IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

NO.CR.1154/99

ATTORNEY GENERAL

-V-

1. *'ESAU NAMOA*
2. *NAILASIKAU HALATUITUIA*
3. *KILISITINA VAEA*
4. *CHRISTOPHER RACINE*
5. *OCEANIA BROADCASTING NETWORK*

Counsel: Mr Kefu for Attorney General
Mr Edwards for Defendants

Hearing: 6th March & 5th April 2000

Judgment: 11 April 2000.

Judgment

On 18 October 1999, a Check it Out Programme was broadcast on television at 11.0am and 8.0pm by the fifth defendant, the Oceania Broadcasting Network. The programme concerned the repeal of section 16 of the Land Act. It took the form of a discussion between two panelists, 'Esau Namoa, a Member of the Legislative Assembly and Nailasikau Halatuituia, who is studying land tenure at the University of Sydney. It was hosted by Kilisitina Vaea, an employee of the television station.

During the programme a number of references were made to a judgment of the Supreme Court in October 1996 in the case of PPEL v Masima and others, number 1089/96, and to the judges, Hampton CJ and Lewis J, who presided over it – particularly the former. Following complaints from the public about the tone and intent of some of the comments, the Attorney General moved for the committal of the people responsible alleging the remarks amounted to contempt of court. The panelists are the first two defendants, the programme host the third. Christopher Racine, the fourth defendant, is joined as the owner and manager of the fifth defendant.

It appears that the repeal of section 16 stemmed from the decision of the judges in the PPEL case that the section conflicted with clause 4 of the Constitution. The topic of the repeal was a matter of intense public debate and concern and this was the second Check It Out programme that had

been devoted to the issue. I accept that both commentators held strong and genuine personal views about the issue.

It is not necessary to go into the details of the programme. It was directed largely at the fact that this section was protective of Tongans and should not be lightly discarded. As the programme developed the commentators also pointed out that a number of other provisions of the Land Act could be contrary to the Constitution and posed the question why only this one should, therefore, be repealed. By the end of the programme, this was the main thrust of the commentators' remarks and there can be no challenge to their right to point that out and comment on it even in the rather extreme terms used by Mr Namoa.

As the repeal had resulted from the PPEL case, it was inevitable the judgment would itself become the subject of some discussion and comment. It is suggested by Mr Kefu for the Attorney General that those comments amounted to contempt.

The contempt alleged here is that the comments scandalised the Court. As with the phrase contempt of court itself, the word is archaic and would possibly be better replaced but it is an accurate enough description. The classic definition of scandalising the court is that of Lord Russell CJ in R v Gray (1900) 2QB 36, the case that effectively revived the offence in England after a century of disuse:

> "Any act done or writing published calculated to bring the court or a judge of the court into contempt or to lower his authority, is a contempt of court."

In England such prosecutions have become rare but in Australia and New Zealand they have been regularly brought and I consider the scope of the offence is now more plainly reflected in the recent judgments from those jurisdictions.

This court derives its power to punish for contempt from the inherent power developed through the common law. The harm that the law of contempt is to prevent is interference with the due administration of justice. It is to protect that and not the individual, whether a court or a judge, who is administering justice. The reason was explained by Richmond P in the New Zealand case of Solicitor General v Radio Avon Ltd (1978) 1NZLR 225 at 230:

> "The justification for this branch of the law of contempt is that it is contrary to the public interest that public confidence in the administration of justice should be undermined."

The test, then, is whether there is a real risk of undermining public confidence in the administration of justice. The types of contempt that will amount to scandalising the court are extreme and would go beyond any form of mere criticism. Scurrilous abuse of the court or judge may amount to scandalising the court if it is likely to undermine public confidence in the court's function. Similarly untrue allegations of bias or impropriety will amount to a serious contempt because of the tendency to undermine the very basis of the judge's function.

I shall set out the passages complained of but, as is so often the case, the effect lies not just in the individual words or phrases but in the total effect of the words against the general tone and context of the programme as a whole. Time and space prevent me from setting out the whole transcript but, in some instances, I have set out the surrounding passages to clarify the context in which the commentators were using them.

The passages form part of two main themes which I shall deal with separately although to some extent the overall effect is also relevant.

The first theme is the suggestion that the Chief Justice acted outside his jurisdiction because this was really a case that should have been tried in the Land Court.

It first surfaced when Mr Halatuituia was making his second contribution to the discussion. He referred to the finding in the PPEL case that the section was contrary to clause 4 of the Constitution and continued:

> "The reasoning and importance attached to the land by the Tongan subject is vastly different hence the publication of this Law (the Land Act) in 1927 which allowed for the establishment of the Land Court and all matters related to the land shall be dealt with by the Land Court. Hence the Constitution and the Law of Tonga allow for an assessor in the Land Court. The nobles and the people of Tonga are aware that the Chief Justice is a European or a foreigner."

He then developed the proposition that the case in 1996 should have been heard in the Land Court so the court would have had the assistance of an assessor to 'clarify matters to the Chief Justice pertaining to how we live as Tongans, our culture and our connection with the land.' He concluded:

> "So the judgment was not in accordance with the Land Act where a land assessor be brought forward as is done by the Land Court. In my opinion, the judgment of the Chief Justice, he had no authority on matters pertaining to the country and the land."

That theme was taken up by Mr Namoa. He suggested that the Crown Law Department should have advised the Chief Justice 'for him to realise he had no authority to deal by himself with the land matters'. Later he stated;

> "...the Minister of Justice and the legal advisers should have known better that the Chief Justice had no authority to deal with and give judgment by himself on land matters in this country."

And finally:

> "The Chief Justice had no authority at all to give judgment in this particular court case."

The second theme arises in the comments by Mr Namoa only. He referred to the section being 72 years old and continued:

> "It has lasted long for there were people wise enough before and people who loved, people who paid allegiance to this country and these people who respected His Majesty. Another thing, Kilisitina, in the history as I understand it from the Palace Office in relation to Tupou I, with respect, he pushed the Chief Justice not to interfere with the matters relating to this country. The land is a record at the Palace Office.
>
> When it came to the Second King, with respect, the Chief Justice was able to make judgments around this country.
>
> When it comes to Queen Salote Tupou III, the Sun who has Fallen, she took the Judge and threw him outside, with respect, he has no involvement at all with the land of this country.
>
> It is now Tupou IV, with respect, the same thing. Tupou IV told the judge stay there according to section 84 of the Constitution. The unfortunate thing is that the judges who delivered the judgments have left and the company PPEL has dissolved. What is the reason for submitting a law where the company has dissolved and the Chief Justice has left? That is what I am talking about. Tupou IV, this King does not accept a Chief Justice or a foreigner to come here and want to make decisions concerning the land of this country."

Mr Kefu suggests that both these groups of comments have a clear tendency and intention to lower the authority of the court and bring it into contempt.

Mr. Edwards for the defendants asks the court to see this as reasonable comment and part of freedom of speech. In Attorney General v Ulakai, number 1178/99, I pointed out:

> "Freedom of the press in Tonga is preserved in article 7 of the Constitution along with and, I would suggest, as part of freedom of speech. The media has the right to publish issues of public importance and also to publish them in such a way as to stimulate discussion. It is important therefore, that the media is not unduly restricted in what it reports and, when it is, the courts must always be careful to see that the rules of contempt are not used to gag the reporting and discussion of matters of public interest or concern for the wrong reasons."

I do not accept Mr Edwards' suggestion that clause 7 can be interpreted by reference to United States cases. In Ulakai's case, I expressed my view that Tonga has already chosen not to follow America. That the common law power to punish for contempt of court exists here alongside clause 7 has been recognised in many cases including the case of Akau'ola v Attorney General, Appeal 3/97, in our Court of Appeal.

Where the allegation is scandalising the court, the question of the effect of the words so often, as here, requires analysis of their meaning and the intention of the person who made them. In this case the court must be careful to distinguish between incorrect statements and illogical comments on the one hand and a real tendency to undermine the authority of the court on the other.

It is only in the clearest case that the court should take action and the court should not be too sensitive of its position. Anyone is entitled to comment on a court decision. Mere criticism is, and for a very long time has been, permitted. In Gray's case, Lord Russell went on to point out:

> "That description of that class of contempt (scandalising a court or judge) is to be taken subject to one and an important qualification. Judges and courts alike are open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court."

Even unfair, inaccurate or biased comment will not give rise to a conviction of contempt unless it goes beyond reasonable comment on the decision and is likely to bring the court itself into disrepute. There is no reason why the courts should not be able to stand the same degree of criticism other institutions and public figures face. If the court has public respect, I find it hard to believe that it will lose it because of even ignorant criticism. It was well expressed by Cory JA in the Canadian case of R v Kopyto (1998) 47DLR (4^{th}) 213 at 227:

> "....the courts are bound to be the subject of comment and criticisms. Not all will be sweetly reasoned.....but the courts are not fragile flowers that will wither in the hot heat of controversy."

Even outspoken comments will not amount to contempt unless they are abusive of the courts or the judges or suggest impropriety. In 'Akau'ola v Attorney General, our Court of Appeal stated:

> "The court, by which the rule of law is maintained and implemented is at the heart of a free society; but it is not a fragile institution. It is and must be robust enough to bear the criticisms of the dissatisfied. It was not set up so much to be protected as to protect. Of course the extremes of calumny which might weaken even the strongest institution, need to be repelled. But contempt of court by scandalising the court should be found only in those extreme cases."

The Court adopted the famous words of Lord Atkin in Ambard v Attorney General for Trinidad and Tobago (1936) AC 322 at 335, in which he pointed out:

> "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

The test is not whether a comment is critical or wrong in its interpretation of the case but whether the tendency is such that it undermines the authority of the court itself. The result will depend on the jurisdiction in which it occurred. I would suggest that, in a small community with few judges

and a relatively undeveloped press and media, the test is the same but the level of criticism likely to undermine public confidence in the administration of justice is lower than in a larger community more familiar with and better able to evaluate the remarks of commentators in the media.

The first group of comments are based on the mistaken view expressed by Mr Halatuituia that all matters related to the land shall be dealt with by the Land Court. The jurisdiction of that Court is expressed in and limited by the provisions of section 149 of the Land Act. The PPEL case was not a Land Court case but a civil case. It could not have been tried in the Land Court and the suggestion that the Chief Justice was mistaken when he heard it in the Supreme Court is erroneous.

The commentators were correct to state that, had it been a Land Court case, the judge would have sat with an assessor. It is also correct that the duties of the assessor are to assist the judge with explanation and advice in regard to Tongan usages and customs and similar matters. However, the Act specifically provides that the assessor shall have no part in the formulating of the orders and judgments of the Court.

The suggestion that the Chief Justice had no jurisdiction in the case was unfortunate but I read those remarks as relating principally to the absence of an assessor based on the second defendant's mistaken belief that this should have been heard in the Land Court.

Mr Namoa continued to build on the same error but his comments, less tempered that those of his fellow commentator, went further and suggested that the Chief Justice would not have gone wrong if he had been properly advised by the Government's legal advisers. That was an unfortunate addition. I consider he was, at the time, intending to direct his criticism at the legal advisers but the effect was to suggest that the Chief Justice was unfamiliar with his own jurisdiction and needed to be put right and, more seriously, that the court is advised in such matters by the executive arm of Government.

Had I thought for a moment that he intended those comments to be understood in that way, I would have not hesitated to find him guilty of contempt in relation to them. However, having considered the nature and accuracy of his remarks in the programme as a whole I feel these comments also arose from a misunderstanding of the position of the Land Court and apparent ignorance of the doctrine of the separation of powers.

I have already stated that even ignorant criticism of the court may not amount to contempt and I am not satisfied to the required standard that his comments are likely to have lowered the authority of the court in the eyes of any right thinking member of the public and they do not amount to contempt of court.

However, they remain relevant to the consideration of the tone and effect of the later comments by Mr Namoa. Those are the comments I have described as comprising the second theme.

The effect of the passage set out is to suggest that King Tupou I had to prevent the Chief Justice from interfering in the matters of the country. He goes on to suggest that in the time of Tupou II,

the Chief Justice was able to make such judgments with the result that Queen Salote had to take the judge and throw him out from any sort of involvement with the land of this country.

I am not commenting on the accuracy or otherwise of the events he may have been referring to. It is no part of the function of this court to dispute what may well be historical fact. The conduct and attitude of judges over the world have altered with the passage of time and changing public expectations. What concerns Mr Kefu is the way in which these comments are worded. The first defendant, having described the earlier events in derogatory terms, passed on to relate it to the present court with the suggestion that the present King also does not accept the jurisdiction of the Chief Justice to make decisions in land matters.

That passage, of course, followed this defendant's earlier suggestion that the Chief Justice needed to be advised on the jurisdiction of his own court because he had gone wrong when acting without such advice.

Mr Kefu suggests the words used and the whole tenor of the remarks are deliberately intended to demean the judges and court. These remarks were made in Tongan and the effect must be assessed by how a Tongan speaker would take them. Words such as *teke'i* and *lii kitu'a* would be seen as intending disrespect. Following that, the use of the word *fietu'utu'uni* in the reference to the present King would be taken as critical of the judge's conduct now.

I am satisfied the overall effect of these passages creates a real risk that they will lower the authority of the court.

It seems probable that any reasonable person making such remarks must have intended such an imputation but I must consider whether the first defendant intended it or simply made these remarks carelessly with little or no thought of such a meaning. This is a criminal matter and I must be satisfied to the criminal standard of proof beyond reasonable doubt. I am satisfied to that standard that he made these remarks with the intention of lowering the judges in the eyes of the public.

The references to the fact that, because the judges have left the country, their judgment should somehow be of no effect coupled with the suggestion that the present King does not accept a foreigner to make decisions about land are all part of the generally derogatory tone of his comments. I am uncertain of his intention by those remarks but, if it was to suggest the judges were unable to appreciate the true position under the law because they were not Tongan, it was ill-informed. The judges are here to apply the law as it stands and, if that law is such that it is necessary to be Tongan to understand its true meaning, I would venture to suggest it is poorly worded. If the law is clear in its terminology, the nationality of the judge will have no effect upon his interpretation.

The two judges who sat on the PPEL case served Tonga well for some years. They applied the law, as they were obliged to do, under the terms of their judicial oath. Their decision becomes a part of the law of Tonga until and if it is changed by the Court of Appeal or by legislation in Parliament. Whether they have left the country or have remained has no effect on the decision

and its continuing application, as one would have expected an educated commentator to understand.

I pass now to the individual defendants.

As I have said, I do not consider the remarks I have referred to as the first theme amount by themselves to contempt. They are the only matters Mr Halatuituia faces. He was, of course, present and continued to take part in the general discussion but I see nothing to suggest he was adopting the later comments of Mr Namoa. He has stated in his affidavit that he had no intention of offending the judges and suggests his remarks were bona fide comment on a matter upon which he, and many others, hold strong opinions. I accept that and he is acquitted of contempt of court.

Mr Namoa also filed an affidavit in which he asserts his right to disagree with the judgment and points out that, as a Peoples' Representative, he has a duty to his electors to keep them informed of proceedings in Parliament:

> "I did not appear on television to attack or abuse the judicial system in Tonga. I appeared on television to inform the public of my objection to section 16 being repealed. If it appears that I attacked the Court, then I sincerely apologise to the Judges concerned and to the Courts of Tonga. It was never my intention to be critical of the judicial system."

It was simply, he stated, an expression of his honest belief that the judgment was wrong. I accept he holds an honest belief the judgment was wrong and he is entitled so to do. Whether or not he intended to be critical of the judicial system, I am satisfied he allowed his disagreement with the judgment to lead him into a deliberate attack on the judges who made it.

It is not necessary to prove that the defendant in such a case intended to bring the court into disrepute or lower its authority and whether he did or not is relevant only to penalty. The test is whether the statements made in the way the court has found they were made pose is a real risk that they will lower the authority of the court. I am satisfied that there is a real risk that the comments made by Mr Namoa would lower the authority of the court. He is convicted of contempt.

His intention is relevant in deciding the appropriate penalty. A Peoples' Representative is a position of importance and such people are treated with great respect. I do not argue with his statement that he should keep the public informed of matters in Parliament but he must remember that his position carries with it a great responsibility. When a Member of Parliament makes his views public on an important issue and especially if he seeks to state them on television, his words carry great weight and he must ensure they are accurate and temperate. Unfortunately, his comments in this programme were neither in many instances. Had he limited his remarks to criticism of the judgment the audience would have been better served and he would have avoided the risk that his remarks would place him in contempt.

I have already stated that only serious cases will amount to scandalising the court in the sense of carrying a real risk of lowering its authority. I am satisfied this is such a case but, within the scale of such contempts, this is at the lower end. I consider the appropriate penalty in such a case is to order him to pay a fine of $1,500.00.

The third defendant filed an affidavit and gave oral evidence. By the time of this programme she had been working for the television station for over a year. She had no prior training in this field or in journalism generally but had gained experience over the time she had been presenting Check It Out. She pointed out that she had no intention to attack the courts and she, too, apologised for any disrespect to the courts.

She explained that the individual presenter and producer are responsible for the content and presentation of the show. She was also responsible for any censoring of the material. She indicated that she could stop the programme if she felt it was exceeding the bounds of what was acceptable. What was surprising and is relevant in relation to the fourth and fifth defendants, is that there appears to be little or no editorial assistance or monitoring of the programme whilst it is on air. As a result, the commentator has to make all censorship decisions as the programme progresses.

I appreciate that it would require a very experienced presenter and one who understood the law of contempt of court to appreciate the significance of the way the remarks in this programme were going. However, as the presenter of the programme, she cannot avoid her responsibility for the remarks of her guests. She is convicted of contempt but I do not consider it necessary to order any penalty.

The fourth defendant was, as I have stated, charged as the owner and manager of the fifth defendant. He has filed an affidavit and given evidence that he is neither. He deposes his position is a shareholder and President.

He established the television station, he said, as a 'charitable donation by my wife and myself to Tonga'. He explained to the court that he was the business arm of the organisation and he knows nothing of the actual operation of a television station. He takes no part in the choice of programmes or the manner in which the staff are trained or the station managed. After the original policy decisions about self-censorship, he has not been involved in the programming.

Read with the evidence of Miss Vaea, however a different picture emerges. For some time there has been no General Manager and he clearly maintains a close personal control of the general running of the station despite being away from Nuku'alofa for much of the time. He plainly retains a right to hire and fire staff because he 'holds the payroll' and he equally clearly considers that, as he has paid for the station, he can make any decision he wishes in relation to it. He told the court; "If I know of a programme and I disapprove, I can threaten to pull the plug". The losses of the company he describes as a personal loss and he agreed that, as far as he knew, he was the sole shareholder. I am satisfied beyond reasonable doubt that he is the effective overall manager and owner of the station.

He cannot assume that role without accepting responsibility for the manner in which the station is run. Any prudent manager would see that proper editorial procedures are in place and the lack of any effective control of this programme once it was being broadcast contributed substantially to this contempt. He told the court that he has no experience in the day to day management of such an organisation. If that is so, he should ensure that someone with such experience and knowledge has the responsibility for running it.

He has made no apology to the court and maintains his denial of responsibility.

The fifth defendant, the company itself, carries the ultimate responsibility. Television is a particularly powerful form of communication and the greater power must be met with an equally increased responsibility. In Tonga, the power of this medium is virtually unchecked because there does not exist the type of press or radio that would comment on and encourage critical discussion of a television broadcast. So effective is the medium, that many viewers accept almost anything stated on it as the truth.

That is no criticism of television but is to state, I think, a recognised fact. The result is that anyone who produces a television programme has a duty to be as accurate as possible in the information broadcast because the lack of alternative sources of comment or further information here means it may well be the only source of information about the topic many members of the public will have.

The failure of the fourth and fifth defendants adequately to control the programme they broadcast means they are also guilty of the contempt in it.

Beyond the need to protect the authority of the court, the law of contempt is not and should not be used to restrict public debate. It is only by such debate that the level of public awareness will be increased, as it should in any society. The Check It Out programme has established itself as a genuine attempt to increase public awareness of matters of current interest and concern and to present them in a way that allows debate and expression of opposing views. In this case it is to the credit of the producers of the programme that an equal opportunity had been given in another programme to present the opposite side and the repeal of section 16 had been referred to in a number of previous programmes.

I bear that in mind in determining the proper penalty. I understand this is the first such case in Tonga involving a live television broadcast. It is important that broadcasters are aware of their responsibility to avoid this type of contempt but I recognise the importance of live debate in current affairs programmes. The actual contempt was by Mr Namoa and he has been fined for it. I do not wish to impose a penalty on the broadcaster that does not recognise the problems of live broadcasts but it should be understood that, if there are other cases, the court will look carefully at the steps taken to reduce the chance of re-occurrence.

I am satisfied the fourth and fifth defendants are guilty of the contempt that occurred in this programme. The fourth defendant is the person who has neglected to ensure proper controls and bearing in mind the remarks I have just made I shall order he pay the relatively nominal fine of

$1,000.00. In view of the relationship between the fourth and fifth defendants, I impose no separate penalty on the fifth defendant.

Normally the costs of the second defendant would follow the event. However, his misstatement that the PPEL case should have been heard in the Land Court was largely responsible for setting the discussion on the course that lead to the contempt. I make no order for costs in relation to the second defendant.

The first defendant shall pay one quarter of the costs of the Attorney General incurred in the case other than against Mr Halatuituia and the fourth and fifth defendants shall pay the remaining three-quarters.

SUPREME COURT TONGA

NUKU'ALOFA: 11 April 2000.

CHIEF JUSTICE