

BETWEEN : ATTORNEY GENERAL - Plaintiff;

AND : FILOKALAFI 'AKAU'OLA - Defendants.
and others.

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mrs Taumoepeau for the Plaintiff
Mr Tu'utafai'iva for the Defendant, F. 'Akau'ola.

Date of hearing: 12 April, 1999.

Date of Judgement: 14 April, 1999.

JUDGEMENT

On 9 September 1998 the trial of one 'Isileli Pulu on a charge of criminal defamation was commenced in the Magistrates' Court. The alleged defamatory matter in that case was a letter to the Taimi 'o Tonga newspaper about a travel agency, Olympia Travel, in New Zealand operated by the wife of the Minister of Police. It suggested the Minister had authorised only that agency to deal with Tongan passports in New Zealand.

At the trial, the Minister was called as a witness for the prosecution and stated he had never given such an authorisation. The officer in charge of the Immigration Branch, Chief Inspector Mele Halapua, also gave evidence that the Minister had never instructed her not to authorise any agency other than that of his wife. At the close of the prosecution case, the hearing was adjourned a number of times until 12 October. On 7 October the Taimi 'o Tonga contained articles, stated to have been written by a reporter, 'Ulu'alo Po'uhila.

The first article appeared on page 1 under the headline; "Is the minister of police lying?" and suggested the Minister and the officer in charge of the Immigration Branch had "both made statements under oath that are lies in the court in the proceedings against 'Isileli Pulu for defamation." It went on to quote the remarks of a person who ran another agency in New Zealand that he had been prevented from working on Tongan passports by Olympia and that Olympia was the only agency authorised to deal with them.

On page 3 there was a second article headed; "Mele Halapua's statement is questionable, after the discovery of her letter." That article again challenges the accuracy of the evidence of the witness in court and claims the newspaper has a letter in its possession that demonstrates her evidence and that of the Minister was not correct.

The present defendant, Filokalafi 'Akau'ola, is named in that issue of the newspaper as the deputy editor.

The Attorney General has filed a notice of motion to have the defendant committed for contempt of court on the grounds that the articles were likely to interfere with the course of justice in the Magistrates' Court and were calculated to interfere with the fair trial of the proceedings in that court.

Mrs Taumoepeau, for the Attorney General, has filed an affidavit from the prosecuting officer who had the conduct of the trial of Pulu describing the events already set out above. The defendant has filed an affidavit in reply. In it, he denies being involved in the publishing of the articles. Mr Tu'utafaiva for the defence does not dispute that the defendant is the deputy editor of the paper. He challenges the Attorney General's case on two bases; that there should have been an application for leave before the motion was filed in this action and that his client, as is stated in his affidavit, was not involved in the publication of the articles.

I can deal with the first matter shortly. Mr Tu'utafaiva relies on the provisions of Order 26 rule 12 which allows the Supreme Court or the Court of Appeal to punish contempt by an order of committal, rule 12 (1), which, if the contempt was in the face of the court, may be immediate, rule 12 (2). Rule 12 (3) then provides:

"(3) where the contempt consists of disobedience to an order of the Court or breach of an undertaking to the Court,

(i) application for leave to apply for an order of committal shall be made ex parte by summons supported by an affidavit stating

- (a) details of the order or undertaking;
- (b) the name and address of the person sought to be committed;
- (c) the grounds upon which his committal is sought."

That is the only provision where leave is required and it can be seen that it is only where there has been disobedience to an order or breach of an undertaking. That is not the case here and application for leave to apply is not necessary.

I pass now to the allegation of contempt.

The Supreme Court will always act to prevent interference with the course of justice in the Magistrates' Court and it has long been accepted that it is a contempt of court to publish words tending or calculated to interfere with the course of justice. As this may amount to a restriction on the right to freedom of speech, it is a remedy the courts should

use only in the clearest cases. Lord Reid in Attorney General v Times Newspapers Ltd (1974) A C 273,294, a case of civil contempt, explained;

"The law on this subject (contempt) is and must be founded entirely on public policy. It is not there to protect the private right of parties to litigation or prosecution. It is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice"

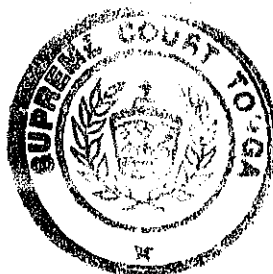
In the same case Lord Morris of Borth-y-Gest pointed out that he found difficulty in framing an exact definition of the conduct that constitutes a contempt of court but he points out that there are some types of conduct that will never be tolerated. One example of that is publications which would prejudice a fair trial.

This is an allegation of a criminal offence and it must be proved to the criminal standard of proof beyond reasonable doubt. On the evidence before me, I am satisfied beyond any doubt that the articles were published in the newspaper during the course of the trial of 'Isileli Pulu, that they were knowingly referring to the evidence in that trial and, by their nature and content, were clearly calculated to impair the court's ability to determine the true facts in the case. I have absolutely no doubt that their publication was likely to prejudice the fair trial of the case and was intended so to do.

The defendant does not seek to deny the nature or effect of the articles but denies any part in the publication. He gives no further evidence of how that is the case. There is no burden on him to prove it; it is up to the prosecution to disprove it. I have considered the evidence of his part in this matter. I am satisfied beyond reasonable doubt that, at the time of the publication of the two articles in Taimi o' Tonga, the defendant was the newspaper's deputy editor. I am similarly satisfied that, as such, he was involved in and responsible for the publication of those articles. Although it is not necessary for the prosecution to prove the defendant knew the contents of the articles, the size of the newspaper and the time between editions leaves me satisfied beyond reasonable doubt that the defendant did know the nature and content of these articles.

He is guilty of contempt of court.

DATED: 14 April 1999.



G. Wand.

CHIEF JUSTICE