms. Pahulu to comment about something "Out of the Blue" about which she had no authority to comment. Her response was proper and appropriate. The remarks may have been inappropriate and, I imagine, embarrassing to her but they cannot be seen in my opinion to constitute contempt of this court in any sense of the consequences pleaded or at all. The motion is discharged.

5.0 THE TAIMI 'O TONGA MOTION

The Crown alleges here that:-

"- The words spoken contained in the passage in question scandalises the court.
- That the publication of those words scandalises the court.
- That it interferes with the process of the court in the pending appeal of the habeas corpus orders.
- That it has in fact interfered with the process of the Court in that CJ Hampton has discharged himself from the proceedings

> of Rex v. Pohiva under the threat of impeachment as the preferred translation by the first respondent published in the paper". (sic)

The article has already been set out in full. What is known of it? The following is established from the evidence before me beyond and reasonable doubt (and I so find):-

- Exhibit P4 contains the article containing the quote attributed to Fusitu'a.
- 'Akau'ola was the assistant editor and advertising manager of Taimi 'o Tonga newspaper at all material times.
- 'Akau'ola interviewed Fusitu'a at Fusitu'a residence on 14 November 1996.
- Some of the interview was recorded by 'Akau'ola, some was written in 'Akau'ola's notebook and some of the interview was not recorded at all.
- The article containing the quotation complained of was then placed in "Taimi 'o Tonga" Vol.7 No.48 and was published on 27.11.96. And distributed and read by members of the public.

I am satisfied beyond any reasonable doubt that on 14 November 1996 the respondent 'Akau'ola in his role as assistant editor and journalist employed by the Taimi 'o Tonga newspaper visited the respondent Fusitu'a at his residence. There he interviewed Fusitu'a.

The words complained of are plain enough with the exception of the possibility of ambiguity in the true sense of the translation and use of the word "Faka'ilo". I find Faka'ilo may mean, depending upon the context "to prosecute" or "to impeach". The Attorney General complains that it carries the contextual meaning in the Taimi 'o Tonga article of "to prosecute". Either meaning, the Acting Solicitor General was quick to point out, is equally powerful in the context of the complaint against the respondents.

It is necessary to spend some time analysing the literalness of the words complained of and how they came into being. Fusitu'a says that he did not say the words and 'Akau'ola claims that they were words Fusitu'a used.

On the score of just what was said, Fusitu'a has prevaricated from the very beginning. In his affidavit he says nothing of whether he uttered the words complained of in the (Taimi 'o Tonga) motion. In his sworn evidence as a witness in cross examination he says of the words complained of "I cannot swear whether I said those words or whether I did not say them". And later he says having heard the tape "I definitely did not say them". From paragraphs 9 - 17 of Fusitu'a affidavit he clearly had a conversation with 'Akau'ola concerning his view on the measures to be taken about the Chief Justice's judgment.

There are other examples of prevarication in the evidence of Fusitu'a. He has filed in this court a document which he describes as a "reply". In that document which appears to be constructed as a form of "Plea in traverse and avoidance", he claims:

> The recitation of the words in the notice of motion filed by the Hon the Attorney General are not the same as those appearing in "Taimi 'o Tonga".

That is true. However the different wording must be viewed against the allegation by the Attorney that the respondent Fusitu'a "Said words to the effect".

An immediate reaction to the "reply" is that it does not in any sense coincide with

the evidence the respondent Fusitu'a gave during cross examination. For the first time in cross examination he revealed his position on the use of the words. He said "I am unable to swear that I did not say them nor am I able to swear that I did".

Did 'Akau'ola publish the words complained of (disregarding the translation of the word "Faka'ilo") in the precise form in which the words were used by Fusitu'a? I think not. I reach my conclusion for the following reasons.

An analysis of the evidence about this issue must logically begin with the now familiar publication in Exhibit P4 (The Taimi 'o Tonga). (An analysis followed, and the judge then concluded):

I am satisfied beyond any reasonable doubt that the words 'Akau'ola used in writing the article are words which were spoken by Fusitu'a to him during the interview of 14 November 1996.

There was some protrated cross examination by counsel for the first respondent (Mr Paasi) which finds its origins no doubt, in paragraphs 10 and 11 of the affidavit of Fusitu'a implying that neither 'Akau'ola nor his notes could be relied upon since 'Akau'ola referred to "Judge" instead of "Chief Justice" in his preparatory materials but to "Chief Justice" in the article.

The cross examination and submission has no force. The subject matter of the interview was the Chief Justice on any account of it - not anyone else. I accept unhesitatingly 'Akau'ola's explanation of the use of the word "Judge" in his notes.

I repeat, the case for the Attorney General has always been that Fusitu'a had used "words to the effect" of those complained of in P4. I have no doubt at all given the evidence before me that the words published and complained of are Fusitu'a's words as recorded and recalled by 'Akau'ola. The words may not be assembled in the article in P4 in the same order in which they were spoken by Fusitu'a but I am left in no doubt that the words carry the same meaning in P4 as they were intended to carry in the answers given by Fusitu'a to 'Akau'ola on the 14 November 1996.

Fusitu'a was asserting that a successful appeal of the habeas corpus rulings of 14 October 1996 by the Chief Justice would lead to committee discussions in the Legislative Assembly Law Committee for his prosecution/impeachment/dismissal. Fusitu'a's assertion needs some careful examination having regard to the law.

The Constitution [1988] Cap 2 Clause 75 provides as follows:-

> "(1) It shall be lawful for the members of the Legislative Assembly to impeach any Privy Councillor, Minister, Governor or Judge for any of the following offences -
>
> Breach of the resolutions or Laws of the Assembly, maladministration, incompetency, destruction or embezzlement of government property, or the performance of acts which may lead to difficulties between this and another country.
> [Emphasis added]

[Sub Clauses (2), (3), (3), (4) and (5) of clause 75 of the Constitution are not material to this issue].

The assertion made by Fusitu'a appears to carry the implication that by delivering a judgment which, in its effect declared among other things an order of the Legislative Assembly unlawful and unconstitutional, the Chief Justice had committed an "offence" within the meaning of Clause 75, namely the offence of "Breaching a resolution of the

Legislative Assembly" in ordering the release of two journalists and a member of the Legislative Assembly held in custody by order of the House. Had he?

Clause 75, a penal statute, first must be construed strictly. Next it must be read as referring to "offences" proof of which must include actus reus and mens rea. Its contemplation includes the commission of crime by the Judge to be impeached. The section uses the word "offence" in its drafting. It recites acts for which impeachment proceeding may be brought. They are, each one of them, "offences". They are, ejusdem generis, crimes. The judgment about which the first respondent claimed he was dissatisfied is a published one. It is circulated for all to see after a hearing in open court. The applicants were each represented by counsel. The proceedings were conducted strictly in accordance with the requirements of natural justice and the parties given the right to be heard and were heard fully.

The Legislative Assembly was, in the habeas corpus applications, in a real sense represented and given the opportunity to argue its position about which the first respondent now claims to be dissatisfied, (he says), on its behalf (since he was acting in an official capacity when being interviewed).

Most importantly neither respondent suggested by pleadings or evidence or submissions that the judgment of the Chief Justice was in breach of the provisions of Clause 75 of the Constitution. Neither respondent has sought to have the Chief Justice cross examined and charged with any offence as a consequence of his conduct management of the hearing or his delivery of judgment and order in the applications for habeas corpus by 'Akau'ola, Moala and 'Akilisi Pohiva.

This Court must therefore conclude that the respondents and each of them accept that the Chief Justice has not offended against Clause 75 in the delivery of the reasons and orders in question. The first respondent says as much in his affidavit and in his "Reply". The second respondent has remained silent on those matters.

Where then is the need for debate of impeachment in the Law Committee? The answer is that there never has been any issue of whether impeachment proceedings ought to be brought against the Chief Justice and there never has been any need to enter into discussion about it. The law at that time was as plain as it is today.

No one at the hearing or at this moment suggests that the Chief Justice, in delivering his reasons and in making his order acted other than with care and propriety, properly and in accordance with the best traditions of the office of the Chief Justice of the Supreme Court of the Kingdom of Tonga - not even the speaker, Fusitu'a.

In the known circumstances of this matter at law and in fact it was never open to the Law Committee of the Legislative Assembly or any body else to seek the impeachment prosecution or dismissal of the Chief Justice and yet here was Fusitu'a the Speaker of the Legislative Assembly solemnly asserting that the committee would be doing work toward investigating his impeachment. It is here, in this very area, that the gravity of the article its authorship and its publication has its worst consequences.

Those consequences have been carefully spelled out by the Attorney-General whose job it is to spell them out when a contempt is alleged. Let me repeat the motion. The motion alleges that the words spoken by Fusitu'a were calculated to:

- Threaten the Chief Justice with prosecution,
- Bring the judicial system into contempt,
- Interfere with the proper exercise of the office of Chief Justice,

- Give the impression that the Chief Justice is not independent,
- Suggest that the Supreme Court of Tonga is subject to manipulation by the Legislative Assembly.

It is very well settled law that punishment consequent on a conviction for contempt is inflicted not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of an attack but of Protecting The Public and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court from the mischief they will incur if the authority of the tribunal is undermined or impaired.

Where then does that take the matter? On the findings and the defences (so called), raised by Fusitu'a a consideration of the operation and scope of the U.K. Contempt of Court Act 1981 needs to be made.

Although the common law is not entirely superceded by the Contempt of Court Act, it is clear that is practice most cases will now fall to be determined under its provisions.

Section 5 of the Act contains the following qualifications to liability:

> "5. A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussions".

S.5 only applies where the proceedings allege a contempt under the strict liability rule.

S.5 of the act has no application where it is contended that the relevant publication is intended to impede the administration of Justice; nor where the intereference is with the administration of Justice as a continuing process, rather than with Justice in that particular case ["Contempt of Court" C.J. Miller 2nd ED. 1990]. The allegations in both motions relate to interference with the continuing process.

It is noted at once that in respect of both motions before the court the Crown relies on the inherent jurisdiction of this court to deal with matters on contempt, but the Contempt of Court Act 1981 (U.K.) provisions need to be considered in light of the fact that each respondent relies upon the Act for his defence.

From the outset it has been the case for the Attorney-General since the filing of the motion that at all material times, the first respondent said words and acted in a private capacity - not in any official capacity.

Fusitu'a in his evidence given orally and in his affidavit deposes to having spoken as and in his capacity as Speaker of the Legislative Assembly. Certainly 'Akau'ola appears to have sought him out in order to interview him as Speaker. 'Akau'ola's evidence is

> "Why I went to Fusitu'a because I have to know what would the House do when we were released from prison because we knew that there was a letter asking Fusitu'a whilst we were in prison with regards to our release ..... that the person with authority in the House to my knowledge would be the Speaker of the House". (sic)

Even though Fusitu'a may have believed then (and still believes) that he was acting in his official capacity in speaking with 'Akau'ola, - it is a matter of fact peculiarly within his own knowledge. No one else speaks of it.

I find that at all material times Fusitu'a spoke and acted in a personal and private

capacity - (as the Solicitor General alleges), when, in the interview with 'Akau'ola he said the words which ultimately were published in "Taimi 'o Tonga".

It is immaterial in what capacity Fusitu'a uttered the words complained of once he is found to be contemnor ..... "Ministers of the Crown and civil servants are natural persons having a legal personality. The obstacles to liability in contempt which arise in the case of 'The Crown' and other government departments do not therefore arise in their case. Prima facie they, like any other citizen, are subject to the Law, the rule of law and the full jurisdiction of the Courts", per Lord Donaldson M.R. - M v Home Office [1992] 4 All ER 97 at 136.

6.0 THE LAW RELATING TO CONTEMPT

I take the law (as presently advised) to be as follows:

The circumstances of the two matters now before the court give rise, broadly speaking, to three separate and different categories of contempt

- Contempt outside the Court,
- Contempt by words used and
- Contempt by publishing and republishing.

As to the form of this hearing and although no point is taken by counsel, in my opinion it is open to one judge of this Court to commit for the established contempt of another judge. Balough v St. Albans Crown Court [1975] Q.B. 73.

At one time there existed a categorisation of contempt into two heads, civil and criminal contempt. However, in Attorney General v. Newspaper Publishing PLC [1988] Ch.333, Sir John Donaldson M.R. considered the law of contempt and its basis in principle. He said:

> "Despite its protean nature, contempt has been classified under two heads 'Civil Contempt' and 'Criminal contempt'. Whatever the value of this classification in earlier times I venture to think that it now tends to mislead rather than to assist, because the standard of proof is the same namely the criminal standard and there are now common rights of appeal. Of greater assistance is a reclassification as (a) conduct which involves a breach or the assisting in a breach, of a court order and (b) any other conduct which involves an interference with the due administration of Justice, either in a particular case, or, more generally, as a continuing process, the first category being a special form of the latter, such interference being a characteristic common to all contempts: Per Lord Diplock in Attorney General v. Leveller Magazine Ltd. [1979] A.C. 440. What distinguishes the two categories is that in general conduct that involves a breach or assisting in the breach of a court order is treated as a matter for the parties to raise by complaint, whereas other forms of contempt are in general considered to be a matter for the Attorney General to raise. In doing so he acts not as a Government Minister or Legal Adviser, but as the guardian of the public interest in the due administration of Justice".

The Master of the Rolls went on to say (at 368 and 971),

> "The Law of contempt is based upon the broadest of principle

namely that the courts cannot and will not permit interference with the due administration of Justice. Its application is universal. The fact that it is applied in novel circumstances, for example the punishment of a witness after he had given evidence (Attorney General v Butterworth [1963] 1 Q.B. 696), is not a case of widening its application. It is merely a new example of its application".

What is contempt? Lord President Clyde described it in Johnson v Grant (1923) SC 789 at 790, cited with approval by Lord Edmund-Davies in Attorney General v. Leveller Magazine Ltd. [1979] 1 All ER 745 at 757:

"The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned ..... the offence consists in interfering with the administration of the law ..... it is not the dignity of the court which is offended - a petty and misleading view of the issues involved - it is the fundamental supremacy of the law which is challenged".

Did Fusitu'a interfere with the administration of the law and intend so to do? From the whole of the evidence before me I have no doubt that he intended to make it plain that the reversing of the will of Parliament by an order of the Supreme Court was something that would not be tolerated while he was Speaker. He was, in speaking to the press, making it plain to as many people as he possibly could that if the Court of Appeal demonstrated that the Chief Justice was in error in his releasing of the prisoners then preparations would be made for the impeachment of the Chief Justice.

But Fusitu'a was at all material times the Speaker of the Supreme Law making Body of Tonga. How could he have not known that there was no means whatsoever in the circumstances which he knew to exist in these habeas corpus applications by which the Parliament could impeach the Chief Justice for doing that which his judicial oath required of him? Parliament has made Laws and Parliament required of him that he uphold its laws.

I am reluctantly forced to conclude that Fusitu'a intended to interfere with the proper course of the administration of Justice by putting about misleading information. That can only be a most serious contempt of Court. What he hoped to achieve by his remarks to 'Akau'ola one cannot know. He said in answer to the Acting Solicitor General in cross-examination:

"What I was concerned about was that we were told that we were wrong constitutionally".

Perhaps it was that concern which motivated his remarks. I am unable to say. Whatever it was that motivated these extraordinary remarks have led him into a grave predicament.

Was Fusitu'a attempting to hold the Chief Justice in fear forever? Whatever his purpose I conclude that he knew full well that what he was saying was wrong in law and in fact and that he intended to put the misleading information about. It is contempt of the Court to do so for it is an interference with the administration of justice and accordingly, a contempt of Court attracting as it does serious consequences. I so find.

I formally find that 'Akau'ola participated in the publishing of the words in the manner which I have described. I find 'Akau'ola guilty of contempt.

I will hear counsel on the appropriate penalties to be imposed in the "Taimi 'o Tonga"

matter.

SENTENCE

Having found the "Taimi 'o Tonga Motion" established beyond any reason doubt it is now necessary to consider the appropriate sanctions to be imposed on Hon. Fusitu'a and Filokalafi 'Akau'ola.

I was reminded recently that "It is not possible for order and peace to be sustained in modern nations unless those nations develop and promote an effective and just legal system. The very legitimacy which citizens are prepared to accord to the state and to the institutions supporting it depends upon their sense that they are treated both fairly and equally with all other citizens. A legal system that is accessible to all citizens which operates according to laws which are known in advance and perceived to be reasonable and fair, and which uses procedures that are both even handed and recognised as effective in reaching the truth, is among the best means of reassuring citizens of that fair and equitable treatment ....."

"An effective legal system is one major means of handling and resolving some types of conflicts and disputes which could otherwise get out of hand and lead to general disorder ....."

There is a separation of powers in the structure of state. The Legislature the executive and the judiciary are separate limbs of government. Each institution must legitimately manage its own affairs. It has been in the exercise of that management that these proceedings have been prosecuted - for the protection of citizens generally and particulary those who have recourse to the justice system.

I repeat the remarks made in the judgment. Punishment consequent on a conviction for contempt is inflicted not for the purpose of protecting the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief theywill incur if the authority of the tribunal is undermined or impaired.

I have carefully noted that what Hon. Fusitu'a said in his affidavit and his reply. It seems extraordinary, that, having spoken about the matter of impeachment with 'Akau'ola in the way he did, he was able to purport to retract the words printed in "Taimi 'o Tonga". Any damage was done in the publishing. It is almost unnecessary to point out the high public office which Fusitu'a held at the time of his published statements to "'Akau'ola". For years he has carried well, the solemn burden in his role as Speaker of upholding the excellent reputation which the Legislative Assembly of the Kingdom of Tonga has acquired over more than one hundred years, a task which he has carried out with distinction.

Associated with Fusitu'a's role is the historical respect in which the office of Speaker is and has been held. The consequence is that when Hon. Fusitu'a makes a statement to the press on any matter, privately or as the Speaker of the House, the people generally accept what is said without reserve - for such is the acceptance of the intgrity of the office-holder it neither could nor should, be otherwise.

I have been convinced by what I have heard that Hon. Fusitu'a used the words complained of. No reasonable by-stander who having read the article and having considered the assertions it contained could think that the Chief Justice (and indeed any Judge of the Court), was independent.

The clear implication is that if the Chief Jusitice is not independent then the administration of justice is one which is unreliable and unsafe for those who may have cause to use it.

The Attorney General asserts in these proceedings that by his actions Hon. Fusitu'a has:

- Brought the Judicial system into contempt,
- Interfered with the proper exercise of the office of Chief Justice,
- Interfered with the lawful processes of the Court,
- Given the impression that the Chief Justice is not independent and
- Suggested that the Supreme Court of Tonga is subject to manipulation by the Legislative Assembly.

In my opinion all the elements particularised are present in the evidence presented to the Court by the Attorney General to a greater or lesser degree, for reasons which I have already given.

The question now is what is the reality of the effect of what has been said and published? When Fusitu'a used the word "Faka'ilo" whatever the proper translation may have been for those circumstances, he was wrong in fact and he was wrong in law.

The confidence of ordinary people in the proper safe and efficient administration of Justice must reasonably be seen to have been shaken. Thus it has become necessary for the Attorney General to move these proceedings.

I comment that this matter has become protracted into a relatively lengthy hearing with some associated delay at the instance of the first respondent. The contempt which existed from publication has been a continuing one; one from which greater damage to the administration of Justice has the potential to flow. I may have taken a different view of penalty had there been a retraction and an apology made at the earliest time. However, that was not to be and what was bad enough at its utterance may well have become compounded over time; however that is mere speculation. I have no evidence of it before me.

As to 'Akau'ola, it was by means of the newspaper which employed him that the misstatement of the law and of the fact was circulated in Tonga.

This was a most serious contempt but I now take into account that the affidavit and reply of the first respondent reflect a retraction and apology.

After taking into account the facts as I have found them to be and the submissions of counsel I have concluded that the appropriate sanctions are as follows:

- As to Hon. Fusitu'a, I impose a fine of $1000.00.
- As to Filokalafi 'Akau'ola, a fine of $500.00

The question of costs is referred into chambers for taxing or agreement on 4 February 1997 at 9.30 am.

I by consent further order that the First Respondent and the Second Respondent each publish on page one of the next edition o "Tonga 'o Tonga" newspaper a retraction not smaller in prominence that the article complained of, to be written in such fashion as shall be approved of by the Solicitor-General Acting on behalf of the Attorney General in this matter.