

IN THE MATTER OF

AN APPLICATION FOR THE ISSUE
OF A WRIT OF HABEAS CORPUS SCR O/28R6

AND IN THE MATTER OF

FILOKALAFI 'AKAU'OLA AND
'EAKALAFI MOALA

- Applicant;

AND

1. THE KINGDOM OF TONGA
2. THE MINISTER OF POLICE

- Respondents.

LEWIS J.

MR TU'UTAFIVA AND WITH HIM
PALUVAVA'UTAUFATEAU FOR THE
APPLICANTS

HON. THE ATTORNEY GENERAL FOR THE FIRST RESPONDENT
HON. THE MINISTER OF POLICE AND PRISONS APPEARING IN PERSON

HEARING : 24 SEPTEMBER 1996
JUDGEMENT : 25 SEPTEMBER 1996

JUDGMENT

Filokalafi 'Akau'ola and 'Eakalafi Moala make application to this court for the issue of writs of habeas corpus pursuant to SCR O/28.

Each applicant seeks an order that he be released from unlawful and unjustifiable restraint or detention imposed upon him at 5.00pm on 19 September 1996 by order of the chairman of the legislative assembly.

The grounds advanced by the applicant 'Filokalafi 'Akau'ola are that the detention is unlawful and unjustifiable on grounds which he set out in a petition to the legislative assembly. It bears interpolation into these reasons

Filokalafi 'Akau'ola
C/- Taimi 'o Tonga
PO Box 880
NUKU'ALOFA

16th September 1996

TO: The Legislative Assembly

Nobles

PETITION LEGISLATIVE ASSEMBLY OF TONGA

Reference to summons dated Wednesday 11th September 1996.
No.2 - 1996

With respect I confirm receipt of the Summons to me, the Assistant Editor and Advertising Manager of the newspaper Taimi 'o Tonga, ordering me to attend the Legislative Assembly of Tonga on 19 September 1996 because of complaint made to your Honour regarding me, alleging that I act disrespectfully to the Legislative Assembly and reminding me that I may be imprisoned if I do not attend as required.

I Apologize to your Lordship and the Honourable Members of the Legislative Assembly, because the declaration of Freedom by virtue of the Constitution. I petition you Lordship by virtue of clause 8 of the constitution. On my understanding that the summons of your Lordship directing me to attend and if I refused I will be committed of prison. I believe without any doubt it's an

infringement of my legal right because there is no law or authority for your Honour to Order my attendance at the Legislative Assembly. If you were to write and ask for my attendance I would be happy to oblige your Lordship with any assistance you may require.

The Summons affects my legal rights and I need advice from my lawyer, this Petition is for:-

1. To require particulars of the charge against me in the Summons as provided by clause 11 of the Constitution, namely, "No one shall be tried or summonsed to appear before any court or punished to appear before any Court or punished for failing to appear unless he have first received a written indictment ..." There has been no decision by the Legislative Assembly about me before upon which I may be said to act disrespectfully to the Legislative Assembly.
2. And if there is a prior decision then you have already adjudged me to be punished. The question would be which authority allowed the Constitution to legalise the decision by the Legislative Assembly because clause 10 of the Constitution provides that "No one shall be punished because of any offence he may have Committed until he has been sentenced according to law before a Court having jurisdiction in the case." You have not specified any provision in law that I have breached and upon which I may be punished as for the said Summons.
3. My legal rights whilst under the protection of the National Flag which is the Cornerstone of the freedom provided by the Constitution, I of very your authority to judge this matter.
 - a. Do I have any right to be protected by clause 75 of the Constitution regarding this Summons in your authority in my defence as I am not a member of the Legislative Assembly of Tonga because clause 84 of the Constitution is the authority to judge anyone who is not a member of the Legislative Assembly, it is for a Court established According to law. This

is supported by clause 30 of the Constitution specifying the manner of ruling this country:

- i. King, Privy Council & Cabinet
- ii. Parliament
- iii. Court

To me, it is Parliament who enact the law but for the Court to judge according to that law is breached by any member of Parliament.

- b. Will I be having any legal right under your authority to elect trial by jury or judge alone, or is it the Legislative Assembly who would be judging my case, because judges take the oath to carry out their duties impartially in judging cases and that is supported by clause 15 of the Constitution, or will you be judging me in accordance with clauses 75 and 69 of your authority under the Constitution.
- c. Will I be judged in your presence or will it be at a forum enabled by law for me to explain freely without fear of justice being affected, for it is Parliament which summoned me but I am not a member of Parliament in accordance with clause 14 of the Constitution, not to force liberty, and my adjudication be impartial as provided by clause 15 of the Constitution.

With respect to your Honour and the Legislative Assembly of Tonga, it would appear that I am threatened and convicted by the Summons and I have lost my freedom and liberty as set out in clause 14.

I submit that the power to judge and punish me is with the Courts of Tonga, and not in the Legislative Assembly of Tonga. In the Summons I have received it does not charge me of breaking any law in this Country. If there is any member in the Legislative Assembly who is unhappy with my

performance of my duties I believe it is open in law to claim his right in Court.

I hope that you would accept my petition and wish to have response from you within two days so that I may prepare my defence.

Yours faithfully

Filokalafi'Akau'ola

On his part, 'Eakalafi Moala enumerates the grounds upon which he makes complaint of his detention as follows:-

8. I am now in prison and honestly believe that my imprisonment is both unlawful and unjustifiable because:-
 - (i) I am not a member of the Legislative Assembly
 - (ii) The said article was not published in the presence of the Legislative Assembly.
 - (iii) The Legislative Assembly cannot lawfully invoke the power under clause 70 of the Constitution against me.
 - (iv) The Legislative Assembly, who have a vested interest in this matter, was the body who charged, adjudged, me to be guilty and sent me to 30 days detention in prison.
 - (v) The procedure adopted by the Legislative Assembly was unfair and unjust.

In her affidavit, Paluvaya'u Taufateau, junior counsel before me and counsel for both applicants before the legislative assembly narrates the procedures adopted by the assembly. The affidavit is neither challenged as to fact nor is it criticised. It is however, impliedly rejected by the respondents as to the claims of unlawfulness the affidavit makes.

Clause 70 of the Constitution provides as follows:

70. 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.

The argument of the applicants is that the neither spoke or acted disrespectfully in the presence of the legislative assembly. On any account of events that is so. However the section does not simply create an offence for that behaviour alone. It goes on to create a number of transgressions the performance of any one of which will render the person liable for imprisonment.

The summons which brought Filokalafi 'Akau'ola to the assembly is indeed in the broadest terms it says:-

In the Legislative Assembly of Tonga
Nuku'alofa

No.2 of 1996

To: SUMMONS

Filokalafi 'Akau'ola of Kolomotu'a
Nuku'alofa
TONGA

There is a complaint to the Legislative Assembly of Tonga regarding the Newspaper "Taimi 'o Tonga" whereby you are the Assistant Editor and Advertizing Manager, published on Vol. 8 No. 36 on Wednesday 4 of September, 1996. It publishes 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 fail to comply with this summons and you do not attend,
you will be committed to prison.

Dated Wednesday 11 of September 1996

.....
Chairman of the Legislative Assembly

In his submissions to the court regarding this application, the Honourable Minister of Police makes a point which bears consideration. The submission is that the word used in clause 70 in the Tongan language copy of the constitution is "lohiaki'i". It means "to lie to or to deceive". Section 21 of the Interpretation Act Cap 1 provides:

21. If upon the trial of any person for an offence against any law of Tonga it is manifest that the Tongan and English versions of the section which the accused person is charged with violating differ in meaning, then, in deciding the question of the accused person's guilt or innocence the court shall be guided by what appears to be the true meaning and intent of the Tongan version. (Amended by Act 28 of 1978)

Given the wording of the section it can be seen that in the Tongan version the Constitution clause 70 plainly contemplates a usage of the word lohiaki'i to mean to deceive or to lie. The English usage of the word to libel also contemplates a usage which may mean 'to publish a false statement so damaging ... reputation'

The law in Tonga is well settled. It was plainly spoken in the decision in Fotofili -v- Siale (unreported 3 August 1987) there the Privy Council said:

"It follows that in England the validity of an Act of Parliament is not open to challenge on the ground that its passage through the house was attended by any irregularity. The same is not true in Tonga where there is a written Constitution. If, on a true construction of the Constitution some event or circumstance is made a condition of the

authentic expression of the will of the legislature, or otherwise of the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court, notwithstanding that the question may involve internal proceedings of the Assembly.

Again, a statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution although its passage through the house was not attended by any irregularity."

It must be clearly understood that parliament is entitled to absolute privilege over its internal proceedings and in that sense it is properly entitled to determine what words or actions will amount to contempt and the sanction which it should (subject to the provisions of clause 70) impose upon a person whom it finds to have committed a contempt of the house.

The applications for the issue of writs of Habeas Corpus are refused.

Nuku'alofa, 25 September 1996



ew
Acting Chief Justice