

BRAISBY (INSPECTOR OF POLICE) v, SLIPPER

High Court Apia
26, 27, 28 February; 3 March 1930
Luxford CJ

Defamatory Libel - Samoa Act, 1921 ss 153, 154 - Whether Administrator Member of Legislative Council and Officer of Samoan Public Service.

Accused was arraigned under s 153 of the Samoa Act 1921 for having published a defamatory libel and under s 154 for having used threatening, abusive or insulting words or behaviour towards an officer of the Samoan Public Service and Member of the Legislative Council. Both charges arose from a letter which he had written to the Administrator and a copy of which he had sent to the Commodore of the New Zealand Navy then in Samoan waters. The material portion of the letter was as follows:-

It is regrettable that death and bloodshed appear to be of small consequence to Your Excellency as compared with the desire, evident and expressed, of absolutism.

Held: Publication of the statement to the Commodore constituted an offence under s 153, the statement being both defamatory of the Administrator and untrue its publication could not benefit the public; nor was it a privileged communication to a person in authority over the Administrator, the Commodore being under the executive authority of the latter while carrying out his duties in Western Samoa. Further, assuming the existence of a qualified privilege, the evidence established malice on the part of the accused, which destroyed any such privilege. Since the Administrator was an officer of the Public Service and a member of the Legislative Council the words used also came within s 154.

Accused convicted on both charges.

LUXFORD CJ. The defendant is charged under Section 153 of the Samoa Act 1921 with publishing a defamatory libel and also under Section 154 of the same Act with using abusive and insulting words towards and in respect of a member of the Legislative Council of Western Samoa.

The charges arise out of a letter written by the defendant to the Administrator of Western Samoa on the 11th day of February, 1930, a copy of which was forwarded by him to Commodore Geoffrey Blake, R.N., the Commodore Commanding the New Zealand Station, who is at present on duty in Samoa with his ship the "Dunedin". The authorship of the letter and its publication to Commodore Blake are admitted by the defendant. It was proved that the letter was handed to and explained to four Samoan ladies before it was published to the Administrator and the Commodore; also, that some person unnamed wrote out in longhand a draft of the letter at the dictation of the defendant, and that Mrs. Muench typed the letter from the longhand draft.

The defendant entered a plea of not guilty to both charges, and to the charge of publishing a defamatory libel he set up the following defences:-

1. The statements contained in the letter are not defamatory within the meaning of Section 153 of the Samoa Act 1921.
2. The statements were published for the public benefit and are in fact true.
3. The statements were published on a privileged occasion.
4. The statements were written and published by the defendant in his capacity as solicitor for four Samoan ladies and as such he was privileged.

I will trace shortly the circumstances leading to the publication

of the letter which is the subject of the present charges.

On 12th January last, H.M.S. "Dunedin" arrived in Apia in command of Commodore Blake, who was instructed by the Government of New Zealand to assist the Administrator to maintain order in Samoa. For that purpose he landed a portion of his ship's company including a number of Royal Marines to co-operate with the police force in certain operations agreed upon between himself and the Administrator.

Those operations included the searching of a number of Samoan fales in various villages. On the night of the 4th/5th February, the fales in the village of Vaimoso were searched by police officers and men of the Royal Marines. Some of the Samoan women objected to the methods employed by the searchers and made their complaint to Masiofo Ala Tamasese, the widow of the late High Chief. She sent a letter to the defendant requesting him to look into the matter on behalf of the complainants. He was unable to go to Vaimoso, but requested several ladies to go there to obtain particulars of the complaints. This was done, and from the information given to him he wrote a letter to the Administrator setting out the matters of complaint and requesting the Administrator to meet Masiofo Ala and witnesses for the purpose of enquiring into them. The Administrator replied to the defendant the following day (6th February) stating that he attended at the Native Office every Wednesday morning from 9 o'clock till midday and would be able to see Masiofo Ala on any such occasion. The Wednesday next following this letter was the 12th February.

Although there is no direct evidence on the point I infer that the defendant and his client decided to go to Mulinu'u to see the Administrator on that date.

At this time the defendant was in possession of a letter addressed to Commodore Blake and signed by a very large number of Samoan women. This letter expressed alarm at the shooting down of their relatives by the New Zealand Police and begged the Commodore to extend to them and their relatives proper protection against police aggression and bloodshed.

The defendant had some correspondence with the Commodore in reference to the presentation of this letter and it was arranged finally that it should be presented to him and the Administrator at Mulinu'u at 10.30 a.m. on Tuesday 11th February, 1930.

Accordingly, four Samoan ladies, Mrs. Nelson, Masiofo Ala Tamasese, Faamu and Paisami, (accompanied by Mrs. Muench to act as interpreter), met the Commodore and the Administrator at the time and place agreed upon.

I will set out the Commodore's version of the meeting as it appears in my note:-

I was at the meeting when Mrs. Nelson, Mrs. Faumuina, Mrs. Tamasese and Mrs. Tuimalealiifano were present. This meeting was held to enable the ladies to hand me a letter.

This took place at the Native Office at Mulinu'u. The Administrator was present, also Mr. Lewis and Tu'u'u the interpreter and a shorthand writer (C.P.O. Prior).

After the general introduction by Mrs. Muench who acted as interpreter for the four women, the letter in question was handed to me and by me to the Administrator.

(Letter put in - Ex. B)

The letter was read by me and the Administrator. The Administrator then gave the ladies present a general outline of the situation; the reason why the "Dunedin" had come to Samoa. He said definitely it was to prevent any shooting and disorder that assistance was brought to Samoa. He expressed regret at what occurred; he pointed out that the solution rests entirely with the Mau. He had made offers to them but they had taken no notice.

After this general statement each lady gave an expression of opinion. They stressed that the searching of fales made sleep impossible; the women and children were getting nervous and their goods were being broken; they asked for protection against this. His Excellency replied that he was very sorry that they were caused inconvenience; that this was what was happening to everyone in Samoa; he stated the reason why fales

should be searched; and stated that searches must continue; finally he made an appeal to these ladies not to continue recriminations but to get together and help him to bring about peace; he asked them to use their influence with the men in the bush to come in so that peace may be restored.

They replied they could do nothing. They had no influence with the men and if they tried to exert influence they would be thrashed.

His Excellency replied that he was very sorry to hear it. At the request of His Excellency I addressed the ladies present.

I pointed out to them the necessity of searching fales and told them it was not work that we liked to do, or which His Excellency cared to do either but that it was necessary and must continue.

I told them of the orders that had been given to the forces under my command in respect of the use of arms. I assured them that these orders had been and would be carried out; I associated myself with His Excellency in making an appeal to the ladies present to co-operate with us in bringing about the peace and harmony of Samoa which was His Excellency's and my chief desire.

They replied that they could do nothing.

That was the end of the meeting.

They made no complaint of terrorisation. Their complaint was that the troops came into their fales and disturbed the occupants which had a bad effect on the nerves of the women and children.

It was fully explained that the solution of the trouble was in the hands of the Mau.

Mrs. Muench was the only other witness who spoke about what happened at this meeting. She agrees with the Commodore's evidence, but says that he did not emphasize that the Administrator said several times that the searching of fales would have to go on and that the solution of the affair was in the hands of the women and that it would all stop as soon as they could persuade their men to come forward.

After the meeting the five ladies met the defendant who was waiting in another room of the Native Office at Mulinu'u. He then went with them (except Paisami) to Mrs. Nelson's house at Papaloloa.

There the ladies discussed the interview they had just had with the Administrator and the Commodore, and decided that they would not attend the proposed meeting with the Administrator which had been arranged for the following day. According to the evidence of the defendant the ladies expressed to him their sentiments concerning the meeting which they had just attended, and instructed him to convey those sentiments to the Administrator in a letter declining to attend the proposed further meeting.

The defendant then went to his office in Apia with Mrs. Muench. He dictated a letter to somebody who took down his words in longhand. This draft was handed to Mrs. Muench, who typed the letter. The defendant and Mrs. Muench then returned to Mrs. Nelson's residence where the letter was read over and explained to the ladies who had given instructions for it to be written. According to the evidence they approved the letter. The defendant then signed it and several copies. These he handed to Mrs. Muench to despatch. She despatched the letter and the copies to the intended recipients, except the copy intended for the Prime Minister of New Zealand.

It is that letter, bearing date the 11th February, 1930, which is the

subject-matter of the charge, and which I will now set out:-

Referring to correspondence between Your Excellency and myself relative to acts of violence perpetuated by members of the Police or other uniformed persons and referring to my application on behalf of Samoan ladies that they should meet with you tomorrow morning, namely February 12th, at 9 a.m. at Mulinu'u, I am instructed to report that the leading ladies concerned in these acts of violence have already this morning brought before Your Excellency the gist of what would be represented to you tomorrow.

These leading ladies departed from your presence this morning with the full conviction that no protection against terrorisation of women and children could be granted by Your Excellency, and that Your Excellency's attitude was such that terrorisation must be expected to be continued until the women of Samoa can persuade their hunted and hounded men to surrender themselves to an unknown fate. It is true that Your Excellency has averred that "wanted" men (whoever they may be and for what they may be "wanted") are supposed to submit themselves to the High Court for trial. It is equally true that the High Court in its Coronial judgment has found that the rifle fire resulting in the death of Prince Tamasese and other Samoans has been pronounced by the Coroner (namely the Chief Judge) as being without his ability to find that fire necessary. The ladies of Samoa remember the tragic circumstances surrounding the death of Molia. This matter was brought to the notice of Your Excellency and the Commodore this morning by Chieftainess Taisi. Authority informed her that she had been misinformed. She responded by saying that she had been present personally at the Hospital when the dying depositions of Molia were recorded by the Chief Judge as Coroner.

In all these circumstances and in view of Your Excellency's repeated asseverations to the effect that the Samoan men must "come in" and surrender, and in view of Your Excellency's apparent attitude that the Mau must be broken, and in view of the fact that the Mau as such has been scattered by gun-fire to the four winds of heaven, the women of Samoa feel that it would be at once futile and stultifying to themselves ask Your Excellency for protection against the ravages of uniformed persons. The ladies of Samoa feel that if the terrorisation of women and children is ordained under Your Excellency's authority to continue, then it must continue. I am instructed that it appears to the ladies of Samoa that their representations to Your Excellency as to the safety of themselves and their children are regarded as of no consequence. The said ladies are aware that the Commodore has firmly intimated that there will be no further shooting; but they are unable to ignore the fact that Civil Government still remains, and it is Your Excellency and not the Commodore to say whether or not there shall be further shooting. The plea of the ladies to the Commodore was made in desperation. To these ladies the matter of life and death is more than a matter of obedience to laws that have never been promulgated either by the electors of New Zealand or the people of Samoa. They can but die, as Tamasese and others have died. It is regrettable that death and bloodshed appear to be of small consequence to Your Excellency as compared with the desire, evident and expressed, of absolutism.

In view of these circumstances the ladies of Samoa desire me to say on their behalf that they are unable to keep the suggested appointment at 9 a.m. on the 12th instant at Mulinu'u. They desire me to forward a copy of this letter to the Commodore and another copy to His Honour the Chief Judge and another copy to the Prime Minister of New Zealand,

The law in Samoa relating to the criminal offence of publishing a defamatory libel follows the common law of England relating to libel, except that the truth of defamatory statements is no defence unless they were published for the public benefit.

The burden therefore is on the prosecution to prove that the defendant published a defamatory libel having reference to the Administrator of Western Samoa. The letter of 11th February, 1930 was written by the defendant and it was published to Commodore Blake, four Samoan ladies, Mrs. Munch and a person whose name I do not know.

The prosecution contends that the whole letter comprises a defamatory libel having reference to the Administrator; in short, the letter means that the Administrator refuses to protect the women and children of Samoa against terrorisation by armed Government forces; and against death by unjustifiable rifle fire; also, that he intends to inflict death and bloodshed upon the Samoans in order to secure for himself the absolute rule of the country.

As a matter of law I find that the letter is reasonably capable of such a meaning. I find as a fact that the words of the letter do in truth impute the meaning alleged by the prosecution. As a matter of law I find that meaning is defamatory of the Administrator.

The prosecution has therefore discharged its onus of proof and I will now consider the defences set up by the defendant.

I allowed the defendant to call evidence of the truth of the statements contained in the letter of the 11th February because I was of opinion that if they were true their publication must be for the public benefit.

The evidence given and adduced on behalf of the defendant to prove the truth of the statements may be summarised as follows:-

1. The defendant received information on the 5th February, 1930 concerning complaints by a number of women in the village of Vaimoso relative to the method in which the fales in that village were searched by police and Marines in the early hours of that morning.
2. The women of Vaimoso were alarmed and frightened by reason of those searches.
3. The contents of the fales were needlessly damaged and knocked about.
4. No woman or child was threatened with injury or in any way harmed.
5. The defendant by letter placed the matters of complaint before the Administrator on the same day.
6. In consequence of a letter received by the defendant from the Administrator in reply he advised and arranged with the persons for whom he acted to attend before the Administrator on 12th February in order to have their complaints enquired into.
7. On the 11th February certain Samoan ladies of high rank met the Administrator and the Commodore for the purpose of presenting a letter signed by a very large number of Samoan women in which the Commodore was requested to protect them and their relatives against police aggression and bloodshed.
8. Commodore Blake's evidence of what took place at the meeting was correct.
9. The Samoan ladies who attended the meeting explained to the defendant what had taken place there. They expressed to him their sentiments on the matter, and he believing what he was told was true, wrote the letter of the 11th February for the purpose of conveying those sentiments to the Administrator and certain other persons.

From a careful consideration of the evidence adduced for the defence and of the evidence given on behalf of the prosecution, I find that the

statements contained in the letter and which I have held are defamatory are untrue.

The next ground of defence is that of privilege. The defendant contends that he was under a duty to make the publication to Commodore Blake and that the Commodore was under a duty to receive it.

From the evidence it appears that Commodore Blake was sent to Samoa with his ship the "Dunedin" by the Government of New Zealand for the purpose of assisting the Administrator to restore order.

The Administrator is charged with the administration of the executive Government of Samoa subject to the control of the Minister of External Affairs, that is, the Administrator is the King's representative in Samoa. It follows that the Commodore, while detailed for his present duty, is under the executive authority of the Administrator. In my opinion, and I hold as a matter of law, that as the Commodore is not a person in authority over the Administrator the defendant cannot claim privilege in respect of a defamatory statement published to him concerning the Administrator.

The privilege claimed by the defendant at the most can be only a qualified privilege which is forfeited if the publication is made with an improper motive - generally called malice. The onus of proving malice - once a qualified privilege is established - is on the prosecution. This onus may be discharged by direct evidence of improper motive or by the defamatory statement itself. Should it be that in the present case that the occasion was privileged I am of opinion that malice has been proved.

In the first place I find as a fact that the defendant had no genuine belief in the truth of the statements he made; and further, that the language is so violent and insulting as to go far beyond the requirements of a letter to intimate that certain people would not attend a meeting.

The evidence shows that the ladies explained to the defendant what had taken place at the meeting at Mulinu'u. The Commodore gave to the Court a very detailed account of what was said there. The defendant did not attempt to traverse in cross examination or by evidence what the Commodore told the Court. He says that he relied entirely on what the ladies told him and that he merely put into his own words the sentiments which they expressed.

If those ladies expressed such sentiments based on what had been said at their meeting with the Commodore it must have been apparent to the defendant that they were under a cruel delusion.

Although the ladies concerned gave evidence that the letter expressed their sentiments, I am satisfied from their answers in cross examination that they have little if any conception of the purport of the statements in the defendant's letter.

I come to the conclusion from the evidence that the defendant took the opportunity to attack the Administrator under the cloak of a mandate from four ladies of Samoa, who approved his action without full knowledge and understanding.

For these reasons the plea of privilege - should it have existed - is destroyed.

I know of no authority in support of the defendant's last ground of defence.

It follows therefore that the defendant must be convicted of the offence of publishing a defamatory libel referring to the Administrator of Western Samoa. He is convicted accordingly.

The defendant submitted that the words used by him did not come within Section 154. I find as a fact that they do. The Administrator is an officer of the Public Service and a member of the Legislative Council.

I therefore must convict him also of an offence under Section 154.

NOTE

On appeal to the Supreme Court of New Zealand sub nom SLIPPER v BRAISBY [1930] NZLR 953 appellant's conviction under s 154 was set aside on the ground that the section should be construed to apply only to spoken words. The Court also disagreed with the finding of Luxford CJ that the Administrator was a member of the Legislative Council, but held that since he was an officer of the Public Service the conviction under s 154 on the charge as laid was proper, it being permissible to disregard as surplusage the reference to membership in the Legislative Council.